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International Arbitral Appeals: What Are We So Afraid Of?

Erin E. Gleason

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International Arbitral Appeals: What Are We So Afraid Of?

Erin E. Gleason

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I. INTRODUCTION

Appellate practice in international arbitration presents a paradox. It is, at once, an accepted practice and a forbidden system. The status it holds depends on the forum in which the parties find themselves, and the type of dispute they seek to resolve. Commodity trade associations provide for arbitral appellate processes, and on a much grander scale, international trade disputes are regularly reviewed by the World Trade Organization's ("WTO") internal Appellate Body. Commercial disputes in France, Belgium and South Africa are eligible for institutional appeal and the incorporation of an appellate mechanism is currently under review for some bilateral investment treaties (BITs) and multilateral investment treaties (MITs). However, most parties to international commercial and investor-state arbitration have no opportunity to appeal arbitral awards.

The past decade saw a dramatic upsurge in the adoption of BITs and MITs. At the close of the 1980s, there were 385 BITs in existence;¹ by the end of 2004, over 2,000 had been embraced.² As a result, the number of international investment disputes also increased.³ Claims filed before the International Centre for Settlement of Investment Disputes (ICSID) have increased exponentially.⁴ From its creation in 1965 through 2002, ICSID registered 85 investor-state disputes and 10 Additional Facility cases.⁵ Since 2002, ICSID's case load has nearly doubled.⁶

Parties are increasingly considering the inclusion of an appellate mechanism within BITs and MITs, as evidenced by some of the more recent treaties.⁷ However, neither ICSID nor most other institutional providers of international arbitration have adopted rules relating to appellate processes in international investment dispute arbitration.⁸ Despite some discussion to

¹ United Nations Conference on Trade and Dev. (UNCTAD), *Bilateral Investment Treaties 1959-1999* (2000).

² International Institute for Sustainable Development, *Investment and Sustainable Development, A Guide to the Use and Potential of International Investment Agreements* (2004).

³ International Center for Settlement of Investment Disputes, *Possible Improvements for the Framework of ICSID Arbitration, ICSID Secretariat Discussion Paper* (October 22, 2004).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., Jack J. Coe, Jr., *The State of Investor-State Arbitration--Some Reflections on Professor Brower's Plea for Sensible Principles*, 20 AM. U. INT'L L. REV. 929, 950-51 (2005) ("[T]he United States has agreed respectively with Singapore, Chile and its CAFTA counterparts that by dates certain, establishment of an appellate mechanism will at least be given consideration.").

⁸ See United Nations Comm'n on Int'l Trade Law [UNCITRAL] *Arbitration Rules*, art. 32.2 ("The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay."); London Court of Int'l Arbitration [LCIA] *Arbitration Rules*,

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include an appellate process within the ICSID and UNCITRAL Rules,⁹ no such procedure has been adopted to date.

Further, while some review mechanisms have been instituted in international commercial arbitration, there are only limited provisions for appellate review of these awards. For example, the International Chamber of Commerce, Judicial Arbitration & Mediation Services, Inc. (JAMS) and the China International Economic and Trade Arbitration Commission require that arbitral tribunals submit draft awards to review committees for scrutiny.¹⁰ As shall be discussed, these requirements should not supplant an appellate process.

The absence of arbitral appeals processes adversely impacts the legitimacy of international arbitration. As the frequency of cross-border transac-

art. 26.9 (“All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to art. 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.”); China Int’l Econ. and Trade Arbitration Comm’n [CIETAC], *Arbitration Rules*, art. 43.8 (“The arbitral award is final and binding upon both parties. Neither party may bring a suit before a law court or make a request to any other organization for revising the award.”); Am. Arbitration Ass’n [AAA], *International Arbitration Rules*, art. 27.1 (“Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties.”); Mexico City Nat’l Chamber Of Commerce [CANACO], *Arbitration Rules*, art. 39.2 (“The award shall be issued in writing and shall be final and binding upon the parties.”); Austl. Ctr. for Int’l Commercial Arbitration [ACICA], *Arbitration Rules*, Section V, art. 43.3 (“To the extent permitted by the law of the seat of the arbitration, the parties shall be taken to have waived any right of appeal or review in respect of any such decisions made by ACICA to any State court or other judicial authority.”).

⁹ Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157, 203 (2003) (“Notably, the delegation for the United Kingdom pointed out that “[w]hilst thoroughly understanding the point of view that the parties should not be compelled to submit to recourse on questions of law, the United Kingdom suggests that the logical consequence of party autonomy is that they should be allowed to have recourse, if that is what they have agreed.” (quoting F. Davidson, *The New Arbitration Act - A Model Law?*, 1997 J. BUS. L. 101, 125)).

¹⁰ ICC, *Rules of Arbitration*, art. 27, available at <http://www.iccwbo.org/court/english/arbitration/rules.asp> (last visited Mar. 29, 2007) (hereinafter ICC), provides for scrutiny of the Award by the Court (emphasis added). See also CIETAC Arbitration Rules, art. 45, available at <http://www.cietac.org.cn/english/rules/rules.htm> (last visited Mar. 29, 2007) (hereinafter CIETAC), which states that “[t]he arbitral tribunal shall submit its draft award to the CIETAC for scrutiny before signing the award. The CIETAC may remind the arbitral tribunal of issues in the award on condition that the arbitral tribunal’s independence in rendering the award is not affected.” See also JAMS International Arbitration Rules, art. 32.3, available at http://www.jamsadr.com/rules/international_arbitration_rules.asp (last visited Mar. 29, 2007) (hereinafter JAMS International Arbitration Rules), which provides that, “Before signing any Award, the Tribunal will submit it in draft to JAMS. JAMS may suggest modifications as to the form of the Award and may also draw the Tribunal’s attention to points of substance. No Award will be rendered by the Tribunal until it has been approved by JAMS as to its form.”

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tions continues to increase, parties have evidenced a need for meaningful review of arbitral awards.¹¹ Many of the disputes arising from these transactions present stakes too high to forbid opportunities for correction of flawed results.¹² Indeed, in a “survey of 606 corporate lawyers from America’s largest corporations, 54.3% of those who chose *not* to opt for arbitration said that choice was made largely because arbitration awards are so difficult to appeal.”¹³

The lack of an appellate process has also resulted in a lack of public confidence in international arbitral systems. The potential for inconsistent awards in investor-state disputes, for example, may also “affect foreign investment decisions, economic development, and foreign relations. For investors, this means investment uncertainty.”¹⁴

This article will explore the advantages of instituting appellate mechanisms in investor-state disputes and international commercial arbitration. Part II begins with a review of the WTO Appellate Body’s development and workings, followed by an analysis of other appellate procedures for international trade law arbitration, including the MERCOSUR system’s Permanent Court and the Grain and Feed Trade Association’s appeals process. These examples demonstrate successful appeals processes within the international realm, which can serve as models for investor-state and international commercial arbitration appeals. Part III examines the current methods for reviewing investor-state arbitration awards under ICSID and NAFTA. Neither system provides an effective method for appealing arbitral awards. The lack of such a structure has a deleterious effect on the development of a reliable and consistent body of law in this area. Part III goes on to advocate for the creation of an Appeals Facility, separate from current arbitral institutions, which would be empowered to hear appeals in investor-state arbitrations. Part IV studies the lack of appellate practice within international commercial arbitration. This section examines current domestic appeals processes within the US and institutional scrutiny of awards. After analyzing examples of Austrian, South African and French institutional appellate proce-

¹¹ William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 531 (2000).

¹² *Id.* at 532.

¹³ See CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS*, 404 (1996) (“The study revealed that of twelve potential barriers to choosing arbitration, corporate counsel named only the unwillingness of the other party to agree to ADR as more significant than the lack of appeal. In another study that polled about fifty American and European lawyers, arbitration commentators, and corporate executives, about one-third stated that the absence of appeal was not an advantage to arbitration, while another third declared that this was a ‘highly relevant’ advantage to private dispute resolution.”).

¹⁴ Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT’L L. & POL’Y 47, 57 (2005).

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dures, Part IV argues that the lack of these processes in other jurisdictions must be remedied in the interests of efficiency and party autonomy. Part V concludes that parties should be permitted to participate in appellate review of arbitral awards, if they so choose.

II. INTERNATIONAL TRADE APPEALS PROCESSES

Appellate review of international trade disputes is well established. Not only has the WTO Appellate Body been in existence for more than a decade, but smaller trade organizations have also provided appeals of arbitration awards.¹⁵ Further, the Southern Common Market, or MERCOSUR, has also incorporated an optional appeals court within its dispute resolution procedure.¹⁶ This section reviews how these systems have been implemented and analyzes their effectiveness in providing for a consistent and reliable body of trade law. This discussion shall inform the need for a formal appellate review procedure within other areas of international arbitration.

WTO Appellate Body

In February 1995, the WTO Dispute Settlement Body (“DSB”) provided for the creation of an Appellate Body, a permanent international tribunal which hears appeals of WTO panel reports.¹⁷ It is comprised of seven members; three members are assigned to hear each appeal, on rotation.¹⁸ To ensure for a reliable appellate process, members are required to discuss each case with the other members of the Appellate Body, who were not selected to hear the appeal.¹⁹ An award is only rendered after this exchange.²⁰

¹⁵ WTO, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), art. 17 (1995).

¹⁶ UNCTAD, COURSE ON DISPUTE SETTLEMENT ON INTERNATIONAL TRADE, INVESTMENT AND INTELLECTUAL PROPERTY, REGIONAL APPROACHES, MERCOSUR, at 20, available at http://www.unctad.org/en/docs/edmmisc232add28_en.pdf at 27 (last visited Mar. 29, 2007).

¹⁷ See WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter DSU), art. 17 (1995) (The WTO dispute settlement system has jurisdiction over any dispute between WTO Members arising under the WTO agreements contained within Appendix 1 to the DSU, including the *WTO Agreement*, the GATT 1994 and all other Multilateral Agreements on Trade in Goods, the GATS, the *TRIPS Agreement* and the DSU.); see also UNCTAD, *Course on Dispute Settlement, WTO, Module 3.1, Overview* (2003), http://www.unctad.org/en/docs/edmmisc232add11_en.pdf (last visited Mar. 29, 2007).

¹⁸ WTO, Working Procedures for Appellate Review, Rule 6(1).

¹⁹ *Id.* Rule 4(3) states, “Each Member shall receive all documents filed in an appeal. A Member, who has a conflict of interest, shall not take part in the exchange of views.”

In the past decade of its operation, the Appellate Body has demonstrated that the appeals processes need not invite: (1) undue delays to the dispute resolution process, (2) increased costs for parties, or (3) an unmanageable caseload for the institution.²¹ The WTO estimates that its dispute settlement process usually takes one year when a case is not appealed; appeals take an additional three months.²² The timetable for general appeals provides that, after a notice of appeal has been filed, parties have twenty-five days to make all submissions.²³ Oral hearings are held ten days later, and can last for up to ten days.²⁴ Thereafter, the Appellate Body Report is circulated to WTO members within ninety days of the date when the Notice of Appeal was filed.²⁵ The Appellate Body's decision becomes public immediately, upon circulation.²⁶ Keeping the arbitral process to such a relatively short period of time protects parties from the cost and time involved in prolonged litigation.

Whereas, in 1996 and 1997, one hundred percent of the panel reports were appealed, the rate of disputes appealed had dropped to sixty percent by 2005.²⁷ This implies that the workings of the Appellate Body have provided for some predictability in the dispute settlement process; such predictability can be relied upon by governments to anticipate the consequence of an appeal.²⁸ Moreover, the Appellate Body's reliance on prior cases, while not binding and not necessarily conclusive, has provided "a degree of consistency which, in turn, enhances the predictability of the whole system."²⁹ In "establishing an institution that can uphold the rules of world trade", the WTO Appellate Body has "furthered the cause of lowering barriers to trade in the world and maintaining security, predictability, and stability in the

²⁰ See UNCTAD, *Course on Dispute Settlement, WTO, Module 3.3 Appellate Review*, 7 (2003), at http://www.unctad.org/en/docs/edmmisc232add17_en.pdf (last visited Mar. 29, 2007).

²¹ WTO, *Understanding the WTO: Settling Disputes*, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Mar. 29, 2007).

²² *Id.*

²³ WTO, *supra* note 18, Rules 20; 21(1); 22, 23(1), (3), (4); 24(1), and (2).

²⁴ *Id.* at Rule 27.

²⁵ DSU, *supra* note 17, art. 17:5.

²⁶ *Id.*

²⁷ WTO, *APPELLATE BODY ANNUAL REPORT (2005)*, available at http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (last visited Mar. 29, 2007).

²⁸ WTO, *Report by the Consultative Board to the former Director-General Supachai Panitchpakdi, The WTO Dispute Settlement System*, (2005) http://www.wto.org/english/thewto_e/10anniv_e/future_wto_chap6_e.pdf (last visited Mar. 29, 2007). Others, however, suggest that reports of the Appellate Body in recent years have often been "essentially unreadable." Peter Van den Bossche, *Debating The Future Of The World Trade Organization: Divergent Views On The 2005 Sutherland Report*, 8 J. INT'L ECON. L. 759, 765 (2005) ("[U]nlike reports from the first few years of the Appellate Body, [recent reports] read as if they were largely written by the Secretariat with only the key findings formulated by the Appellate Body Members themselves.").

²⁹ Van den Bossche, *supra* note 28, at 765.

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world trading system.”³⁰ In such a setting, parties are well informed as to the workings of the Appellate Body and in a better position to decide whether to file an appeal.

Other Trade Related Arbitral Appeal Procedures

Appellate systems, similar to the WTO Appellate Body, have been developed under the auspices of other trade related institutions. For example, the Southern Common Market, or MERCOSUR, recently established a Permanent Court of Review (“Permanent Court”) to hear arbitral appeals.³¹ MERCOSUR was formed by the Treaty of Asuncion between Brazil, Argentina, Uruguay and Paraguay and was entered into force in 1991.³² The objective in establishing MERCOSUR was to form a common market and found a dispute settlement system for member countries.³³ Further clarifying the availability of MERCOSUR dispute settlement, the Olivos Protocol for the Settlement of Disputes in MERCOSUR was entered into force in 2004.³⁴

The Olivos Protocol modified MERCOSUR’s dispute settlement system to enhance the predictability of the system.³⁵ Accordingly, the Olivos Protocol provides a three-tier dispute settlement system, which includes (1) direct negotiations, (2) *ad hoc* arbitration, and (3) appeals before the Permanent Court.³⁶ The Permanent Court may be comprised of three or five arbitrators, dependent on the number of MERCOSUR States involved in the arbitration.³⁷ Appeals are limited to legal issues of the dispute and to the le-

³⁰ Proceedings of the Ninety-Ninth Annual Meeting of the American Society of International Law, *New World Order or a World in Disorder? Testing the Limits of International Law, WTO Appellate Body Roundtable*, 99 AM. SOC’Y INT’L L. PROC. 175, 179 (2005).

³¹ UNCTAD, *supra*, note 16.

³² *Id.*

³³ UNCTAD, *supra* note 16, at 8 (last visited Mar. 29, 2007). The institutional structure of MERCOSUR was set up in 1994 by The Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, or the Protocol of Ouro Preto. *Id.* at 12. This established MERCOSUR as an international organization. *Id.* However, as none of its founding Member States chose to transfer their sovereignty to MERCOSUR, it holds no supranational authority. *Id.* at 13. See also Treaty of Asuncion, Annex III (1991).

³⁴ UNCTAD, *supra* note 16, at 24.

³⁵ *Id.* at 26.

³⁶ Michael Cornell Dypski, *An Examination Of Investor-State Dispute Resolution Under The Mercosur And NAFTA Regimes*, 8-SPG L. & BUS. REV. AM. 217, 227-28 (2005).

³⁷ UNCTAD, *supra* note 16, at 36.

gal interpretations in the underlying award.³⁸ The Permanent Court's decisions are final.³⁹

The MERCOSUR dispute settlement system has not yet been widely used.⁴⁰ In practice, disputes have been settled through direct negotiations between state officials.⁴¹ Appeals procedures are, however, readily utilized within commodity trade arbitration.⁴² Here, trade associations provide for review of arbitral awards through institutional appellate processes.⁴³ The Grain and Feed Trade Association (GAFTA), for example, offers arbitration services for contractual disputes which incorporate the GAFTA Arbitration Rules.⁴⁴ These rules provide a rather extensive explanation of parties' right to appeal,⁴⁵ the constitution of a board of appeal,⁴⁶ the appeals procedure,⁴⁷ appeals on string contracts,⁴⁸ withdrawal of appeals⁴⁹ and appeal awards.⁵⁰

GAFTA arbitration awards may be appealed by either party within thirty days after an award has been rendered;⁵¹ if both parties appeal the award, they may be consolidated for hearing by the same board of appeal.⁵² Where the first award was made by a sole arbitrator, the board of appeal will include three members;⁵³ where the first award was issued by a tribunal of three arbitrators, the board of appeal shall be comprised of five members.⁵⁴ Here, appeals involve a new hearing of the dispute wherein the board of appeal is empowered to: (a) vary an award by increasing or reducing the liability of either party, (b) correct any errors in the award or otherwise alter or

³⁸ ASIL, *International Law in Brief, Southern Common Market (MERCOSUR): Protocol of Olivios* (February 18, 2002), <http://www.asil.org/ilib/ilib0509.htm> (last visited Mar. 29, 2007).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See, e.g. Dypski, *supra* note 36, at 228 n. 61.

⁴² Knull, *supra* note 11, at 557.

⁴³ *Id.*, stating: "Many of these commodity arbitration rule systems include separate, default procedures for appeal. Appeal is commonly heard by a panel or board with five members, drawn from a list of approved arbitrators maintained by each trade association. As a rule, appeals board members are senior practitioners in the trade with experience in arbitrating complex disputes." See also *infra* note 44 at Rule 10; COFFEE TRADE FEDERATION ARBITRATION RULES, RULE 40; LONDON RICE BROKERS' ASSOCIATION ARBITRATION RULES, RULE III.

⁴⁴ See The Grain and Feed Ass'n [GAFTA], *Arbitration Rules No. 125* (2003), available at <http://www.medimedita.com/Contratti%20tipo/125.pdf> (last visited Mar. 29, 2007).

⁴⁵ *Id.* at Rule 10.

⁴⁶ *Id.* at Rule 11.

⁴⁷ *Id.* at Rule 12.

⁴⁸ *Id.* at Rule 14.

⁴⁹ *Id.* at Rule 13.

⁵⁰ GAFTA, *supra* note 44, at Rule 15.

⁵¹ *Id.* at Rule 10.1.

⁵² *Id.* at Rule 10.2.

⁵³ *Id.* at Rule 11.1.

⁵⁴ *Id.*

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amend it, (c) award the payment of interest, (d) award the payment of costs, fees and expenses of and incidental to the hearing of the arbitration and the appeal.⁵⁵ The board of appeal's award is final and binding on the parties.⁵⁶

This review process is also conducted in a cost efficient and timely manner; GAFTA estimates that awards will be published within six months of receipt of parties' first submissions.⁵⁷ The finality of the arbitral process is preserved as awards of the board of appeals are final and binding.⁵⁸ Thus, GAFTA is able to provide disputants with an effective means for ensuring the issuance of accurate awards and to recognize parties' interests in designing an arbitration process to fit their needs.

Advantages of International Trade Appellate Processes

The rationale for instituting appellate review for international trade arbitration awards was due to parties' desire for certainty within the arbitral process and consistency as the law developed.⁵⁹ Each of the provisions for such review, discussed above, allow for institutional review of awards. These systems have proven to be timely and cost-effective means for providing parties with the option for appeal.

As discussed below, the advantages in providing for institutional review of arbitral awards far outweighs current review processes. The lessons learned by the implementation of appellate review of international trade disputes should be applied to investor-state and international commercial arbitration. The appellate mechanisms available for international trade arbitration show that appellate processes in international arbitration are not only preferable to seeking judicial remedies, but they are desired by parties as an efficient and cost-effective means for ensuring reasoned awards.

III. THE CASE FOR ARBITRAL APPEALS IN INVESTOR-STATE ARBITRATION

When international trade arbitration awards are dubious, parties can turn to the appellate vehicle available to them for review of said award. But in investor-state disputes, parties who wish to challenge an award "end up in a

⁵⁵ *Id.* at Rule 12.4.

⁵⁶ GAFTA, *supra* note 44, at Rule 12.6.

⁵⁷ *Id.* at Rule 4.6.

⁵⁸ *Id.* at Rule 12.6.

⁵⁹ Knull, *supra* note 11, at 550.

diffuse system of contract and treaty arbitration.”⁶⁰ Both the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention) and the North American Free Trade Agreement (NAFTA) leave parties with few options for reviewing legally deficient awards.⁶¹ To cure this deficiency, a cohesive and independent Appeals Facility must be established for review of investor-State arbitration awards.

ICSID

As discussed below, the inadequacy of the recourse provided by ICSID arbitration is increasingly apparent. In lieu of an appellate procedure, the Washington Convention, which created the ICSID system for settling investment disputes between host States and investors, provides an annulment process for arbitrations conducted pursuant to ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules).⁶² Requests for annulment must be based on a party’s assertion that

(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.⁶³

ICSID annulment committees have exhibited an enthusiasm for replacing earlier tribunals’ awards with their own legal reasoning.⁶⁴ Of the ten annulment proceedings that have concluded, tribunals annulled the underlying awards in six cases,⁶⁵ eight annulment proceedings are currently pend-

⁶⁰ Michael D. Goldhaber, *Wanted: A World Investment Court*, Summer 2004, at <http://www.americanlawyer.com/focuseurope/investmentcourt04.html> (last visited Mar. 29, 2007).

⁶¹ See Knull, *supra* note 11 at 532.

⁶² International Centre for Settlement of Investment Disputes [ICSID], *International Centre for Settlement of Investment Disputes Convention, Regulations and Rules* art. 52 (Oct. 14, 1966), http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf (last visited Mar. 29, 2007).

⁶³ ICSID Treaty art. 52. Rule 21.8.2.

⁶⁴ Thomas Walde, *ICSID ‘Annulment Committee,’* Transnational Dispute Management, February 2004, at 24, available at http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_75.htm (last visited Mar. 29, 2007).

⁶⁵ See *Amco Asia Corp. v. Indonesia*, ICSID (W. Bank) ARB/81/1(1990); *Klöckner Industrie-Anlagen GmbH v. Cameroon*, ICSID (W. Bank) ARB/81/2 (1985); *Maritime Int’l Nominees Establishment v. Guinea*, ICSID (W. Bank) ARB/84/4 (1989); *Wena Hotels Ltd. v. Egypt*, ICSID (W. Bank) ARB/98/4 (2005); *Consortium R.F.C.C. v. Morocco*, ICSID (W. Bank) ARB/00/6 (2003); *CDC Group plc v. Seychelles*, ICSID (W. Bank) ARB/02/14 (2005). It is significant that of the ten concluded applications for annulment, two settled before the tribunal made a decision, and one claim was withdrawn for lack of payment. See *Joy Mining Mach. Ltd. v. Egypt*, ICSID (W. Bank) ARB/03/11 (2004), *S.Pac. Props. (Middle E.) Ltd. v. Egypt*, ICSID (W. Bank) ARB/84/3 (1983); see *Gruslin v. Malaysia*, (ICSID (W. Bank) ARB/99/3 (1999).

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ing.⁶⁶ For example, in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Vivendi)*, the ICSID annulment committee chose to displace the arbitral tribunal's theory of the case with its own.⁶⁷ Here, the tribunal determined that Claimants were required to exhaust local remedies, though such exhaustion was not required by the BIT.⁶⁸ The annulment committee, thereafter, ruled that the tribunal acted in excess of its powers, as the BIT specifically permitted Claimants to take their grievances to ICSID directly, without exhausting local remedies.⁶⁹ Here, the tribunals' decision, and the resultant findings of the annulment committee highlight the need for an appellate process within ICSID. If the actions of arbitrators will effectively render the annulment process an appellate procedure, the rules of investor-state arbitration should be updated to recognize the needs of parties and the actions of arbitrators. The current means for review, the ICSID annulment, is complicated by the fact that the annulment committee has the power to remand decisions to the original arbitral tribunal, as in *Vivendi*. This is contrary to most appeals procedures, where "the original judges will often - for reasons of objectivity and impartiality - be no longer competent to hear a case that was appealed on a higher level."⁷⁰

In recognition of these concerns, an ICSID appeals procedure was recently under review. This revision, however, was not adopted and, in any event, would have only applied to the ICSID Arbitration Rules, and not to the Additional Facility Rules or investor-state arbitrations conducted outside of ICSID.⁷¹

⁶⁶ CMS Gas Transmission Co. v. Argentina, ICSID (W. Bank) ARB/01/8 (2005); Mitchell v. Democratic Republic of the Congo, ICSID (W. Bank) ARB/99/7 (2004); MTD Equity Sdn. Bhd. v. Chile, ICSID (W. Bank) ARB/01/7 (2004); Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador), ICSID (W. Bank) ARB/01/10 (2005); Soufraki v. United Arab Emirates, ICSID (W. Bank) ARB/02/7 (2004); Lucchetti v. Peru, ICSID (W. Bank) ARB/03/4 (2005).

⁶⁷ See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID (W. Bank) ARB/97/3 (2002).

⁶⁸ See Walde, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ICSID, *Additional Facility Rules, Introduction*, <http://www.worldbank.org/icsid/facility/intro.htm> (last visited on April 1, 2006). The Additional Facility Rules authorize ICSID to:

[A]dminister certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. These are (i) fact-finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; and (iii) conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly

NAFTA

In contrast to the ICSID annulment process, recourse against faulty NAFTA awards lies within the courts of the nation where the arbitration was held.⁷² NAFTA is an international agreement between the United States, Canada, and Mexico concerning trade, investment, and the provision of services. The chief function of NAFTA is to “assist the North American region in becoming more economically competitive with the rest of the world.”⁷³ Chapter Eleven of NAFTA relates to the regulation of investment in the region; Section B contains the Chapter’s dispute resolution mechanism.⁷⁴

NAFTA’s dispute resolution process works in multiple stages, providing disputants, first, with the opportunity to seek consultations to resolve their disputes.⁷⁵ If this step fails, parties may request that the Federal Trade Commission convene to resolve the dispute promptly.⁷⁶ If parties are still unable to reach an agreement at this stage, either party may request arbitration.⁷⁷ After the arbitral process is completed and upon parties’ receipt of the final report, the disputing parties must agree on a resolution of their dispute.

Parties must seek enforcement of NAFTA awards domestically.⁷⁸ While the opportunity to seek either revision or annulment of the award does exist under NAFTA, “Chapter Eleven itself is silent on challenges to panel decisions. The possibility of ‘appeal’ remains subject to the rules of the relevant arbitral regime and thus possibility of appeal varies from case to case.”⁷⁹

The NAFTA dispute resolution system provides no assurance of accuracy or consistency in the awards rendered.⁸⁰ Local judges, by and large, do

out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

Consequently, international investment dispute arbitration, which significantly includes claims pursuant to the North American Free Trade Agreement (NAFTA), will be left in the dust. Mexico, Canada and the United States are parties to NAFTA. However, neither Mexico nor Canada are parties to the Washington Convention. Therefore, NAFTA claims before ICSID must be administered pursuant to the Additional Facility Rules.

⁷² NAFTA, U.S.-Can.-Mex., arts. 1115-38, Dec. 17, 1992, 32 I.L.M. 289 (1993) (hereinafter NAFTA).

⁷³ Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT’L & COMP. L. REV. 1, 5 (1998).

⁷⁴ NAFTA, *supra* note 72, at art. 1118.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at art. 1136.

⁷⁸ *Id.*

⁷⁹ Gal-Or, *supra* note 73, at 30.

⁸⁰ Goldhaber, *supra* note 60.

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not have the “experience with international law and arbitration doctrine” that the arbitrators who unanimously rendered these awards typically possess.⁸¹ Furthermore, judicial review of complex investor-state disputes is undesirable as it defeats NAFTA’s basic goals of political neutrality and that disputes are settled by seasoned arbitrators.⁸² Thus, as shall be discussed below, an Appeals Facility should be established to review investor-state arbitral awards.

Effect of Insufficient Review of Investor-State Arbitration

The absence of an appeals process for investor-state disputes comes at a very high price. At present, neither ICSID’s annulment process nor the judicial recourse afforded to NAFTA parties is comparable to, or as advantageous as, an appellate process for international investment disputes. Parties’ attempts at including judicial appellate review provisions within arbitration agreements are perceived as attempts at expanding the scope of treaties and national laws which govern the recognition and enforcement of arbitral awards.⁸³ Under these provisions, there are only limited grounds for refusing to recognize and enforce arbitral awards, which mainly relate to procedural mishaps. There is no mention of appellate processes.

The US Trade Promotion Authority Act “suggests that, when negotiating future investment treaties, the U.S. will consider an appellate body for each treaty.”⁸⁴ This concept was recently incorporated into the Central American Free Trade Agreement (CAFTA).⁸⁵ CAFTA is an international

⁸¹ Coe, *supra* note 7, at 949.

⁸² *Id.*

⁸³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, § 1, June 10, 1958, 7 I.L.M. 1046 [hereinafter New York Convention], provides that recognition and enforcement of an award may be refused only if a party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) the parties to the agreement were under some incapacity; (b) the party against whom the award was invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings; (c) the award contains a decision beyond the scope of the arbitration; (d) the composition of the tribunal or the arbitral proceedings was not in accordance with the parties agreement; or (e) the award has not yet become binding on the parties. The Inter-American Convention on International Commercial Arbitration, arts. 5(1)(e) and 6, June 16, 1976, 14 I.L.M. 336 [hereinafter Panama Convention], contains similar provisions acknowledging that such awards can only be vacated by the national courts where the award was made.

⁸⁴ Franck, *supra* note 14, at 95.

⁸⁵ CAFTA, Chapter 10, Annex 10-F (Aug. 2, 2005), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file328_4718.pdf (last visited Mar. 29, 2007), stating: “Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to re-

agreement to help promote trade liberalization between the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.⁸⁶ Chapter Ten, the agreement's investment chapter, provides that disputes be resolved through binding arbitration; an annex to this chapter calls for negotiations on the development of an appellate body to review decisions rendered by CAFTA tribunals.⁸⁷

Further, the most recent US Model BIT offers that "[w]ithin three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered."⁸⁸ The US has also entered into bilateral investment treaties with Singapore and Chile, each of which call for further negotiations on the creation of an appeals process as a part of the agreement's dispute resolution provisions.⁸⁹

However, many commentators have pointed to the disadvantages in creating an appellate system for investor-state arbitration. Most of these concerns relate to whether "an appeal would go against the principle of finality, would bring additional delays, costs and caseload and lead to the politicisation [sic] of the system."⁹⁰ However, the absence of an appeal procedure creates an environment which fosters prolonged litigation after awards are issued. Losing parties are forced to submit grievances to state courts and to try to neatly fit their grievances into some grounds for vacatur.⁹¹ For example, the current Argentinean investment treaty arbitration crisis illustrates the

view awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement." *Id.*

⁸⁶ *Id.*

⁸⁷ CAFTA, *supra* note 85, at Annex 10-FG; *see also* James L. Loftis & Adrienne L. Goins, *Feature, 2005 Year In Review, International Law*, 69 TEX. B.J. 45, 45-46 (2006).

⁸⁸ 2004 Model BIT, Annex D, *available at* <http://www.state.gov/documents/organization/38710.pdf> (last visited Mar. 29, 2007).

⁸⁹ Coe, *supra* note 7, at 950-51; Chile FTA, U.S.-Chile, art. 10.19.10 (2003) *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (last visited Mar. 29, 2007); (Article 10.19.10 states that "If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under art. 10.25 in arbitrations commenced after the appellate body's establishment."); Singapore FTA, U.S.-Singapore, art. 15.19.10 (2003), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf (last visited Mar. 29, 2007).

⁹⁰ KATIA YANNACA-SMALL, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, IMPROVING THE SYSTEM OF INVESTOR-STATE SETTLEMENT: AN OVERVIEW 21 (2006).

⁹¹ Knull, *supra* note 11, at 542.

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need for an appellate process in investor-state arbitration.⁹² As C. Ignacio Suarez Anzorena noted in a May 2004 presentation before the Institute of International and Comparative Law, current investment disputes relating to Argentina's economic crisis of 2001 provide a recipe for disaster.⁹³

The looming possibility of Argentina losing in many, if not all, of the approximately forty pending claims against it, in determinations to be made by nearly thirty arbitrators, has forced the government to construct new and creative defense strategies.⁹⁴ One such tactic has been an expansion of judicial review of arbitral awards.⁹⁵ In a 2004 decision, the Federal Supreme Court of Argentina held that "local courts could review an arbitral award even when the parties involved have specifically agreed to waive the right of appeal" to ensure that arbitral awards comply with Argentinean public policy and are constitutional, legal and rational.⁹⁶ It is probably no coincidence that each of the ICSID claims pending against Argentina involves public policy issues, namely, the country's decision in 2001 to devalue the peso which resulted in the existing plethora of alleged BIT violations.⁹⁷ Here, the

⁹² See Alfaro-Abogados, *Argentina: ICSID Arbitration And BITs Challenged By the Argentine Government* (December 21, 2004), available at <http://www.alfarolaw.com/ima/tapa/alfaro3.htm> (last visited Mar. 29, 2007). Argentina's economic crisis resulted in the country's default on foreign debt. Despite guarantees that the peso and the US dollar were of equal value, Argentina was later forced to devalue the peso. The country's action had serious repercussions for investors. As many investments were made pursuant to BITs, which provided arbitration clauses, many investors brought claims against Argentina before ICSID. *Id.*

⁹³ C. Ignacio Suarez Anzorena, *Appeals And Challenges To Investment Treaty Awards: Is It Time For An International Appellate System?*, *British Institute of International and Comparative Law, Comment: Testing the Procedural Limits of the Treaty System: The Argentinean Experience* (May 7, 2004), at <http://www.biicl.org/admin/files/Ignacio%20Suarez%20Presentation.pdf>.

⁹⁴ Alfaro-Abogados, *supra* note 92.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID (W. Bank) ARB/97/3 (2002); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID (W. Bank) ARB/01/3 (2001); *CMS Gas Transmission Company v. Argentine Republic*, ICSID (W. Bank) ARB/01/8 (2001); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID (W. Bank) ARB/02/1 (2002); *Azurix Corp. v. Argentine Republic*, ICSID (W. Bank) ARB/01/12 (2001); *Sempra Energy International v. Argentine Republic*, ICSID (W. Bank) ARB/02/16 (2002); *AES Corporation v. Argentine Republic*, ICSID (W. Bank) ARB/02/17 (2002); *Camuzzi International S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/03/2 (2003); *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/03/5 (2003); *Continental Casualty Company v. Argentine Republic*, ICSID (W. Bank) ARB/03/9 (2003); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/03/10 (2003); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID (W. Bank) ARB/03/13 (2003); *El Paso Energy International Company v. Argentine Republic*, ICSID (W. Bank) ARB/03/15 (2003); *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios*

possibility for inconsistent awards seems inevitable. ICSID's annulment process is ill-equipped for reconciling any legal errors made in the nearly forty Argentinean awards, especially considering that some of these cases are outside of ICSID's jurisdiction. If parties are forced to take their claims to Argentinean courts to consider their appeals, the opportunity for justice is questionable, at best.

In addition, the ICSID annulment process does not provide parties with a speedy or efficient course of action, characteristics so beloved of arbitration. Of the claims which have made it through the annulment process, it took an average of five years for the ICSID arbitration process to finally conclude.⁹⁸ Moreover, parties are not limited to one request for annulment, heightening the inefficiency of the arbitration process.⁹⁹ The Secretary General of ICSID is permitted to consider any request for an annulment if it is made, in accordance with Article 52(2) of the Convention, "within 120 days after the date on which the award was rendered (or any subsequent decision or correction)" or "in the case of corruption on the part of a member of the

Integrales de Agua S.A. v. Argentine Republic, ICSID (W. Bank) ARB/03/17 (2003); *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/03/19 (2003); *Telefónica S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/03/20 (2003); *Enersis S.A. and others v. Argentine Republic*, ICSID (W. Bank) ARB/03/21 (2003); *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/03/22 (2003); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/03/23 (2003); *Unisys Corporation v. Argentine Republic*, ICSID (W. Bank) ARB/03/27 (2003); *Azurix Corp. v. Argentine Republic*, ICSID (W. Bank) ARB/03/30 (2003); *Total S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/04/1 (2004); *SAUR International v. Argentine Republic*, ICSID (W. Bank) ARB/04/4 (2004); *BP America Production Company and others v. Argentine Republic*, ICSID (W. Bank) ARB/04/8 (2004); *CIT Group Inc. v. Argentine Republic*, ICSID (W. Bank) ARB/04/9 (2004); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID (W. Bank) ARB/04/14 (2004); *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/04/16 (2004); *DaimlerChrysler Services AG v. Argentine Republic*, ICSID (W. Bank) ARB/05/1 (2005); *Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/05/2 (2005); *TSA Spectrum de Argentina, S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/05/5 (2005); *Asset Recovery Trust S.A. v. Argentine Republic*, ICSID (W. Bank) ARB/05/11 (2005).

⁹⁸ See ICSID, List of Concluded Cases, at <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited on Mar. 20, 2006 (noting that: *Amco* was registered in 1981 and concluded in 1991, *Klöckner* was registered in 1981 and concluded in 1988, *Wena* was registered in 1998 and concluded in 2004, *RFCC* was registered in 2000 and concluded in 2004, and *CDC* was registered in 2002 and concluded in 2005).

⁹⁹ See *Amco Asia Corp. v. Indonesia*, ICSID (W. Bank) ARB/81/1(1990) (rejecting the parties' applications for annulment of the Award and annulling the Decision on Supplemental Decisions and Rectification rendered on December 17, 1992). The *Amco* arbitration proceedings lasted just short of a decade, after the second annulment award was issued. *Klöckner* was not concluded until a third tribunal decided a second annulment application seven years after the original proceeding was registered with ICSID. *Klöckner Industrie-Anlagen GmbH v. Cameroon*, ICSID (W. Bank) ARB/81/2 (1985) (rejecting the parties' applications for annulment signed by the ad hoc Committee on May 17, 1990).

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Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction)."¹⁰⁰ The ICSID Annulment process could, conceivably, last an eternity.

Fears that an appeals procedure would result in added costs and setbacks in the arbitral process are unfounded. The average time period for annulling an ICSID award is approximately five years,¹⁰¹ whereas, the average time for an appeal before the WTO Appellate Body is three months.¹⁰² Forcing parties to continue within the current ICSID annulment process, or to take their objections to state courts, has not cut costs or engendered a more efficient practice. An appeals mechanism would remedy the inefficiencies of the current process.

Recommendations for Providing Appellate Review of Investor-State Arbitration

The establishment of a mechanism for appellate review of investor-state arbitral awards is inevitable. Based on the fact that multiple treaties are considering the creation of appellate review instruments, it is likely that more than one mechanism will be established. However, the creation of multiple systems of review will intensify existing challenges of developing a consistent body of jurisprudence and will have detrimental consequences for stability in this area of the law.¹⁰³ Whereas a "single, preferably institutionally-managed and widely-accepted" mechanism for reviewing investor-state arbitral awards would be best suited to address the risk of "fragmentation of the dispute settlement system that" might otherwise ensue.¹⁰⁴ Therefore, an Appeals Facility should be introduced, separate and distinct from existing arbitral institutions.

Such an institution could be founded by adding a protocol to existing BITs and MITs.¹⁰⁵ By creating an Appeals Facility, independent of ICSID, parties would not sacrifice finality, but instead ensure that awards would be both final *and* passable. Such a procedure would not remove the finality or

¹⁰⁰ ICSID Rules of Procedure for Arbitration Proceedings, Chapter VII, Rule 50.

¹⁰¹ ICSID, List of Concluded Cases, *supra* note 98.

¹⁰² WTO, *supra* note 27.

¹⁰³ OECD, *Working Papers On International Investment, Improving The System Of Investor-State Dispute Settlement: An Overview* (2006), available at <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

¹⁰⁴ *Id.*

¹⁰⁵ Goldhaber, *supra* note 60.

enforceability of awards. It would provide for an environment in which investors and States would be afforded recourse against awards where necessary. While this might slightly prolong the arbitration, it would provide parties with more confidence in the process.

Time limits could be set in place for this appellate procedure, similar to those instituted by the WTO DSB. In this way, appellate processes would be limited to a relatively short period of time, which would greatly alleviate the burden currently placed on parties by the annulment process and judicial review of awards. Further, the creation of a separate Appeals Facility will also ease fears of subjecting ICSID to an increased case load. Here, the institution of a separate appellate mechanism will assist in developing a consistent body of investor-state law and might actually lessen ICSID's docket as the law, and parties' obligations, become clearer.

A single, permanent Appeals Facility "charged with interpreting the network of investment treaties would more readily promote the creation of a reliable, predictable and clear jurisprudence."¹⁰⁶ As this area of the law continues to develop and progress, an appellate mechanism will further enhance the legitimacy of this system.

IV. INTERNATIONAL COMMERCIAL ARBITRATION AND THE POSSIBILITY FOR APPELLATE REVIEW

While investor-state disputes involve governments and foreign investors, international commercial disputes are a more private matter. Traditionally, arbitration has been the favored means for settling international commercial disputes as it provides parties with the ability to bypass foreign legal systems, and the difficulties related to litigating in unfamiliar forums. Moreover, arbitration is driven by party autonomy: parties can elect arbitral institutions, arbitrators and rules which are particularly suited to their needs. Awards are usually confidential and enforcement is guaranteed under international law.

Nonetheless, most parties are precluded from requesting institutional review, or appeal, of international commercial arbitral awards. US courts, for example, have held that private parties cannot alter the judicial process by imposing "on the *federal courts* a broader standard of review than the grounds authorized by" the Federal Arbitration Act (FAA).¹⁰⁷ The grounds for judicial review of arbitral awards have been extremely limited in order to "preserve due process but not to permit unnecessary public intrusion into

¹⁰⁶ Franck, *supra* note 14, at 95.

¹⁰⁷ *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (emphasis added); *see also* *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 933 (10th Cir. 2001).

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private arbitration procedures.”¹⁰⁸ Courts have rightly reasoned that they should not interfere with contract-based arbitral proceedings. But to further enhance the efficiency and accuracy of this process, and in the interests of party autonomy, arbitral *institutions* can implement appellate processes for review of international commercial arbitration awards.

The increased incorporation of appellate mechanisms within international commercial arbitration rules will assist in creating “a new area of growth” in “the use of ADR by large corporations otherwise unwilling to ‘bet the farm’ on a single tribunal’s decision.”¹⁰⁹ Such systemic transformation, properly assembled, will enhance the capacity of international commercial arbitration.

Existing Appellate Mechanisms for Review of International Commercial Awards

The only recourse that most parties are afforded for faulty international arbitration awards lies within a national court at the place of arbitration. However, the “fact that the New York Convention does not specify the controlling grounds for vacating a non-domestic award would tend to suggest that there exists a dramatic lack of uniformity in the standards national courts apply when determining whether to vacate such an award.”¹¹⁰

Depending upon the place of arbitration, various methods of post-award review may be available. While appellate mechanisms are in place for domestic arbitration within the US, these methods do not seem to be utilized in international commercial arbitral proceedings. As discussed below, arbitration institutions in the US, Great Britain and China rely upon institutional scrutiny of awards, a process that bears no resemblance to an appeal.¹¹¹ However, Austrian, South African and French arbitration law does provide for appellate review of international commercial awards.¹¹² Appellate systems, similar to those discussed below, should be made more available within international commercial disputes to promote the efficiency and reliability of international arbitration.

¹⁰⁸ *Kyocera*, 341 F.3d at 998.

¹⁰⁹ Knull, *supra* note 11, at 535.

¹¹⁰ *Id.* at 547.

¹¹¹ See *infra* notes 116-30 and accompanying text.

¹¹² See *infra* notes 131-41 and accompanying text.

Domestic Appeals Processes

In contrast to US opinions of appellate processes for international arbitration,¹¹³ these mechanisms do exist in the domestic arbitration realm. In 1999, the International Institute for Conflict Prevention & Resolution (CPR) became the first major private commercial arbitration institution to establish separate, optional rules governing appeals procedures, though these rules have, thus far, only applied to domestic arbitrations conducted in the US.¹¹⁴ CPR asserts that “a well structured private appeal to a highly qualified tribunal is likely to be preferable to seeking judicial review with all the attendant uncertainties.”¹¹⁵ Moreover, the lack of an arbitral appellate process often convinces “parties in larger cases to opt for a panel of three arbitrators, resulting in substantial additional cost and often delay. If parties have the safeguard of an appeal, they may see less need for three arbitrators.”¹¹⁶ Furthermore, an internal appeals mechanism may also deter the losing party from seeking “review in court even on statutory grounds.”¹¹⁷

There are no arbitration providers within the U.S. who offer appellate mechanisms for international commercial arbitration, though optional domestic appeal processes are available. This distinction is erroneous. To date, the case law foreclosing parties’ ability to contract for expanded review of arbitral awards relates to “judicial” review of such awards.¹¹⁸ Moreover, such provisions are not foreclosed by the New York or Panama Conventions.¹¹⁹ Under the New York Convention, each contracting State is obligated to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”¹²⁰ In the US, arbitral institutions readily provide parties to domestic arbitration with the opportunity to participate in an appellate process. Institutional appellate practice is made in accordance with US law for domestic arbitration. Therefore, internal appellate review of international awards should also be offered in institutional rules.

¹¹³ *Kyocera*, 341 F.3d at 987; *see also* van Ginkel, *supra* note 9.

¹¹⁴ Int’l Inst. for Conflict Prevention & Resolution, Revision History, http://www.cpradr.org/arb_appeal_revhist.asp?M=9.2.3.2 (last visited Mar. 27, 2007); Knull, *supra* note 11, at 555.

¹¹⁵ Int’l Inst. for Conflict Prevention & Resolution, *Commentary*, http://www.cpradr.org/arb_appeal_commentary.asp? (last visited Mar. 27, 2007).

¹¹⁶ Int’l Inst. For Conflict Prevention & Resolution, *Rationale*, http://www.cpradr.org/arb_appeal_rationale.asp?M=9.2.3.6 (last visited Mar. 6, 2007).

¹¹⁷ *Id.*

¹¹⁸ *See generally* *Kyocera*, 341 F.3d 987; *Bowen*, 254 F.3d 925.

¹¹⁹ New York Convention, *supra* note 83, at art. III; Panama Convention, *supra* note 83, at art. 5(1)(e).

¹²⁰ New York Convention, *supra* note 83, at art. III.

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The New York Convention further provides that recognition or enforcement of an award may be refused if the “award has not yet become binding on the parties, or has been set aside or suspended.”¹²¹ It is therefore possible to construct an appellate process, within arbitral institutions, which comports with the requirements of the Convention. For example, where parties opt to participate in an appellate process, such an award should not be deemed binding by the institution until (1) parties have communicated they do not wish to file a request for appeal; (2) the award, on appeal, has been rendered; or (3) the time period for requesting appellate review has elapsed.¹²² In this way, the advantage in the finality of arbitral awards is preserved and the final, binding decision is enforceable under the Convention.

Institutional Scrutiny of Awards

Nevertheless, most arbitral awards cannot be appealed according to institutional rules, though some arbitral institutions have introduced methods for keeping arbitrators to some discipline.¹²³ The International Chamber of Commerce (ICC), Judicial Arbitration & Mediation Services, Inc. (JAMS) and the China International Economic and Trade Arbitration Commission (CIETAC) rules for international arbitration provide that awards must be subjected to some scrutiny before they are finalized. As an example, the ICC Rules state that the

Court may lay down modifications as to the *form* of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its *form*.¹²⁴

However, conditions such as this do not obligate the tribunal to change its award. The rules make clear that any suggestions made should

¹²¹ *Id.*

¹²² See ICC, *supra* note 10; CIETAC, *supra* note 10; JAMS International Arbitration Rules, *supra* note 10.

¹²³ Walde, *supra* note 64.

¹²⁴ ICC, *supra* note 10 (provides for scrutiny of the Award by the Court (emphasis added)); see also CIETAC, *supra* note 10 (which states that “[t]he arbitral tribunal shall submit its draft award to the CIETAC for scrutiny before signing the award. The CIETAC may remind the arbitral tribunal of issues in the award on condition that the arbitral tribunal’s independence in rendering the award is not affected.”); see also JAMS, *supra* note 10 (which provides that “Before signing any Award, the Tribunal will submit it in draft to JAMS. JAMS may suggest modifications as to the form of the Award and may also draw the Tribunal’s attention to points of substance. No Award will be rendered by the Tribunal until it has been approved by JAMS as to its form.”).

not “affect the Arbitral Tribunal’s liberty of decision” or “independence in rendering the award.”¹²⁵

It is doubtful that these processes are capable of ensuring that awards “accurately [restate] the substance of any evidence identified in the award, or accurately [describe] every aspect of applicable law that is referenced in the award.”¹²⁶ Moreover, neither procedure allows for a party-driven appellate process, as parties have no role in the ICC, JAMS or CIETAC scrutiny of an award.¹²⁷

Institutional Appellate Review

Institutional appellate review processes have, however, been created in some jurisdictions and in varying forms.¹²⁸ As discussed in this section, South African, Austrian and French arbitral institutions each offer optional appeal procedures for parties to international commercial disputes.¹²⁹ In both Austria and South Africa, arbitral awards are final and binding unless the parties have agreed to the possibility of an appeal against the award.¹³⁰ In Austria, appeals are referred to a second-tier arbitral body,¹³¹ while parties to an arbitration agreement in South Africa may elect to have an award reviewed by either another arbitral tribunal or to the High Court for adjudication.¹³²

The Paris Arbitration Chamber (PAC), founded more than seventy years ago, has overseen approximately twenty-five thousand arbitrations; more than half of the disputes referred to PAC are international.¹³³ The rules of

¹²⁵ ICC, *supra* note 10.

¹²⁶ James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT’L ARB. 9, 25 (2004).

¹²⁷ See ICC, *supra* note 10; CIETAC, *supra* note 10; and JAMS, *supra* note 10.

¹²⁸ See Zivilprozessordnung [ZPO] [Civil Procedure Statute] 1984, as amended, § 594 (Austria), available at <http://www.arbitration-austria.at/documents/ZPO-Engl.pdf> (last visited Mar. 27, 2007); see also Arbitration Act 42 of 1965 s. 28 (South Africa), available at <http://www.arbitrators.co.za/argsnew/arbact42-65.htm> (last visited Mar. 29, 2007); Chambre Arbitrale de Paris, *General Presentation*, http://www.arbitrage.org/us/Proceedings/reglement_us_2005.pdf (last visited Mar. 29, 2007).

¹²⁹ *Id.*
¹³⁰ Austrian Code of Civil Procedure, art. 594, available at <http://www.arbitration-austria.at/documents/ZPO-Engl.pdf> (last visited Apr. 15, 2007); South African Arbitration Act 42 of 1965, § 28, available at http://www.arbitrators.co.za/argsnew/arbact42-65.htm#_23_Time_for (last visited Apr. 15, 2007).

¹³¹ Austrian Code of Civil Procedure, *supra* note 130, at art. 594.

¹³² The Arbitration Foundation for South Africa, *Commercial Rules for Arbitration*, art. 12.10, available at http://www.arbitration.co.za/Pages/docs/commercial_rules.pdf (last visited Mar. 29, 2007).

¹³³ Chamber Arbitrale de Paris, *General Presentation* 3, http://www.arbitrage.org/us/Presentation/us_presentation_cap.pdf (last visited Apr. 15, 2007) [hereinafter PAC]. Foreign en-

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the PAC provide for a two-tier procedure.¹³⁴ After a provisional award is rendered by the arbitral tribunal in the first stage of the proceedings, a party may request that the case be heard by a second panel before a final award is rendered.¹³⁵ In the next stage of the proceedings, the second tribunal will hear the case again and then render a final award.¹³⁶

This review process is also conducted in a cost efficient and timely manner. The PAC estimates that arbitration proceedings can last from three to five months, depending on the conscientiousness of the parties and the complexity of dispute.¹³⁷ The finality of the arbitral process is preserved as awards of the second panel are final and binding.¹³⁸ Thus, the PAC is able to provide disputants with an effective means for ensuring the issuance of precise awards and to recognize parties' interests in crafting an arbitration process to suit their needs.

Recommendations for Providing Appellate Review of International Commercial Arbitration

Accordingly, parties to international commercial arbitration should be provided with the option of appellate review within the arbitral institution where they have filed their claim. Arbitral institutions should provide optional recourse for disputed awards, and not force parties to transfer their claims to the judicial system. According to this scheme, parties should agree to an institution's internal rules for the optional appeal of international commercial awards.¹³⁹ Both parties should be empowered to appeal a provisional award, rendered pursuant to the institution's applicable arbitration rules.

terprises are parties to fifty-five percent of arbitration procedures before the PAC and two foreign parties are in dispute in fifteen to twenty percent of the institution's cases. *Id.* at 5.

¹³⁴ *Id.* at 6.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ PAC, *supra* note 133, at 2.

¹³⁹ See JAMS Optional Arbitration Appeal Procedure, <http://www.jamsadr.com/rules/optional.asp> (last visited Mar. 29, 2007); see also the Rules of Procedure of the Arbitration Chamber of Paris, http://www.arbitrage.org/us/Proceedings/US_Reglement_mediation.pdf (last visited Mar. 29, 2007); WTO Working Procedures for Appellate Review, *at* http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#24 (last visited Mar. 29, 2007).

Initially, the appeal may be commenced once a written Notice of appeal (“Notice”) has been served on the institution by the appellant.¹⁴⁰ Upon the filing of a Notice, the institution will recommend an appeal panel to the parties and make any applicable disclosures regarding the candidates for the panel. The institution will seek the agreement of the parties as to the selection of the appeal panel members; if the parties do not agree on the composition of the appeal panel within seven (7) calendar days of having received the institution’s recommendation, the institution will appoint an appeal panel.¹⁴¹

Within seven calendar days of the service of the Notice, the party(ies) must serve on the institution, and on the opposing party(ies), a written submission.¹⁴² Any party to the dispute that wishes to respond to allegations raised in an appellant’s submission may, within twenty-five days after the date of the filing of the Notice, file with the institution, and serve a copy on the appellant, a written submission.¹⁴³

Thereafter, the appeal panel shall hold an oral hearing within forty five days of the filing of the Notice, if all parties request such argument.¹⁴⁴ Thereafter, the Provisional Award shall become null and void once the formalities for the appeal have been carried out within the stipulated time limit.¹⁴⁵ The award of the appeal panel shall be issued on the basis of a majority vote.¹⁴⁶ It shall include the names of the Arbitrators and parties, a concise summary of the cases of the parties, their respective arguments and

¹⁴⁰ WTO Working Procedures for Appellate Review, *supra* note 139. This Notice should include: (1) the title of the arbitral proceedings under appeal; (2) the name of appellant; (3) the service addresses, telephone and facsimile numbers of the parties to the dispute; and (4) a statement of the nature of the appeal, which includes a summary of the alleged errors in the issues of law covered in the Provisional Award and legal interpretations developed by the arbitrator(s).

¹⁴¹ JAMS Optional Arbitration Appeal Procedure, *supra* note 139. An Appeal Panel will consist of three neutral members, unless the Parties agree that there will be one neutral member. An arbitrator, or member of the tribunal, sitting on the bench of the first arbitration should not serve as Arbitrator on the Appeal Panel.

¹⁴² The appellant’s submission must contain: (1) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the Provisional Award and legal interpretations developed by the panel, and the legal arguments in support thereof; (2) a precise statement of the provisions of the covered agreements and other legal sources relied on; and (3) the nature of the decision or ruling sought.

¹⁴³ JAMS Optional Arbitration Appeal Procedure, *supra* note 139; WTO Working Procedures, *supra* note 139. The appellee’s submission must contain: (1) a precise statement of the grounds for opposing the appellant’s submission, and the legal arguments in support thereof; (2) a precise statement of the provisions of the covered agreements and other legal sources relied on; and (3) the nature of the decision or ruling sought.

¹⁴⁴ WTO Working Procedures, *supra* note 139. All fees for the original arbitration must be paid in full before an appeal will be scheduled.

¹⁴⁵ PAC, *supra* note 133, at art. 20.

¹⁴⁶ *Id.*

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the given facts, the reasons for the award reached and a statement of the fines.¹⁴⁷ This Award shall be final and binding.

Such a process will obviate the need for applying to unpredictable State courts for assistance and will enhance the legitimacy of international commercial arbitration by reinforcing its commitment to the principals of party autonomy, efficiency and finality.

V. CONCLUSION

As is true within judicial proceedings, arbitral awards are sometimes based on misapplications of law or misconstruing of objective evidence.¹⁴⁸ Even arbitrators may be fallible. If parties wish to safeguard against such human frailties, they should be allowed to do so.

Current methods for review of both investor-state and international commercial arbitral awards are inadequate for providing parties with effective review mechanisms for faulty awards. An appellate system should be readily available to parties who opt to participate in this process. The creation of a stand-alone appeals facility for reviewing investor-state disputes would aid in promoting a cohesive and consistent body of law. Further, the adoption of appeals procedures for international commercial disputes at an institutional level would enhance the efficiency of international commercial arbitration. To encourage the finality, efficiency and enforceability of international arbitral awards, such appellate processes must be recognized.

¹⁴⁷ *Id.*

¹⁴⁸ Gaitis, *supra* note 126, at 97.

