

The Sovereign, the Investor and the Arbitrator

Why and How to Reform International Investment Arbitration

SAMANTHA BESSON, docteure en droit, Professeure à l'Université de Fribourg*

'Changes to the dispute settlement process must be seen in the context of a developing international law regime rather than simply as a tinkering with the arbitration procedures. Simply put, this cannot be achieved by giving the limitations of yesteryear primacy over the needs of tomorrow.' (MANN et al. 2004b, 3)

Summary

Introduction

- I. Some definitions and distinctions
 - A. Legitimacy
 1. Normative v. sociological legitimacy
 2. External v. internal legitimacy
 3. Formal v. material legitimacy
 4. Political v. legal legitimacy
 5. Input v. output legitimacy
 - B. International investment arbitration
 1. International arbitration v. national arbitration
 2. International investment arbitration v. international commercial arbitration
 3. International investment treaty arbitration v. international investment contract arbitration
- II. The legitimacy critique
 - A. The legitimacy of arbitration per se
 1. Arbitration and local jurisdictions
 - a. The exhaustion of local remedies
 - b. The local review of arbitral awards
 2. Arbitration and international jurisdictions
 - a. Arbitration and arbitration
 - b. Arbitration and international courts
 - B. The legitimacy of the lex arbitrii
 1. Lex arbitrii and national law
 2. Lex arbitrii and international law
 - C. The legitimacy of arbitrators
 1. The arbitrators' independence and impartiality
 - a. The election of arbitrators
 - b. The remuneration of arbitrators
 2. The arbitrators' expertise

- D. The legitimacy of the arbitral procedure
 - 1. The publicity of procedures
 - a. The publicity of pending procedures
 - b. The publicity of the process
 - c. The publicity of awards
 - 2. The coherence of awards
 - 3. The review of awards
 - III. Proposals for reform
 - A. An assessment of proposed reforms
 - 1. Renationalizing investment disputes
 - 2. Reforming current multilateral and bilateral treaty arbitration mechanisms
 - 3. Replacing international investment arbitration by an international investment court
 - B. A proposal for a multilevel reform
 - 1. National reform: developing and exhausting local remedies
 - 2. Transnational reform: reforming multilateral and bilateral treaty arbitration mechanisms
 - 3. International reform: creating an International Investment Court
- Conclusion
- References

Introduction

Pierre Tercier was an unusual supervisor, always prompt to let you explore areas he did not seem to care much about or, rather, that he cared about, but did not want to confess he did. This is how he got to supervise my thesis on the theory of anti-discrimination law and its critique of Swiss contract and personality law.¹ This is also how many years later he got me thinking about the legitimacy of international arbitration and more precisely that of international investment arbitration. It was shortly before he was elected to the International Chamber of Commerce's (ICC) International Court of Arbitration in Paris. It is one of Pierre's unique merits to always be looking for trouble, as it were, knowing that dealing with critiques of his own positions will necessarily help him improve his take on them. I therefore propose to celebrate his 65th birthday and his essential contribution to the reshaping of international arbitration institutions and procedures by positioning myself once more in the black sheep position.

For many years, commercial arbitration did not attract much theoretical attention. It was after all meant to escape at least in part the publicity inherent in public jurisdic-

* Professor of Public International Law and European Law and Member of the Direction of the European Law Institute, University of Fribourg (Switzerland). This chapter is a follow-up to some of the ideas published in July 2005 in a Swiss electronic law journal (*Jusletter* 2005). Previous versions benefited from the repeated feedback of Master students at the University of Fribourg from 2005 to 2007 and from questions and critiques by Andreas Bucher, Gabrielle Kaufmann-Kohler, Carrie Menkel-Meadow and, last but not least, Pierre Tercier. Many thanks are due to my assistants Alexandre Chardonnens and Stéphanie Murenzi for their help with the formal layout of the article.

¹ See BESSON S. 1999.

tion. The same may not be said of inter-state arbitration that, from the eighteenth century and right up to the Second World War, had been the predominant judicial means of international dispute settlement.² In fact, its constant development post-1945 confirmed its primary role in the making of international law.³ As a result, there is no shortage of theoretical accounts of international arbitration.⁴ While its procedural aspects have been discussed to a great extent in the literature, its legitimacy is a more recent theme. There is one type of international arbitration, however, whose hybrid nature and legitimacy have sparked controversy lately and that is international investment arbitration between a private investor and a State. In a nutshell, international investment arbitration is the contract- or treaty-based mechanism that allows a private investor to initiate a commercial-like arbitration unilaterally against the host State in which it invested in case of dispute pertaining to that investment.⁵

Many reasons may be brought forward to explain this interest in the legitimacy of international investment arbitration.⁶ Some are general and relate to the increasing quest for the legitimacy of international law, and law-making institutions and procedures in general since the 1990s.⁷ This may be explained in particular by reference to the growing material and personal scope of international law, but also, more importantly, to its increasingly objective, imperative and *erga omnes* nature that no longer sits comfortably with the traditional subjective, voluntarist and relative approach to international law. As a result, the legitimacy of international investment rules and arbitration can no longer be derived simply from the existence of an international agreement between two sovereign states without regard for non-conventional international law and in particular international human rights, international environmental law and more generally self-determination rights.

Other more specific reasons for this recent controversy may be found in the exponential development of international investments in all areas of private but also public governance, first in so-called developing countries⁸ and from the 1990s across the board.⁹ The spectacular increase of investments since the 1990s has led to the devel-

² See ALVAREZ G./PARK W.W. 2003 365 on early cases of international investment arbitration.

³ See e.g. COLLIER J./LOWE V. 2000 32–35; MERRILLS J.G. 2005 91–95; ALVAREZ G./PARK W.W. 2003 366–370.

⁴ See e.g. LILICH R.B./BROWER C.N. 1994; SIMPSON J.L./FOX H. 1959.

⁵ See FRANCK S.D. 2005 1538. The legitimacy of international investment arbitration is only examined under its procedural and institutional aspects in this chapter and further issues pertaining to the substantive rights included or excluded from investment treaties and contracts will not be discussed here. See on the latter and their scope *ratione materiae* and *ratione personae*, FRANCK S.D. 2005 1529–1535. For a critique and reform proposals, see SORNARAJAH M. 1997; PETERSON L.E. 2003; MANN H. et al. 2004b; WALDE T. 2004; HORCHANI F. 2006.

⁶ Investment arbitration will be discussed in general in this chapter, except when arbitration procedures differ and offer specific features worth emphasizing. While this general approach might be oversimplifying in some cases, it has the merit of emphasizing globalization in arbitration procedures. See e.g. KAUFMANN-KOHLER G. 2003; FRANCK S.D. 2005.

⁷ See e.g. WEIL P. 1982; FRANCK T. 1995; KINGSBURY B. 1998; BUCHANAN A. 2004 and 2008; KUMM M. 2004; BESSON S. 2007; TASIIOULAS J. 2008.

⁸ On the notion, see SORNARAJAH M. 1997 106–107, 110–111.

⁹ See SACERDOTI G. 1997 299 on that extension. See also United Nations Conference on Trade and Development (UNCTAD)'s survey of BITs 1995–1999, <http://www.unctad.org/en/docs/poiteiad2.en.pdf>.

opment of idiosyncratic dispute settlement mechanisms that matched investors' interests in neutrality,¹⁰ privacy and efficiency, given their fear of politicization and corruption of jurisdictions in many of the host States.¹¹ This implied more particularly an increase in the adoption of multilateral investment arbitration treaties (MITs) and institutions,¹² but mostly of bilateral investment arbitration treaties (BITs).¹³ The sophistication of arbitration clauses whether contract- or treaty-based has consolidated private investors' position by giving them a unilateral right to initiate arbitration in case of conflict.¹⁴ At the same time, however, these clauses have weakened host States whose policies on key public interests end up being resolved in private, secretly most of the time, before different sets of arbitrators like in any other commercial dispute rather than before national or international jurisdictions.¹⁵ As a result, public and hence sovereign interests of host States have been privatized, so to speak, in an increasing number of cases of investment disputes with private investors, pertaining to water concessions, public health, sewage services, road infrastructures, waste policies, fishing permits or energy resources.¹⁶

Of course, the questionable legitimacy of international legal arrangements would not be enough *per se* to trigger a debate about legitimacy, and this despite the wealth of critiques raised in academic and civil society circles since the 1990s.¹⁷ These critiques stemmed mostly from development and environmentalist groups whose main concern was developing countries' interests. Unilateral investment arbitration clauses would not have been questioned in themselves, had investments not started to take place

¹⁰ For a critique of the alleged neutrality of international investment arbitration, see SORNARAJAH M. 1997 103.

¹¹ See BLACKABY N. 2002a.

¹² The first MITs adopted in the 1960s included among others: the 1966 International Centre for the Settlement of Investment Disputes (ICSID), <http://www.worldbank.org/icsid/>. Of course, investment arbitration could also be based from the beginning on commercial arbitration conventions, such as the 1966 United Nations Commission on International Trade Law (UNCITRAL), <http://www.uncitral.org/uncitral/en/index.html>; and the 1923 International Chamber of Commerce (ICC) International Court of Arbitration, <http://www.iccwbo.org/court/>. Since the 1990s, one should mention among others: the 1992 North American Free Trade Agreement (NAFTA), http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?ArticleID=5; and the 1994 Energy Charter Treaty (ECT), <http://www.encharter.org/index.php?id=32>.

¹³ There are nowadays more than 2400 BITs in force, and among these 1500 new BITs have been concluded at the pace of one hundred every year since the 1990s.

¹⁴ There are now more than 240 known investor-State arbitrations (over 200 of which were launched in the last seven years) and they involve extremely important sums of money. See SORNARAJAH M. 1997; COE J. 2003; FRANCK S.D. 2005. Of course, it is difficult to assess the exact number of arbitration cases due to the confidentiality of most procedures outside ICSID and NAFTA procedures. To date, there have been more than 140 ICSID arbitration cases and the majority were initiated after 2001 (see GAILLARD E. 2004; REED L./PAULSSON J./BLACKABY N. 2004). The second most widely used rules for resolving investment disputes are UNCITRAL Arbitration Rules (see SACERDOTI G. 2004).

¹⁵ See FRANCK S.D. 2005 1521–1522.

¹⁶ See MANN H. 2001a; WALDE T./WEILER T. 2002; GRUNER D.M. 2003; NEUFELD R. 2004; BLACKABY N. 2002a; KAUFMANN-KOHLER G. 2004.

¹⁷ See e.g. from the civil society, writings by MANN H. or PETERSON L.E. in International Institute for Sustainable Development (<http://www.isdlaw.com>); WALDE T. in Transnational Dispute Management (<http://www.transnational-dispute-management.com/>). See e.g. from the academia, SORNARAJAH M. 1994, 1997 and 2002.

in developed countries as well and the States submitted to arbitration under those clauses not included wealthier Western States such as the United States or Canada under Chapter 11 North American Free Trade Agreement (NAFTA)¹⁸ as well as, albeit more rarely, the International Centre for the Settlement of Investment Disputes (ICSID)¹⁹. Since the end of the 1990s, reactions triggered by the use of investment arbitration relative to those countries have been vigorous in political²⁰, judicial²¹ and civil²² circles, giving rise in response to preventive or corrective measures on the part of investment arbitral tribunals²³.

As a result, most multilateral investment arbitration treaties and international investment arbitration centres have launched reforms aiming at reducing the acknowledged legitimacy gap, although the reforms proposed have remained limited.²⁴ Arbitral tribunals themselves have grown more sensitive in recent years to the public interests at stake in many of the (known) disputes they have had to arbitrate.²⁵ Academics have also joined the debate and since 2002 countless publications and conferences have addressed ways to enhance the transparency, consistency and accountability of investment dispute settlement mechanisms, in order to prevent investment arbitration being

¹⁸ See e.g. *Methanex Corporation v. United States of America*, Final Award, 8 March 2005 or *United Parcel Service of America Inc. v. Government of Canada*, Final Award, 11 June 2007 (<http://www.naftaclaims.com>). See ALVAREZ G./PARK W.W. 2003 367: 'When the shoe is on the other foot, perceptions of fairness may be quite different, and the industrialized countries may not be enthusiastic about playing by the same rules.' See also PATERSON R. 2000.

¹⁹ See e.g. *ADF Group Inc. v. United States of America*, Final Award, 9 January 2003, <http://www.worldbank.org/icsid/cases/awards.htm>.

²⁰ See e.g. GOLDBABER M. 2004b who used the term 'arbitral terrorism' in this context.

²¹ See e.g. the decision of the British Columbia Court, *Mexico v. Metalclad Corp.*, Reasons for Judgement of the Honorable Mr Justice TYSOE (2001) 39 British Columbia Law Reports 389, 393. See also the decision of the Ontario Court of Appeal, *Council of Canadians v. Canada (Attorney General)*, (2006) O.J. No. 4751 (QL). The Council of Canadians announced on 13 June 2007 that it would make an appeal before the Canadian Supreme Court relative to the constitutionality of Ch. 11 NAFTA investment arbitration rules and their compatibility with the rule of law and democracy: <http://www.canadians.org/media/trade/2007/13-June-07.html>.

²² See e.g. PETERSON L.E. 2003; MANN H. et al. 2004b. See also the special volume (2005) 2:2 Transnational Dispute Management.

²³ See e.g. for a preventive reaction: *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1 (2000), <http://www.worldbank.org/icsid/cases/awards.htm>. See e.g. for a corrective reaction: *United Parcel Service of America Inc. v. Government of Canada*, Final Award, 11 June 2007, <http://www.naftaclaims.com>. See DHOOGHE L.J. 2001 on *Metalclad*.

²⁴ See ICSID 2004 paper on 'Possible Improvements of the Framework for ICSID Arbitration', <http://www.worldbank.org/icsid/highlights/improve-arb.pdf> and 2005 ICSID follow-up paper 'Suggested Changes to the ICSID Rules and Regulations', <http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf>. See reactions by MANN H. et al. 2004b. See also the revision launched in 2006 by UNCITRAL, its Working Group on Arbitration's 2007 revised Arbitration Rules and the 2007 comments by IISD and CIEL on the draft, http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf. See also the 2006 OECD's paper 'Improving the System of Investor-State Dispute Settlement', <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

²⁵ See e.g. *SGS Société Générale de Surveillance SA v. Republic of Philippines*, Competence Award, 29 January 2004, www.worldbank.org/icsid/cases/awards.htm; *Waste Management Inc v. United Mexican States*, Final Award, 30 April 2004, www.worldbank.org/icsid/cases/awards.htm.

'thrown out with the proverbial bathwater'.²⁶ Most academics writing on the topic, however, also often happen to take part in investment arbitrations as counsels or arbitrators; while enhancing their perception of the practical issues, this situation implies that inescapable conflicts of interests can affect their analysis of the flaws of the current system, which they only rarely question *per se*.²⁷

The time has come therefore to take stock of these various institutional and academic proposals for reform. After an analysis of the main concerns and issues of legitimacy that can be raised in the context of investment arbitration, the chapter will discuss different proposals of reform. Many conceptualizations of the legitimacy crisis²⁸ and its remedies are short-sighted, I will argue, and the approach to solving the problem should be holistic. The solution lies neither, as one often reads, in the largely cosmetic reform of current multilateral or bilateral treaty arbitration mechanisms one by one nor in their replacement by a single international investment court. The problem with many reform proposals is that they have lost sight of the broad picture and in particular of the intense development of international law in the last fifteen years.²⁹ One could mention the reinforcement of international dispute settlement mechanisms and the development of judicial organs by contrast to political and quasi-judicial bodies, on the one hand. On the other, important changes may also be observed relative to the material scope of international law with the development of human rights and States' positive duties, but also to its personal scope with the strengthening of the status of private and legal persons *qua* subjects of international rights and obligations. This implies that international law both strengthens host States' duties vis-à-vis their population and home States' duties *erga omnes*, and creates additional international duties for private investors abroad. If the position of private investors has been constantly consolidated since the 1960s, the same may also be said of that of national populations, i.e. the sovereigns behind host States.³⁰ While concerns about decolonization and the spread of communism could explain the choices made to protect investments in the 1960s, those reasons can no longer prevail over the interests of host States and their populations.

As a result, in order to solve investment disputes in a way that satisfies other international standards, investment dispute settlement mechanisms need to be reconceptualized completely in a new international legal environment and not only reformed from within. On 2 May 2007, the first withdrawal ever from ICSID was notified to

²⁶ FRANCK S.D. 2005 1523. The literature on the reform of investment arbitration procedures has grown out of any proportion. See e.g. KNULL W.H./RUBINS N.D. 2000; ABBOTT F.M. 2000; AFILALO A. 2001; BLACKABY N. 2002a; SORNARAJAH M. 2002; WÄLDE T./WEILER T. 2002; JONES R.C. 2002; ALVAREZ G./PARK W.W. 2003; COE J. 2003; GRUNER D.M. 2003; SHAPREN A. 2003; BEN-HAMIDA W. 2003 and 2004; KAUFMANN-KOHLER G. 2004; GOLDBERGER M. 2004b; FRANCK S.D. 2005; BESSON S. 2005; ORTINO F./SHEPPARD A./WARNER H. 2006; VAN HARTEN G. 2007.

²⁷ Hence the doubts one may have about FRANCK S.D. 2005 1613–1615's argument relative to the role academics can play in redeeming the legitimacy of investment arbitration procedures and awards.

²⁸ See BROWER C.H. 2002 on the term.

²⁹ There are exceptions, of course. For the use of foreign or international experience, see e.g. AFILALO A. 2001; KAUFMANN-KOHLER G. 2004; MANN H. et al. 2004b 4.

³⁰ On the new conception of international sovereignty, see BESSON S. 2006 and 2008a. See also section 2 below.

the World Bank by Bolivia;³¹ this has been interpreted both as a sign of lassitude vis-à-vis *ad hoc* reforms and as a sign of the political will in certain States to do without international investment arbitration altogether.³² Retrospectively, history might show that international investment arbitration was an anomaly contingent on the development of international trade and the weakness of international dispute settlement mechanisms at a given time. National judicial remedies, I will argue, need to be reactivated in investment disputes and exhausted before bilateral and multilateral treaty arbitrations are initiated, but at the same time the latter need to be reformed completely – and not only superficially – and complemented by the creation of an international investment appellate court.

I. Some definitions and distinctions

Legitimacy is a *portmanteau* concept that is used in many interchangeable ways. As a result, its meanings need to be clarified at the outset of a legitimacy assessment of international investment arbitration mechanisms or else it will just be glossed over, as is often the case. The same applies to the notion of international investment arbitration given the great diversity of sources and scope of its mechanisms.

A. Legitimacy

In a nutshell, legitimacy is the quality of what is justified and hence of what gives reasons for action, i.e. has authority. There are many ways in which something, and in our case the arbitral award, can be justified. In this chapter, legitimacy will be understood in a normative, formal, political, external and input-centered meaning.³³

1. Normative v. sociological legitimacy

A decision may be justified objectively on normative grounds (normative legitimacy), but it may also be deemed as justified subjectively from each individual's perspective (sociological legitimacy). While the latter matters a lot, since decisions need to be perceived as justified and not only be said to be so, this chapter will concentrate on the former. There are many reasons why investment arbitration may be perceived as justified in given circumstances of poverty where they give investors security and host States a chance to attract investors. This does not, however, make for the legitimacy of those dispute settlement mechanisms in objective terms.

³¹ This withdrawal followed the recent ICSID award in the case *Agua del Tunari S.A. v. Republic of Bolivia*, Final Award, 21 October 2005, www.worldbank.org/icsid/cases/awards.htm.

³² Further similar moves may be expected from other South American States such as Ecuador, Nicaragua or Venezuela, which are all part of the Bolivarian Alternative for the Americas (ALBA).

³³ For a discussion of the concept of international law's legitimacy, see BUCHANAN A. 2008; BESSON S. 2007; FRANCK T. 1995.

2. *External v. internal legitimacy*

Legitimacy can consist both of the objective justification to participants in the practice (internal legitimacy) and of a general outsider's judgement (external legitimacy). Although both are important, it is the latter that will be used in this chapter when assessing the legitimacy of investment arbitration. One of the most important critiques made against the legitimacy of investment arbitration, as we will see, is indeed that it does not take the interests of other (absent) stakeholders besides those of governments and investors sufficiently into account.

3. *Formal v. material legitimacy*

A decision may be justified by virtue of its process, in which case its legitimacy is formal, or of its content, in which case its legitimacy is material. Formal legitimacy usually consists of the publicity, transparency, accountability, consistency and inclusion of the process by which the award was issued. Material legitimacy can be linked back to the substantive justice and moral correctness of the award itself. This chapter will mainly focus on the formal legitimacy of investment arbitration, as this is also the way the legitimacy of judicial decisions on controversial issues of public interest is assessed for epistemological reasons and *a fortiori* the way international decisions are most likely to be assessed.³⁴

4. *Political v. legal legitimacy*

Formal or processual legitimacy can reflect the respect of legal constraints on that process, but also, more generally, political requirements that add onto the former, and include principles such as representativity, accountability or inclusion. In this chapter, both legal and political requirements will constitute the standards by which the legitimacy of investment arbitration should be assessed. While legal requirements are generally respected and remedies are available within a legal system when they are not, political standards of legitimacy are more rarely discussed within the legal arena, although they constrain and shape future legal requirements. Because international investment arbitration usually abides by its own legal procedural requirements at the risk of annulment otherwise, it is interesting to assess its procedural legitimacy from a moral-political perspective.

5. *Input v. output legitimacy*

The formal legitimacy of a decision can be judged on the basis either of its background conditions (input legitimacy) or of its results (output legitimacy). While the latter is of relevance and is, in fact, an important motivation to use investment arbitration, this

³⁴ See BESSON S. 2008b on international legality and legitimacy.

chapter will concentrate on the former as it is often sidelined and is essential in the evaluation of investment arbitration by comparison to other modes of decision-making on public interests.

B. International investment arbitration

International investment arbitration is a complex form of dispute settlement that lies at the junction of many different international mechanisms. Briefly, it is a kind of international arbitration between a private investor and a host State, that aims at resolving an investment-related dispute and that can be contract-based and/or stem from a multilateral and/or bilateral investment treaty.

1. *International arbitration v. national arbitration*

Investment arbitration is a kind of international arbitration and should be distinguished from national arbitration. Arbitration constitutes a private mode of dispute settlement that is an informal alternative to judicial mechanisms whether national or international. A number of arbitrators, usually nominated by the parties, are called to settle the dispute swiftly and with discretion. Arbitration was developed primarily to resolve national or transnational private disputes among individuals or corporations. However, it has been used since the eighteenth century in inter-state conflicts and was only gradually complemented by international judicial mechanisms to solve inter-state disputes in the second part of the twentieth century.³⁵

Nowadays, international arbitration covers not only cases of inter-state arbitration, but also those which oppose a state to an individual or a corporation and even cases of purely private disputes. While the type of parties is not decisive for the international nature of arbitration, the source of the law applicable is not necessarily either. What matters is the source of the arbitration procedures applicable, and in particular whether they can be found in an international convention or the rules established by an international body. As a result, the 1923 ICC Statute and its International Court of Arbitration may be classified among international arbitration mechanisms, although they apply mostly to private contractual disputes and the *lex arbitrii* is usually national law.³⁶

Originally, the link between investment disputes and international arbitration was just as loose. In principle, indeed, investment contracts between a State and a private investor from another State are submitted to national law. They could not, therefore, in virtue of their nature and of their parties be regarded as international agreements submitted to international law. As a result, investment disputes should be submitted to

³⁵ See e.g. COLLIER J./LOWE V. 2000 32–35; MERRILLS J.G. 2005 91–95; ALVAREZ G./PARK W.W. 2003 366–370.

³⁶ One may wonder whether the term ‘transnational’ might not be more adequate in this respect since arbitration lies in the hands of individuals from different states deciding together, rather than in those of international bodies *per se*.

national jurisdictions or at least to national arbitration mechanisms. As early as the 1960s, it became clear, however, given the state of national jurisdictions in certain host States, on the one hand, and the absence of adequate national law in those countries, on the other, that foreign investment contracts should be protected by international law.³⁷ Of course, private investors quickly started using diplomatic protection mechanisms to have their own States claim damages from host States for breach of investment contracts and bring a case to the International Court of Justice (ICJ).³⁸ Given the inherent limitations and uncertainty of that route, however, foreign investment contracts were internationalized and regarded as international treaties.³⁹ This was confirmed in famous arbitral awards such as the *Texaco* and *Aminoil* cases in the context of nationalizations in the Middle East.⁴⁰ Since then, foreign investment contracts have been interpreted according to international investment law and general principles of international law.

While this internationalization contributed to consolidating the international status of individuals and corporations *qua* international law subjects, it also led to regarding investment disputes as international disputes that had to be resolved according to international law rules and according to international dispute settlement mechanisms. The problem was that back then there was not much international law of investment.⁴¹ Moreover, there was no international jurisdiction that could settle disputes between States and private actors as opposed to purely inter-state disputes. As a result, multilateral investment treaties and international arbitration structures started to develop. One should mention in particular the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the International Centre for the Settlement of Investment Disputes that was established according to the Convention. Various countries also concluded bilateral investment treaties to secure rights for their private investors abroad and included arbitration clauses that granted investors unilateral rights to initiate arbitration in case of dispute. Since the 1990s, with the increase of foreign investments, the number of BITs has exploded to more than 2400. Moreover, further multilateral investment treaties have been enacted since then, such as the 1994 North American Free Trade Agreement and its Chapter 11 on investment rights and dispute settlement procedures.⁴²

³⁷ See SACERDOTI G. 1997 413–414; SORNARAJAH M. 1997 107–114.

³⁸ See e.g. COLLIER J./LOWE V. 2000 132–169; MERRILLS J.G. 2005 112–123, 139–144.

³⁹ See FRANCK S.D. 2005 1524–1529 on this evolution.

⁴⁰ See *Texaco-Calasiatic v. Lybia*, Final Award, 19 January 1977, 53 International Law Review 389; *Aminoil v. Kuwait*, Final Award, 24 March 1982, 66 International Law Review 518. See also VERDROSS A. 1964.

⁴¹ See SORNARAJAH M. 1997 107–124 for a critique of the internationalization of investment contracts and dispute settlement mechanisms in this respect. International investment law is currently developing fast thanks to the systematization work of academics and the growing case-law building from arbitral awards. See e.g. MUCHLINSKI P./ORTINO F./SCHREUER C. 2008.

⁴² On this evolution, see FRANCK S.D. 2005 1535–1539; PETERSON L.E. 2003; OBADIA E. 2002 67–68; SALACUSE J. 1990.

2. *International investment arbitration v. international commercial arbitration*

International investment arbitration aims at settling an investment dispute, i.e. a dispute over the breach of an investment contract between the host state and the foreign investor.⁴³ It ought to be distinguished therefore from international commercial arbitration, i.e. international arbitration mechanisms that aim at solving disputes pertaining to purely commercial contracts between a State and an individual or corporation.

Investment contracts are a special kind of commercial contracts that pertain to investment, i.e. every kind of asset and in particular movable and immovable property, shares, claims to money or to performance having a financial value, etc.⁴⁴ According to the definition one might draw from recent ICSID awards, a contract is an investment contract, when (i) there is an expenditure of money or other contribution, (ii) a gain is sought, (iii) there is a certain element of risk, (iv) there is a certain duration of the performance and (v) there is a contribution to the economic development of the host country.⁴⁵ The distinction is not always easy to make in practice, since multilateral commercial arbitration mechanisms such as the ICC⁴⁶ or the United Nations Commission on International Trade Law (UNCITRAL) often apply to solve investment disputes. All in all, however, most investment arbitrations follow mechanisms foreseen in investment treaties whether bilateral or multilateral.

3. *International investment treaty arbitration v. international investment contract arbitration*

International investment arbitration may be foreseen by treaty or, in rare cases, by the investment contract itself. Nowadays, treaty-based investment arbitration is the most frequent of the two. In most cases, indeed, the investment contract includes an arbitration clause that refers to one or many multilateral investment treaties and does not establish its own arbitration rules.⁴⁷

Treaty-based arbitration can be of two kinds: multilateral or bilateral. Most cases of investment arbitration are based on multilateral investment treaties and their arbitration rules. The two most important multilateral systems are ICSID and Ch. 11 NAFTA. In the former case, even if both home and host States are parties to the ICSID Convention, the parties to the investment dispute still need to recognize the arbi-

⁴³ Some BITs include so-called 'umbrella clauses' which grant investors a right to arbitration under international law in case of breach of contractual obligations and without breach of treaty rights *stricto sensu*. On this opposition between treaty and contract claims, see e.g. SINCLAIR A.C. 2004. See also the 2006 OECD's paper 'Improving the System of Investor-State Dispute Settlement', 26–40, <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

⁴⁴ See e.g. definition articulated in the Model BIT for Great Britain. See FRANCK S.D. 2005 1534 fn. 43.

⁴⁵ See OBADIA E. 2002 71.

⁴⁶ See GRIGERA NAON H. 2000.

⁴⁷ See e.g. KAUFMANN-KOHLER G. 2004.

tral jurisdiction of the ICSID for an arbitration claim to be made.⁴⁸ Once consent to arbitration has been given by the host State and the investor, it can no longer be withdrawn unilaterally (Article 25 ICSID).

This consent can be given in many ways and, for instance, by an investment contract. Provided both the host and home States have ratified the multilateral treaty, individual investment contracts can refer directly to those mechanisms, provide the host State's and investor's consent to arbitration in case of conflict and thus give the private investor a unilateral right to initiate an arbitration in case of dispute. Usually investment contracts refer to more than one multilateral treaties for arbitration purposes. Consent of the host State to multilateral arbitration mechanisms may also be given in a bilateral investment treaty between the host and the home States and this is the most frequent. Once the bilateral treaty has been ratified by the two States, the conclusion of an investment contract between the host State and the private investor grants the investor the unilateral right to initiate an arbitration in case of conflict.⁴⁹ Usually, bilateral treaties refer to more than one multilateral treaties for arbitration purposes, such as ICSID, UNCITRAL, ICC, etc.

Bilateral investment treaties between the home and host States may, however, also foresee their own arbitration rules without referring to a multilateral treaty.⁵⁰ In this case, again, the investment contract will merely refer to the BIT for arbitration purposes and grant the private investor the unilateral right to initiate an arbitration in case of conflict. Interestingly for our purposes, bilateral treaties between two states allow states to bind themselves unilaterally and abstractly to later arbitration with private investors even before the latter are individuated and investment contracts are concluded. Once consent to arbitration has been given by the host State and the investor, whether separately in a bilateral treaty and an investment contract, or simultaneously in an investment contract, this unilateral offer to arbitrate can no longer be withdrawn unilaterally (e.g. Article 25 ICSID). As a result, the host state may not escape arbitration many years after having consented to it abstractly in a BIT. BITs are usually concluded for long periods of time (10 to 20 years minimum) and foresee long denunciation periods. Thus, by reference the first example of denunciation of ICSID in history, unless all the BITs ratified by Bolivia to date are denounced, its denunciation of the ICSID Convention in May 2007 will not affect the unilateral rights to arbitration vested in all the private investors who have given their consent via BITs and in various contracts referring to BITs ratified by Bolivia before November 2007, when the denunciation of ICSID will take effect (Articles 71 and 72 ICSID).

⁴⁸ See Preamble to the ICSID Convention: 'Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.'

⁴⁹ On the difficulty there is to distinguish between the investor's consent to arbitration and the claim initiating arbitration, see e.g. STERN B. 2005; KAUFMANN-KOHLER G. 2004; OBADIA E. 2002 69; SORNARAJAH M. 1997 126–139.

⁵⁰ See e.g. FRIEDMAN M./VERHOOSSEL G. 2003.

II. The legitimacy critique

The legitimacy of international investment arbitration is in question because it allows private investors to unilaterally initiate commercial-like arbitration against host States for breach of investment contracts or treaties, even though these disputes often raise public interests issues and are protected by national and international legal provisions. In a nutshell, therefore, the critique has been articulated around four main issues: the legitimacy of arbitration *qua* process of dispute settlement, the legitimacy of the *lex arbitrii* and the law applicable to the investment dispute, the legitimacy of the arbitrators chosen and, finally, the legitimacy of the arbitration process itself.

A quick and frequent reply to those critiques is the argument of sovereignty. After all, host States have sovereignly consented to BITs, MITs and/or investment contracts that foresee arbitration to resolve disputes and they are bound therefore by their obligations.⁵¹ A first line of reply could be to doubt the veracity of the sovereign consent that is given to most MITs and BITs and denounce the abusive length of the minimal period of duration in most of them.⁵² Further, when the host State's consent is given to another State through a BIT and MIT, its validity is extended artificially as a general and abstract offer of arbitration to any private investor who has contractual claims against the host State and decides unilaterally to initiate an arbitration without further agreement between the host State and the investor; the legitimating power of state consent is clearly very thin in that case.

The main difficulty with the sovereignty argument, however, and this provides for an alternative rejoinder, is that consent is no longer the only source of legitimacy in international law.⁵³ Human rights, accountability and inclusion in the international law-making process also matter.⁵⁴ Moreover, sovereignty has gradually evolved from independence to responsibility in international law.⁵⁵ As a result, a sovereign can no longer invoke sovereignty or be opposed sovereignty to justify any decision or behaviour. More particularly, sovereignty is only protected to the extent that it is democratic and reflects popular will.⁵⁶ This provides for duties of sovereignty for host States towards their own citizens and duties to protect the former's sovereignty for home States, and arguably also for private investors, as we will see.

A. The legitimacy of arbitration *per se*

The first and main concern raised by international investment arbitration pertains to the choice of an international and private procedure by contrast to national jurisdictions or other international judicial mechanisms.

⁵¹ See e.g. PAULSSON J. 2005; FRANCK S.D. 2005 1591.

⁵² See e.g. SHAPREN A. 2003 347; DOOGHE L.J. 2001 273–278.

⁵³ See BUCHANAN A. 2004 and 2008; BESSON S. 2007.

⁵⁴ See KUMM M. 2004; BESSON S. 2008b.

⁵⁵ See BESSON S. 2006 and 2008a.

⁵⁶ See the essays in FOX G./ROTH B. 2000; BESSON S. 2007.

1. *Arbitration and local jurisdictions*

Since most investment disputes raise issues of public interest and often find their cause in national public law, the first question that arises is why should international arbitration be privileged over national official jurisdictions and be vested with the responsibility of requiring the disapplication of national laws or deciding over complex public interests. After all, in a democracy, the separation of powers calls for judicial control and interpretation of public laws. As a result, there is nothing to fear from the so-called politicization of national decisions through national judicial control, as the latter belongs to the ordinary circumstances of politics in a democratic State.

Of course, international investment arbitration usually allows for a residual control of national jurisdictions and in particular, in certain cases, for the exhaustion of local remedies and the local review of arbitral awards and their enforcement. This residual role of local jurisdictions is both too much to give credit to the allegations of their lack of neutrality and too little to allow them to provide arbitral awards with the check against national conditions required before a case can be internationalized.

a. *The exhaustion of local remedies*

Originally, most investment treaties used to foresee, like other international judicial mechanisms, the exhaustion of local remedies before the arbitration could be initiated. This is actually, arguably, a principle of customary international law.⁵⁷ Gradually, however, those clauses have stopped being respected and new treaties no longer foresee them or at least waive them.⁵⁸ This is the case, for instance, in the context of ICSID arbitration where the exhaustion of local remedies was never required (Article 26 ICSID).⁵⁹

One may argue, however, that allowing for local remedies to be exhausted would make sure all arguments are presented and discussed in each case before international arbitrators start their work. It would also serve the purpose of the inquiry into factual circumstances. Finally, it could allow national jurisdictions to solve disputes in favour of private investors in certain cases under the umbrella (and the threat) of arbitration, and prevent parties from having recourse to arbitration in the end.

b. *The local review of arbitral awards*

While arbitral appeals are only rarely open, local review of arbitral awards is often possible. This varies according to national legal orders. True, certain treaties preclude any national review (e.g. Articles 26 and 51 ICSID), because the finite nature of the arbitration is part of its attractiveness and the source of its success. Other investment trea-

⁵⁷ See SORNARAJAH M. 1997 135–137; PETERS P. 1997 233, by reference to the ICJ case, *ELSI*, ICJ Rep. 1989, 41.

⁵⁸ See PETERS P. 1997 234–237.

⁵⁹ See BLACKABY N. 2002a.

ties allow for local appeals at the place of arbitration. Most States restrict those appeals, however, to the formal review of arbitral awards, when basic procedural rights have been violated.⁶⁰

This is a regrettable situation, however, as local review may help reconcile national authorities with arbitral awards by giving them a chance to uphold and integrate the awards in the national legal order, and in certain cases to review them in the light of national circumstances. Of course, arbitral awards need national authorities and jurisdictions to be enforced, since an arbitral award vests duties of enforcement on them. In fact, in the absence of exhaustion of local remedies or local review, the enforcement of arbitral awards often becomes a pretext for contestation by national authorities. In fact, this may even contribute to discipline certain arbitral tribunals in advance.⁶¹ Grounds for enforcement denials are usually restricted to procedural grounds, however.

2. *Arbitration and international jurisdictions*

If the need for international control over national decisions in matters of foreign investment may be understandable, one may wonder why allow arbitration only and not other international judicial mechanisms.

a. *Arbitration and arbitration*

An increasing difficulty with investment treaties and contracts concluded in recent years is that they no longer foresee a consolidation of claims, but allow for different claims stemming from the same or similar sets of facts to be arbitrated over by different tribunals and under different multilateral conventions and procedures. Most BITs allow for many kinds of arbitration, such as ICSID, ICC and UNCITRAL. This is also sometimes referred to as arbitration 'forum shopping', since it leads to a multiplication of procedures and to seeking the most favourable procedure and forum for the investor's claims and sometimes to initiating parallel procedures.⁶²

The multiplication of procedures constitutes a threat to legal coherence. It also reveals the inherent limitations of using a private type of dispute settlement to settle conflicts over public interests and responsibilities. Of course, the case-law, and in particular ICSID case-law, demonstrates an increasing awareness of the risk of inconsistency and indirectly consolidates the cases it receives. Moreover, certain BITs⁶³ and Article 1126 NAFTA now expressly allow for the consolidation of claims.

⁶⁰ See FRANCK S.D. 2005 1548–1557; RUBINS N.D. 2004 363. See also PETROCHILOS G. 2004.

⁶¹ See the *Metalclad* saga, fn. 21 and 23. See also FRANCK S.D. 2005 1556; DOOGHE L.J. 2001.

⁶² See e.g. CREMADES B./CAIRNS D. 2003. See also the 2006 OECD's paper 'Improving the System of Investor-State Dispute Settlement', 20–21, <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

⁶³ See e.g. Article 33 of the new US Model BIT.

b. Arbitration and international courts

The second half of the twentieth century coincided with the unprecedented development of international judicial bodies and procedures in cases where individuals are right-holders, but also duty-bearers thanks to the development of international criminal justice. At the same time, however, alternative investment dispute settlement mechanisms were developed to avoid having to mediatize state-individual disputes through interstate applications. Certain investment treaties actually expressly exclude the recourse to other international procedures than arbitration (e.g. Article 26 ICSID). While the further integration of arbitration into international judicial mechanisms in the reform process will be discussed later in this chapter, one may wonder at this stage about the current state of their relationship.

One could imagine cases indeed where the same claim may give rise to both an investment arbitration and a state responsibility case before the International Court of Justice, although the parties would differ in the latter. There might also be, however, cases in which a host state bound by an investment arbitral award is led to violate other international commitments, especially in the human rights context, and hence can be condemned by the European Court of Human Rights or another human rights body.⁶⁴ While judicial pluralism is a well-established phenomenon in international law,⁶⁵ the relationship between arbitral and judicial awards, especially when they are to be enforced in national law, raises further difficulties that need to be addressed.

B. The legitimacy of the *lex arbitrii*

The legitimacy of international investment arbitration may also be questioned with respect to the law applicable to the investment dispute at hand.

1. Lex arbitrii and national law

Whether arbitration is contract-based or treaty-based will affect the sources of the law applicable to the dispute at hand. In principle, contract-based arbitration should be decided according to the law applicable to the investment contract and that is usually the chosen national law. The law applicable to treaty-based arbitration, on the contrary, usually consists of the rules of law as agreed by the parties, whether national or international.⁶⁶ In the absence of agreement, the *lex arbitrii* is usually the host State's national law (e.g. Article 42 par. 1 ICSID).⁶⁷

The problem is that even when national law applies, this does not necessarily mean it will be interpreted in the light of the applicable public law. Quite the contrary. This

⁶⁴ See PETERSON L.E. 2003 22–31.

⁶⁵ See HIGGINS R. 2006.

⁶⁶ See KAUFMANN-KOHLER G. 2004. On the development of international substantive investment law, see MUCHLINSKI P./ORTINO F./SCHREUER C. 2008.

⁶⁷ See REISMAN M. 2000.

is particularly problematic in disputes that affect public interests and are often regulated by national public law. This might lead to unappealable arbitral awards having to be enforced by national authorities in spite of their violating national public law. In turn, a chilling effect upon important public law regulation at national level cannot be excluded.⁶⁸ Of course, most BITs and MITs nowadays provide for basic procedural rights,⁶⁹ but these rights are restricted to procedural guarantees. Further, while most national legal orders do not enforce arbitral awards which disregard constitutional rights and provide for appeals against awards that violate constitutional rights, there remains an important grey zone between disregarding constitutional rights and disapplying ordinary public law.⁷⁰

2. *Lex arbitrii and international law*

Treaty-based arbitration will often choose to include international investment law into the applicable law, i.e. general principles and customary law applicable to international investments. When parties do not identify the applicable law, most treaties foresee that international law should apply beside the host State's national law. When international law applies, it should in principle also include international human rights law and further international law norms unrelated to investment by reference to Article 38 ICJ Statute.⁷¹ However, this interpretation is often contested (e.g. Article 42 par. 1 ICSID).⁷²

This is problematic, as host States are bound by other international commitments and can face international responsibility for disrespecting them.⁷³ This is the case of international human rights law, but also of international environmental law or international criminal law. It might lead to unappealable arbitral awards having to be enforced by national authorities in spite of their violating international law. A case that is often mentioned in this context is the 1992 ICSID case in *SPP v. Egypt*, where the fact that the Gizeh pyramids belonged to the world's cultural monuments did not, according to the arbitral tribunal, affect the contractual claims in damages of the investor. The sidelining in the *lex arbitrii* of imperative obligations of international law does not only constitute a violation of the home State's duties under international law,⁷⁴ but also, arguably, a violation of that of the international organization sponsoring the arbitration rules and institutions organizing the arbitration (e.g. the United Nations for UNCITRAL or the World Bank for ICSID) and, finally, possibly of the private investors themselves.⁷⁵

⁶⁸ See DOOGHE L.J. 2001 281; MANN H. 2001a 34.

⁶⁹ See e.g. FRANCK S.D. 2005 1529–1535.

⁷⁰ It is this very grey zone which allowed the Ontario Appeal Court in the *UPS v. Canada* case to consider that the award did not raise any *direct* constitutional concerns in Canadian law. See fn. 21 and 23.

⁷¹ See PARRA A. 2001 21; PETERSON L.E. 2003 10.

⁷² On the plurality of international law regimes, see BESSON 2008b.

⁷³ See PETERSON L.E. 2003.

⁷⁴ See PETERSON L.E. 2003 22–31.

⁷⁵ See PETERSON L.E. 2003 16–21. See CLAPHAM A. 2006 on foreign investors' human rights duties.

C. The legitimacy of arbitrators

The legitimacy crisis of international investment arbitration may also depend on the arbitrators and in particular on their personal qualities and expertise.

1. *The arbitrators' independence and impartiality*

Investment arbitrators' personal qualities of independence and impartiality are affected by their way of election and their level of remuneration.⁷⁶

a. *The election of arbitrators*

International investment arbitrators are traditionally elected by the parties (e.g. Articles 37–40 ICSID). This is considered a guarantee of the neutrality, effectivity and flexibility of investment arbitration. Their independence and impartiality is usually said to be improved by the fact that each party can choose some of the arbitrators in the tribunal and by the so-called 'arbitrator marketplace'⁷⁷. This does not compensate, however, for the fact that the circle from which investment arbitrators are chosen is extremely small, thus allowing for cumulated mandates.⁷⁸ While this conceivably can have beneficial consequences for consistency, it also presents a risk of partiality and corruption. Moreover, arbitrators are often counsels in a case and arbitrators in the next, while the parties, facts and fellow arbitrators do not differ that much, and this leads to important risks of collusion.⁷⁹

The private selection of arbitrators appears particularly problematic in investment disputes that raise public issues. It excludes *prima facie* the likelihood of sufficient representativity of all affected public interests at national level. Of course, arbitrators have to prove qualities of independence. As a matter of fact, requirements of this kind have recently been strengthened (e.g. Rule 6 ICSID Arbitration Rules). Lack of these qualities may even constitute in certain cases ground for annulment or review of the award.⁸⁰ This does not, however, replace a public selection process of the kind applicable to members of the national or international judiciary.⁸¹

b. *The remuneration of arbitrators*

Besides the selection process, another concern relative to the independence and impartiality of arbitrators is their remuneration. While investment arbitrators are often remunerated less than commercial arbitrators, at least under multilateral treaties like

⁷⁶ See e.g. MACKENZIE R./SANDS P. 2003.

⁷⁷ FRANCK S.D. 2005 1597.

⁷⁸ See e.g. PAULSSON J. 1997.

⁷⁹ See MANN H. et al. 2004b 11.

⁸⁰ See FRANCK S.D. 2005 1596–1598.

⁸¹ See MANN H. et al. 2004b 11 on the inherent limitations of 'disclosure requirements for arbitrators'.

ICSID which sets standard daily fees for arbitrators (Regulation 14 ICSID Administrative and Financial Regulations), this no longer holds in most BITs arbitrations where the fees match the value of the claims at stake.

This is particularly problematic also in view of the resources available to certain host States, in the absence of judicial aid in the context of investment arbitration. Even more so when an arbitration takes place many years after a given BIT allowing it was ratified, and the financial situation of the host State has changed. A solution might be to organize a system of judicial aid, for instance through the World Bank, on the model of what takes place in sports law arbitration.

2. *The arbitrators' expertise*

The legitimacy of arbitrators may also be contested in terms of actual expertise. Investment disputes often require knowledge in areas very distant from investment law, ranging from environmental regulation to human rights. Of course, arbitrators will usually be chosen in context and this should enhance their professional ability, but given the small circle from which they are chosen, one may doubt at their abilities to arbitrate in such a vast range of areas.⁸²

In the absence of review of final awards, this is particularly problematic, as errors may occur. Moreover, reactions in the national context cannot always be foreseen and can no longer be fixed *ex post facto*. Of course, arbitrators have to demonstrate certain material qualities. As a matter of fact, requirements in this sense have recently been strengthened (e.g. Rule 6 ICSID Arbitration Rules). Accordingly, in certain cases failure to comply with those requirements may constitute ground for annulment or review of the award.⁸³

D. The legitimacy of the arbitral procedure

The last, and somehow most discussed concern relative to the legitimacy of international investment arbitration, relates to the procedure of arbitration itself, and in particular its publicity, coherence and the possibility of review of its awards.

1. *The publicity of procedures*

a. *The publicity of pending procedures*

With the exception of the procedures initiated under a few multilateral and bilateral investment treaties, most investment arbitrations take place without anyone else knowing they do. This is regarded as the price of privacy and effectivity of investment

⁸² See BLACKABY N. 2002a.

⁸³ See FRANCK S.D. 2005 1596–1598.

arbitration.⁸⁴ This is particularly problematic, however, in view of the multiplication of awards and risk of inconsistency alluded to before.

Of course, progress has been made. Since 1996, pending ICSID arbitrations are made public from the moment of their initiation until the final award. The same applies to NAFTA arbitrations.⁸⁵ The same cannot be said of ICC arbitrations, however, and of the majority of investment arbitrations in general.

b. The publicity of the process

Investment arbitration is traditionally a closed process that protects the privacy and confidentiality interests of the parties. This is particularly problematic in cases where sensitive public issues are raised and discussed, whether arbitration is contract- or treaty-based.⁸⁶

Since the 1990s, however, the rise of cases together with the sensitivity of the public issues addressed have generated a demand for more publicity of the process to non-parties. Nowadays, both ICSID (Rule 32 ICSID Arbitration Rules) and NAFTA arbitrations allow for NGOs and third parties to be present if they can attest of an interest.⁸⁷ The great majority of pending arbitrations, however, and in particular ICC arbitrations remain closed to the public.

There is an area where important changes have occurred in the past few years and this applies even in cases where access to the actual hearing is not open to non-parties. That is the possibility for NGOs, which can demonstrate they have a stake and can contribute to the settlement of the case, to file *amicus curiae* briefs. This has been the case in NAFTA arbitrations since the *Methanex* case⁸⁸ and since 2006 in ICSID arbitrations (Rule 37 ICSID Arbitration Rules). Questions remain, however, with respect to the importance that ought to be granted to those submissions and the margin of appreciation of the arbitral tribunals remains very broad.⁸⁹

c. The publicity of awards

While the publicity of the procedure and of its process may be understandable, the secrecy of investment arbitral awards threatens their reception and enforcement in national law and the possibility of consistency in international investment law. Of course, confidentiality is a consequence of the hybrid nature of investment arbitration that sits

⁸⁴ See e.g. OAKLEY-WHITE O. 2003.

⁸⁵ See <http://www.naftaclaims.com>.

⁸⁶ See MANN H. et al. 2004b 9–10. See also STERN B. 2002.

⁸⁷ See for further transparency requirements, the steps taken by the United States and Canada in the Amended US Model BIT and Canada's Model Foreign Investment Promotion and Protection Agreement.

⁸⁸ See the post-*Methanex* 2003 Statement of the Free Trade Commission on non-disputing party participation, <http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf>. See MANN H. 2001b.

⁸⁹ See e.g. BJORKLUND A.K. 2002; KAUFMANN-KOHLER G. 2004.

between public adjudication and commercial arbitration. No other dispute settlement system under public international law, however, prevents the complete, accessible and timely publication of its decisions.⁹⁰

Of course, things have changed in the past few years. All ICSID and NAFTA claims are available on-line, provided the parties consent to the publication. In any case, the new Rule 48 ICSID Arbitration Rules allows ICSID to promptly release excerpts from the legal holdings of the awards. The lack of accessibility has remained unchanged, however, with respect to ICC and UNCITRAL awards and the numerous other unknown arbitration awards rendered every year.

2. *The coherence of awards*

Another difficulty pertaining to the legitimacy of the investment arbitration procedure itself is the lack of synchronic and diachronic coherence of awards. On the one hand, the same set of facts may indeed give rise to different procedures at the same time since the same parties can have arbitration rights under different BITs and MITs or even rights to different arbitration rules under the same BIT or MIT.⁹¹ On the other, different sets of facts raising the same legal issues may also give rise to different awards both by similarly composed tribunals and by others, whether according to the same arbitration procedure or not. There is no *stare decisis* and there are as a result no precedents in investment arbitration.⁹² This is very problematic for the overall credibility of investment arbitration, but also for its predictability and efficiency over time.⁹³

Of course, things have improved in the past few years.⁹⁴ Paradoxically, the fact that the same arbitrators are elected over and over again triggers a certain coherence, although it need not necessarily. Similarly, the threat of a national appeal, but mostly of an ICSID annulment also encourages a certain coherence, although grounds of annulment are mostly formal. As discussed before, some BITs and MITs now foresee consolidation requirements that can help avoid contradictory awards on the same case, but not diachronic coherence among different cases.

3. *The review of awards*

Another important source of concern is the lack of systematic review or appeal institutionalized for investment arbitral awards at the international level. In fact, finity has always been seen as a condition of the success of investment arbitration. This is problematic, however, in cases which raise complex public issues and where errors can-

⁹⁰ MANN H. et al. 2004b 8.

⁹¹ See PETERSON L.E. 2003.

⁹² See e.g. Article 1136 par. 1 NAFTA. See BLACKABY N. 2002a 152.

⁹³ See KAUFMANN-KOHLER G. 2004; FRANCK S.D. 2005 1558–1582; GOLDBABER M. 2004a. See also the 2006 OECD's paper 'Improving the System of Investor-State Dispute Settlement', 17–25, <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

⁹⁴ See PARRA A. 1997 352.

not be excluded. Of course, one may refer to the mainly process-focused local review mechanisms and to the ICSID annulment mechanism (Article 52 ICSID). The fact that they exclude the possibility of substantive review is problematic, however. Moreover, the ICSID annulment mechanism is operated by an *ad hoc* committee and for limited formal annulment grounds.⁹⁵ Finally, one could also mention the scrutiny process of awards taken under ICC Rules before they are released by the ICC International Arbitration Court (Article 27 ICC Rules). However, the mechanism is preventive only and does not constitute an appeal *stricto sensu*.⁹⁶

There has been a great deal of discussion lately of ways to establish appeals in investment arbitration.⁹⁷ Most participants have rejected the idea of a treaty-by-treaty revision of BITs as too fastidious.⁹⁸ All stakeholders agree, however, that if there were to be an international investment appellate court, it should be unique and it would be most at home under the ICSID Convention.⁹⁹ In 2005, however, the ICSID's Administrative Council rejected the possibility to create an ICSID appellate court as premature.¹⁰⁰ As a matter of fact, its dependence from the World Bank contributes to making such revisions difficult.¹⁰¹

III. Proposals for reform

In response to these shortcomings, further proposals of reform have been suggested. After a presentation and a short assessment of predominantly corrective proposals,¹⁰² the chapter sketches a more holistic reform that reconciles the public/private and national/international dimensions of investment disputes.

A. An assessment of proposed reforms

Among the different proposals for reform put forward in recent years, three main groups can be distinguished. They match the different levels they suggest to reform in priority: national, transnational or international.

⁹⁵ See FRANCK S.D. 2005 1547–1548; SCHREUER C.H. 2001 881–1075; KAUFMANN-KOHLER G. 2004 190–197.

⁹⁶ For a recent discussion, see the 2006 OECD's paper 'Improving the System of Investor-State Dispute Settlement', 14–16, <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

⁹⁷ See e.g. RUBINS N. 2004; FRANCK S.D. 2005 1547–1557.

⁹⁸ Of course, some States like the United States have contracted obligations under NAFTA, but also under BITs to establish a bilateral appellate body or similar mechanism to review arbitral awards (e.g. 2004 US Model BIT).

⁹⁹ See e.g. FRANCK S.D. 2005 1617 et seq.

¹⁰⁰ See 2005 ICSID follow-up paper 'Suggested Changes to the ICSID Rules and Regulations', 4, <http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf>. See also the 2006 OECD's paper 'Improving the System of Investor-State Dispute Settlement', 7–8, <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

¹⁰¹ See MANN H. et al. 2004b 13.

¹⁰² See e.g. for minimalist reform proposals, ALVAREZ G./PARK W.W. 2003 366; COE J. 2003 1385–1386. For a detailed account of those proposals, see FRANCK S.D. 2005 1587–1610.

complement to national jurisdiction in cases implicating both individual and state interests. The time has come therefore to see whether this could not be done in the case of investment disputes as well.

The main difficulty with this approach is that it underestimates the development of international trade and hence the amount of investment disputes. Experience with human rights jurisdiction in Europe tends to show that such a court's workload despite exhaustion of local remedies could be enormous. As a result, the flexibility of investment arbitration is of value in this context.

B. A proposal for a multilevel reform

In view of the proposed reforms and their shortcomings, a multilevel reform needs to be initiated at all three levels: national, transnational and international, to account for the complexity of the interests at stake. One should make the most of the increasing judicial pluralism in international law, as exemplified in the European Union in particular.

1. *National reform: developing and exhausting local remedies*

The first step in the reform consists in reinforcing local remedies in investment disputes by requiring the exhaustion of local remedies before investment arbitration can be initiated.¹⁰⁶ This is the case in other major areas of international jurisdiction such as human rights or diplomatic protection, where international courts cannot be seized before evidence of the exhaustion of local remedies is provided. Of course, local remedies should be considered exhausted where they 'provide no reasonable possibility of an effective remedy'¹⁰⁷.

Accordingly, and in parallel to the renationalization of investment disputes, it will be necessary to consolidate and develop local jurisdictions so as to improve or at least secure their independence, impartiality and expertise in complex public law issues pertaining to investment. Customary international law actually requires states to maintain a judicial system that meets international minimum standards of due process in its treatment of foreigners.¹⁰⁸ It does not serve, however, to guarantee that final judicial outcomes are reviewable by international tribunals based on a standard of reasonableness, but rather that national denials of justice be remedied locally under international control and possibly sanctioned.

¹⁰⁶ See e.g. *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, Final Award of 26 June 2003, 7 ICSID Reports 434.

¹⁰⁷ PAULSSON J. 2005 115–119, by reference to Special Rapporteur John Dugard in his Second Report on Diplomatic Protection to the International Law Commission.

¹⁰⁸ See e.g. PAULSSON J. 2005 98. See also BJORKLUND A.K. 2005.

Various measures of capacity-building may be imagined such as education programmes and training programmes for legislatures and judiciaries.¹⁰⁹ Funding for these measures may be provided by a percentage of the value of every arbitration dispute or of the gain of every foreign investment collected by an International Investment Fund.¹¹⁰ This could be done under the World Bank or the Multilateral Investment Guarantee Agency (MIGA), for instance. Arguably, it might even be the moral responsibility of investors to reinvest in the political and judicial system that guarantees their investment.

2. *Transnational reform: reforming multilateral and bilateral treaty arbitration mechanisms*

Even though a form of international control once national remedies are exhausted is useful in matters as sensitive as foreign investment, a single international court could not settle the multiple investment disputes that can arise nor achieve this with the know-how, flexibility and rapidity required.¹¹¹ As a result, the current system of international investment arbitration should be kept albeit reformed radically. While a few corrective measures have already been taken that did not require the revision of MITs and BITs themselves but only of additional rules or annexes,¹¹² further measures are still expected that can apply across investment treaties. Some will be able to be inserted into future treaties and contracts, while others actually require revisions of existing treaties. It is crucial that revisions be made consistently across the board to prevent investors from choosing alternative arbitration procedures in the meantime that are less transparent and less responsive to public concerns, and hence from undermining the whole purpose of those revisions.¹¹³ The reverse risk also exists, however, and botched revisions should be avoided.¹¹⁴

The different elements of reform should match the legitimacy concerns delineated above. First of all, regarding the *lex arbitrii*, it is important to encompass national public law in all investment arbitrations, whether or not this was agreed upon by the parties, and to include general international law besides international investment law. Second, with respect to the arbitrators: they should be selected by the parties from a large pool or roster of arbitrators elected in advance and periodically re-elected by States parties to the BIT or MIT in question; their parallel activity as counsels should be precluded; their remuneration should be adapted to that of international judges; and a system of judicial aid should be established. Finally, regarding the arbitral process itself: all pending procedures should be made public and the awards should be publicized. Access to hearings should be open to non-parties as far as they can prove they

¹⁰⁹ See e.g. PETERSON L.E. 2003 37–38.

¹¹⁰ See POGGE T. 2002 158 and 196.

¹¹¹ See e.g. FRANCK S.D. 2005 1600–1601, 1606 who conflates, however, investment arbitration with the merits of international arbitration *tout court*.

¹¹² See e.g. the revision of ICSID Additional Facility Rules in 2006, <http://www.worldbank.org/icsid/facility/partA.htm>.

¹¹³ See MANN H. et al. 2004b 3.

¹¹⁴ See MANN H. et al. 2004b 12.

have a stake and the same applies to *amicus curiae* briefs. The increased publicity of proceedings and awards will contribute to enhancing the coherence among awards across time. Last but not least, appeals should be made available against investment arbitral awards.

3. *International reform: creating an International Investment Court*

Once local remedies have been exhausted and an arbitral award has been rendered, the parties should have the possibility to appeal. The lack of an international appeal on substance against most investment arbitral awards is a source of great concern for the reasons alluded to before and in particular the coherence, self-correction and credibility of investment dispute settlement.¹¹⁵

There are many ways to organize an appellate mechanism, however. Because a national appeal would undermine the international control dimension brought by international arbitration, it is important not to generalize such appeals. Appeals based on procedural guarantees can of course be made a condition for enforcement in certain countries. But if the possibility of appeal on substance is to increase coherence and the quality of judgements, it is important it be done by a single jurisdiction and at the international level.¹¹⁶ A possibility would be to organize international arbitral appeals, either in each BIT or MIT or under a single MIT and in particular under the ICSID. While the former solution would be the least intrusive in the investment arbitration system, it has the disadvantage of potentially increasing incoherence among awards and of undermining the credibility of the system. True, some newer BITs already offer the possibility of an appeal before another arbitral tribunal. Most specialists favour the latter solution, therefore. They stress the difficulty, however, when revising the ICSID, of encountering resistance at the World Bank. It did not come as a surprise therefore that in the last revision of its arbitration rules, the ICSID did not try to flesh out or amend its annulment procedure to provide for an ICSID appeal.¹¹⁷

In view of the *status quo*, one may suggest creating an International Investment Court on the model of other international and European courts that settle disputes between States and private parties.¹¹⁸ If the neutrality of international arbitration by reference to investors' interests is important, it is just as important to remain neutral by reference to host State's interests and this is just what an international court could do.¹¹⁹

This International Investment Court would have as a mandate to hear appeals against any contract- and treaty-based investment arbitral award based on national law, but also on international investment law and general international law. It could uphold

¹¹⁵ See e.g. FRANCK S.D. 2005 1606 et seq.; BLACKABY N. 2002b 364; KNULL W.H./RUBINS N. 2000; SCHWEBEL S. 1995. See the 2006 OECD's paper 'Improving the System of Investor-State Dispute Settlement', 11–14, <http://www.oecd.org/dataoecd/3/59/36052284.pdf>.

¹¹⁶ See also FRANCK S.D. 2005 1557; BLACKABY N. 2002a 156.

¹¹⁷ See above section 2.

¹¹⁸ See e.g. AHILALO A. 2001 9; PATERSON R. 2000 122–123; BLACKABY N. 2002a.

¹¹⁹ See e.g. MANN H. et al. 2004b 6–7.

awards, but also remand a case to the arbitral tribunal which issued the award deemed as contrary to international investment law and had the factual knowledge of the case. Appeals to the investment court would coexist with existing process-based annulment procedures in place.¹²⁰ On the model of the World Trade Organization (WTO)'s Appellate Body, its judges would be elected and full-time professionals, whose expertise in international investment law but also in international law in general and whose international reputation would prevent from being either overpoliticized or corrupted. The number, origin and qualifications of judges could be modelled on that of the WTO Appellate Body or that of the International Court of Justice.¹²¹ Establishing this international investment appellate court under the auspices of an internationally recognized institution or court would enhance its legitimacy and authority. Some have suggested establishing it under the Permanent Court of Arbitration in The Hague, whose remit already encompasses disputes between States and private parties.¹²² Finally, the requirements placed in the previous section on arbitral procedures, such as publicity and transparency, would apply to processes before the proposed Court.

Of course, important critiques could be raised, and have been for some. To start with, establishing such an International Investment Court would still require revising the more than 2400 BITs in force and various MITs including ICSID and NAFTA to enable parties to an award to file an appeal.¹²³ Recent revisions of NAFTA and ICSID arbitration rules show, however, that revisions may take place when the political will is there. A new multilateral convention would need to be concluded in any case to establish the Court and its procedures, and organize its relationships to existing annulment and appeal mechanisms and to other international jurisdictions including human rights courts.¹²⁴

Another critique pertains to the important workload and the potential backlog that might threaten such a court. This would imply additional delays and costs. Deposits and securities may be foreseen, however, to discourage routine resort to appeal and overburdening the court. Moreover, the possibility of an appeal before the International Investment Court should have a preventive effect and discipline arbitral tribunals to comply with international investment law but in due respect of all public interests affected. It is likely that, as a result and with time, very few appeals will need to be filed against investment arbitral awards. This is actually what the European Union (EU)'s judicial experience and the central role vested in national judiciaries in the implementation of EU law have shown.

Furthermore, one should not underestimate how effective major human rights courts have been able to be in the last few years, with no less than 1000 decisions of the European Court of Human Rights rendered *per annum* over the last few years. Moreover, preliminary rulings of the European Court of Justice may serve as an example for this

¹²⁰ See FRANCK S.D. 2005 1621.

¹²¹ See FRANCK S.D. 2005 1623–1624.

¹²² See FRANCK S.D. 2005 1610.

¹²³ See BLACKABY N. 2002b 365.

¹²⁴ On the latter, see PETERSON L.E. 2003 34–37.

International Investment Court; arbitral tribunals, at the exclusion of national courts, may send their questions to the Court which renders a binding decision on those legal questions only, without assessing the facts and hence leaving the decision on the case to the arbitrators.¹²⁵ Such a preliminary ruling procedure would ensure that arbitral tribunals remain the primary investment jurisdictions albeit with a little international control over the coherence of international investment law. It would also prevent lengthy procedures from having to be initiated after the arbitral award to obtain an international legal answer. Finally, the coherence of investment law would be enhanced by having recourse to those preliminary rulings, without necessarily having to go through a further appeal at a later stage.

With time, the three levels should influence each other mutually and hopefully give rise to a virtuous circle of investment dispute settlement that can keep, thanks to subsidiarity, national jurisdictions in check while reinforcing them at the same time. Gradually, investment arbitration should no longer be regarded as the primary settlement mechanism of investment disputes nor as an aim in itself. In cases where the host State's national judicial system complies with minimal international requirements, the exhaustion of remedies is likely to prevent too many arbitrations from being initiated. When it does not, however, the possibility of investment arbitration will function as a threat that should also have a preventive effect and discipline national remedies to comply with international investment law. In a similar way, the liability of appeal against arbitral awards and the possibility to require a preliminary ruling from the International Investment Court should preventively guarantee a certain coherence and neutrality on the part of arbitral tribunals without too many appeals having to be filed in practice.

Conclusion

International investment arbitration raises difficult and somehow intractable questions of legitimacy. Addressing those questions is a necessity both for the development of international trade and the security of investment transactions, on the one hand, and that of democratic governance at national level and national self-government over issues of fundamental public interests, on the other. If substantive international investment law has developed steadily to match the importance investment has taken in global economics, the same cannot be said of the corresponding procedural and institutional mechanisms: they have largely remained unchanged since their origins and have failed so far to comply with the requirements of contemporary international law and international dispute settlement principles.

While it is wrong to argue that governments and people of host States bind themselves freely to private arbitration, it is just as misleading to argue that investment treaties do

¹²⁵ See KAUFMANN-KOHLER G. 2004 221 who seems to separate preliminary rulings from the existence of an investment court as they would be given by a 'permanent consultative body', thus raising further difficulties of impartiality and independence. See also AFILALO A. 2001 9, 45, 51.

not serve any public interests at all. Manichean judgements and solutions to a complex problem should be avoided. A carefully tailored multilevel approach to investment dispute settlement was proposed in this article that makes the most of national, transnational and international mechanisms and will hopefully with time lead to reinforcing national jurisdictions. Global justice has a price and that is the balance between identifying and safeguarding fundamental international interests, on the one hand, while also allowing sovereign states and populations to decide on them when affected, on the other.

References

- ABBOTT F.M., The Political Economy of NAFTA Chapter 11: Equality Before the Law and the Boundaries of North American Integration, 23 *Hastings International and Comparative Law Review* 2000 303.
- AFILALO A., Constitutionalization through the Backdoor: A European Perspective on NAFTA's Investment Chapter, 34 *New York University Journal of International Law and Politics* 2001 1.
- ALVAREZ G./PARK W.W., The New Face of Investment Arbitration: NAFTA Chapter 11, 28 *Yale Journal of International Law* 2003 365.
- BEN HAMIDA W., L'arbitrage Etat-investisseur étranger: Regards sur les traités et projets récents, 2 *Journal de Droit International* 2004 419.
- BEN HAMIDA W., L'arbitrage transnational unilatéral – réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique, thèse, Paris II, 2003.
- BESSON S., Whose Sovereignty ? State (In)equalities and International Law-Making, (2008a) forthcoming (manuscript on file with author) [2008a].
- BESSON S., The Sources of International Law, in BESSON S./TASIOULAS J. (eds), *The Philosophy of International Law*, Oxford 2008, forthcoming [2008b].
- BESSON S., Institutionalizing Global Democracy, in MEYER L. et al. (eds), *Justice, Legitimacy and International Law*, Cambridge 2007, forthcoming.
- BESSON S., Sovereignty in Conflict, in TIERNEY, S./WARBRICK, C. (eds), *Towards the International Legal Community? The Sovereignty of States and the Sovereignty of International Law*, London 2006 131.
- BESSON S., La légitimité de l'arbitrage international d'investissement, *Jusletter* 25 July 2005, <http://www.weblaw.ch/jusletter> (11 September 2007).
- BESSON S., L'égalité horizontale: L'égalité de traitement entre particuliers. Des fondements théoriques au droit privé suisse, Fribourg 1999.
- BJORKLUND A.K., Reconciling State Sovereignty and Investment Protection in Denial of Justice Claims, 45 *Vanderbilt Journal of International Law* 2005 809.
- BJORKLUND A.K., The Participation of Amici Curiae in NAFTA Chapter Eleven Cases, 2002, <http://www.dfait-maeci.gc.ca/tna-nac/participate-en.asp> (11 September 2007).
- BLACKABY N., Public Interest and Investment Treaty Arbitration, in KAUFMANN-KOHLER G./STUCKI B. (eds), *Investment Treaties and Arbitration*, Swiss Arbitration Association Special Series 2002/19 153 [2002a].
- BLACKABY N., Public Interest and Investment Treaty Arbitration, in VAN DEN BERG A.J. (ed.), *International Commercial Arbitration: Important Contemporary Questions*, London 2002 [2002b].
- BROWER C.H., A Crisis of Legitimacy, *National Law Journal* 2002.
- BROWER C.H., Structure, Legitimacy and NAFTA's Investment Chapter, 36 *Vanderbilt Journal of Transnational Law* 2000 37.
- BUCHANAN A., The Legitimacy of International Law, in BESSON S./TASIOULAS J. (eds), *The Philosophy of International Law*, Oxford 2008, forthcoming.
- BUCHANAN A., *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law*, Oxford 2004.
- CLAPHAM A., *Human Rights Obligations of Non-State Actors*, Oxford 2006.
- COE J., Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods, 36 *Vanderbilt Journal of Transnational Law* 2003 1381.
- COLLIER J./LOWE V., *The Settlement of International Disputes*, Oxford 2000.

- CRAWFORD J., The Global Democracy Deficit: An Essay in International Law and its Limits, in CRAWFORD, J. (ed.), *International Law as an Open System*, London 2003.
- CREMADES B./CAIRNES D., The Brave New World of Global Arbitration, 3 *Journal of World Investment* 2003 173.
- DHOOGHE L.J., The North American Free Trade Agreement and the Environment: The Lessons of *Metalclad Corporation v. United Mexican States*, 10 *Minnesota Journal of Global Trade* 2001 209.
- FOX G./ROTH B., Introduction: The spread of liberal democracy and its implications for international law, in FOX G./ROTH B. (eds), *Democratic Governance and International Law*, Cambridge 2000 1.
- FRANCK S.D., The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions, 73 *Fordham Law Review* 2005 1521.
- FRANCK T., *Fairness in International Law and Institutions*, Oxford 1995.
- FRIEDMAN M./VERHOOSSEL G., Arbitrating over BIT Claims, *National Law Journal* 2003 15.
- GAILLARD E., *La jurisprudence du CIRDI*, Paris 2004.
- GOLDHABER M., Wanted: A World Investment Court, *American Lawyer – Focus Europe – Summer 2004* [2004a].
- GOLDHABER M., Arbitral Terrorism, *American Lawyer – Focus Europe – Summer 2003*, reproduced in 1:3 *Transnational Dispute Management* 2004 [2004b].
- GRIGERA NAON H., The Settlement of Investment Disputes Between States and Private Parties: An Overview from the Perspective of the ICC, 1:1 *Journal of World Investment* 2000.
- GRUNER D.M., Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform, 41 *Columbia Journal of Transnational Law* 2003 923.
- HIGGINS R., A Babel of Judicial Voices? Ruminations from the Bench, 55:4 *International and Comparative Law Quarterly* 2006 791.
- HORCHANI F., *Où va le droit de l'investissement? Désordre normatif et recherche d'équilibre*, Paris 2006.
- JONES R.C., NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to be Embraced or a Sword to be Feared?, *Brigham Young University Law Review* 2002 527.
- KAUFMANN-KOHLER G., Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there differences?, in GAILLARD E./BANIFATEMI Y. (eds), *Annulment of ICSID Awards: The Foundation of a New Investment Protection Regime in Treaty Arbitration*, Cambridge 2004 189.
- KAUFMANN-KOHLER G., Globalization of Arbitral Procedure, 36 *Vanderbilt Journal of Transnational Law* 2003 1313.
- KINGSBURY B., Sovereignty and Inequality, 9 *European Journal of International Law* 1998 599.
- KNOLL W.H./RUBINS N., Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?, 11 *American Review of International Arbitration* 2000 531.
- KUMM M., The Legitimacy of International Law: A Constitutionalist Framework of Analysis, 15 *European Journal of International Law* 2005 907.
- LILLICH R.B./BROWER C.N., *International Arbitration in the 21st Century: Towards 'Judicialisation' and Uniformity?*, New York 1994.
- MACKENZIE R./SANDS P., International Courts and Tribunals and the Independence of the International Judge, 44 *Harvard International Law Journal* 2003 271.
- MANN H., Private Rights, Public Problems. A Guide to NAFTA's Controversial Chapter on Investor Rights, *International Institute for Sustainable Development – World Wildlife Fund – US* 2001 [2001a].

- MANN H., Opening the doors, at least a little: Comment on the Amicus decision in *Methanex v. United States*, 10:2 *Review of European Community and International Environmental Law* 2001 241 [2001b].
- MANN H./COSBEY A./PETERSON L.E./VON MOLTKE K., IISD Model International Agreement on Investment for Sustainable Development, 2004, http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf (11 September 2007) [2004a].
- MANN H./COSBEY A./PETERSON L.E./VON MOLTKE K., Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration", 2004, http://www.iisd.org/pdf/2004/investment_icsid_response.pdf (11 September 2007) [2004b].
- MERRILLS J.G., *International Dispute Settlement*, 4th edn, Cambridge 2005.
- MUCHLINSKI P./ORTINO F./SCHREUER C., *The Oxford Handbook of International Investment Law*, Oxford 2008, forthcoming.
- NEUFELD R., Investment Arbitration: Protecting the Public Interests. Legitimacy and Accountability in International Law, Proceedings of the 33rd Annual Conference of the Canadian Council of International Law, Ottawa, October 14–16 2004, Ottawa 2005 45.
- OAKLEY-WHITE O., Confidentiality Revisited: is International Arbitration Losing one of its Major Benefits?, 6 *International Arbitration Law Review* 2003 29.
- OBADIA E., Investment and Arbitration: Current and Emerging Issues, in KAUFMANN-KOHLER G./STUCKI B. (eds), *Investment Treaties and Arbitration*, Swiss Arbitration Association Special Series 2002/19 67.
- ORTINO F./SHEPPARD A./WARNER H., *Investment Treaty Law: Current Issues*, London 2006.
- PARRA A., Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties, 16:1 *International Centre for Settlement of Investment Disputes Review* 2001 21.
- PARRA A., Provisions on the Settlement of Investment Disputes in Modern Investment Laws: Bilateral Investment Treaties and Multilateral Instruments on Investment, 12:2 *International Centre for Settlement of Investment Disputes Review* 1997, Fall.
- PATERSON R., A New Pandora's Box. Private Remedies for Foreign Investors under the North American Free Trade Agreement, 8 *Willamette Journal of International Law and Dispute Resolution* 2000 122.
- PAULSSON J., *Denial of Justice in International Law*, Cambridge 2005.
- PAULSSON J., Ethics, Elitism, Eligibility, *Journal of International Arbitration* 1997 14.
- PAULSSON J., ICSID's Achievements and Prospects, *Foreign Investment Law Journal* 1991 380.
- PETERS P., Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties, 44 *Netherlands International Law Review* 1997 233.
- PETERSON L.E., International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration, IISD Research paper, Swiss Federal Department of Foreign Affairs, 2003 [2003].
- PETROCHIOS G., *Procedural Law in International Arbitration*, Oxford 2004.
- POGGE T., *World Poverty and Human Rights*, Oxford 2002.
- REED L./PAULSSON J./BLACKABY N., *Guide to ICSID Arbitration*, The Hague/London/New York 2004.
- REISMAN M., The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold, 15:2 *International Centre for Settlement of Investment Disputes Review* 2000 377.
- RUBINS N., Judicial Review of Investment Arbitration Awards, in WEILER T. (ed.), *NAFTA Investment Law & Arbitration: Past Issues, Current Practice, Future Prospects*, New York 2004 354.

- SACERDOTI G., Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards', 19 ICSID Review – Foreign Investment Law Journal 2004 1.
- SACERDOTI G., Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 *Revue de droit international* 1997 255.
- SALACUSE J., BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 *International Law* 1990 655.
- SCHREUER C.H., *The ICSID Convention: A Commentary*, Cambridge 2001.
- SCHWEBEL S., The Creation and Operation of an International Court of Arbitral Awards, in HUNTER M./MARIOTT, A./VEEDER, V.V. (eds), *The Internationalisation of International Arbitration*, London 1995 115.
- SHAPREN A., NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?, 17 *Temple International and Comparative Law Journal* 2003 323.
- SIMPSON J.L./FOX H., *International Arbitration: Law and Practice*, London 1959.
- SINCLAIR A.C., The Origins of the Umbrella Clause in the International Law of Investment Protection, 20:4 *Arbitration International* 2004 411.
- SORNARAJAH M., The Clash of Globalisations and the International Law on Foreign Investment, The Simon Reisman Lecture in International Trade Policy, The Norman Paterson School of International Affairs, 12 September 2002, Centre for Trade Policy and Law, Ottawa, <http://www.carleton.ca/ctpl/download.htm> (11 September 2007).
- SORNARAJAH M., Power and justice in foreign investment arbitration, 14 *Journal of International Arbitration* 1997 103.
- SORNARAJAH M., *The International Law on Foreign Investment*, Cambridge 1994.
- STERN B., ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Mafezzini Case, in CHARNOVITZ S./STEGER D./VAN DEN BOSSCHE P. (eds), *Law in the Service of Human Dignity. Essays in Honour of Florentini Feliciano*, Cambridge 2005 246.
- STERN B., L'entrée de la société civile dans l'arbitrage entre Etat et investisseur, 2 *Revue d'arbitrage* 2002 329.
- TASIOULAS J., The Legitimacy of International Law, in BESSON S./TASIOULAS J. (eds), *The Philosophy of International Law*, Oxford 2008, forthcoming.
- VAN HARTEN G., *Investment Treaty Arbitration and Public Law*, Oxford 2007.
- VERDROSS A., Quasi-International Agreements and International Commercial Transactions, 8 *Yearbook of World Affairs* 1964 230.
- WALDE T., Nouveaux horizons pour le droit international des investissements dans le contexte de la mondialisation de l'économie, Cours IHEI, Paris 2004.
- WALDE T./WEILER, T., Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct to Economic Regulation, in KAUFMANN-KOHLER G./STUCKI B. (eds), *Investment Treaties and Arbitration*, ASA Special Series 2002/19 215.
- WEIL P., Vers une normativité relative en droit international?, 86 *Revue Générale de Droit International Public* 1982 5.