

# **A PROPOSAL FOR INTERNATIONAL COURT OF STATE AND CORPORATE DISPUTES - THE ICSCD**

Thesis submitted for the degree of  
Doctor of Law  
at the University of Leicester

by  
Iris Truman L.L.B , M.B.A.  
Department of Law  
University of Leicester

May, 2014

## **Abstract**

The present study focuses on the gaps and lacunas of the current international legal system as a unified system, specialising in commercial and investment disputes arising between sovereign states and Multi-National Enterprises (MNEs). As shown extensively throughout this work, the lack of such court in an ever-tightening global economy has some rather severe implications both for the states and (to a lesser degree) for MNEs.

Although numerous attempts have been made to rectify the situation, successful and comprehensive outcomes are still lacking. In response, this thesis proposes establishment of an International Court of State and Corporate Disputes (hereinafter ICSCD) as an answer to the various legal problems that the current system does not address. This type of court would give a coherence and finality to an international court system, both of which are mandatory for any legal system.

Thus, this work presents an integration of the most important issues demonstrating the need for such a comprehensive system, and deepens the discussion on their inherited complexities and ramifications. Most significantly, it also attempts to show, as an original contribution to this field of study, how the ICSCD may provide satisfying answers for these issues ; i.e. definition of MNEs status and personality, conflict of interest between national and international courts, lack of an international commercial court that has jurisdiction world-wide, compliance, and enforceability of decisions.

Copyright 2014

By

**Iris Truman**

## **Acknowledgements**

I would like to express my respect and appreciation to my supervisor, Prof Malcolm Shaw for his guidance and support, kindness, patience, and professional attitude.

Many thanks to Prof Katja Ziegler who supervise me during the final mile of this journey and to all my friends at Leicester and Israel for their support and encouragement.

Last, but certainly not least, much gratitude goes to my family especially to my dear Mother Rachel Yaacov and to my wonderful children Daphna, Eyal, and Uriel for their love, patience and understanding.

## TABLE OF CONTENTS

Acknowledgements .....	iv
CHAPTER ONE: INTRODUCTION.....	1
Definition of Terms.....	1
1.1 Significance of the Study .....	1
1.2 Theoretical Framework .....	7
The problem .....	8
The solution.....	10
1.3 Contribution of this Study .....	16
CHAPTER TWO: THE GLOBAL ECONOMY ENVIRONMENT OF MNEs.....	19
2.1 Status and International Personality of Corporation.....	19
Introduction.....	19
The international legal status of MNEs .....	20
A matter of definition.....	26
The United Nations (UN) and the Economic and Social Council (ECOSOC) view of MNE definition.....	27
The Organisation for Economic Co-operation and Development (OECD) Guidelines on MNE personality .....	29
MNE definition according to the World Bank Guidelines .....	31
The Legal Forms of Multinational Enterprise .....	31
The modern state system and the MNE .....	34
The deep economic integration and the Internationalisation of production.....	35
MNEs and Cyberspace.....	37
Networks and Alliances .....	39
The Proposed Definition of MNE .....	40

2.2 International Trade Treaties and their effect on MNE Operations .....	41
Introduction.....	41
The GATT, GATS, TRIMS, TRIPs and NAFTA: gaps and imitations .....	41
The General Agreement on Tariffs and Trade (GATT).....	41
The General Agreement on Trade in Services (GATS).....	43
Agreement on Trade-Related Investment Measures (TRIMs).....	44
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).....	45
The North American Free Trade Agreement (NAFTA).....	46
The Diplomatic Dispute Settlement System .....	48
The lack of enforceability .....	48
Conclusions.....	51
2.3 NAFTA, FTA, ASEAN and MERCOSUR .....	52
Introduction.....	52
Legal Issues .....	52
General and Sector-Specific Exceptions.....	52
Expropriation .....	56
Performance Requirements .....	59
The Question of Enforceability .....	61
Conclusions.....	68
CHAPTER THREE: THE LIMITATIONS OF TRADITIONAL LAW .....	71
3.1 <i>The UN Code of Conduct of Transitional Corporations - Legal Effects Since         1988</i> .....	71
Introduction.....	71
John Ruggie's Guiding Principles report.....	72
Implementation of the Codes of Conduct .....	73

Limitations and Enforceability of the Codes.....	77
The gaps between the codes and the current MNE conduct .....	78
Case Studies .....	81
3.2 The OECD Guidelines for <i>Multinational Enterprises</i> .....	83
Introduction.....	83
The climate in which the OECD guidelines were developed .....	84
The MNEs and the OECD .....	85
The OECD gaps and limitations, inconsistency and the lack of uniformity .....	87
Double standards and the failure to establish an international rules .....	88
The capability of multinationals to evade the guidelines.....	89
Lack of guideline efficiency.....	89
Conclusions.....	90
3.3 The Deficiencies in National Regulation of MNEs.....	91
Introduction.....	91
The problem of liberalisation and governments' misconception of foreign investment.....	93
Global scale conflicts.....	95
The MNEs and the developing countries.....	99
The lack of enforcement mechanisms.....	100
MNEs before the US courts, Case study: The Problematic Usage of US Courts in Solving States - MNEs Disputes. ....	101
The Legal Framework .....	101
The Legal Status of MNEs .....	102
The Problem of Extraterritoriality .....	106
Conclusion - How the ICSCD Would Remedy the Problems.....	110
CHAPTER FOUR: INSTITUTIONAL SYSTEMS FOR INTERNATIONAL DISPUTE SETTLEMENT – THE INADEQUACY IN THE CURRENT LEGAL SYSTEM .....	112

4.1. The WTO and its subsidiaries entities- the DRB and the AB .....	112
Introduction.....	112
The importance and utility of the DSB and the AB .....	114
The limitations of the WTO system.....	115
The struggle forces in the WTO's forums - Case studies .....	120
European Communities Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States.....	120
Patents, compulsory license, and access to medicines.....	123
Conclusions.....	124
4.3 The International Centre for Settlement of Investment Disputes (ICSID) .....	124
Introduction.....	124
The legal effects of the ICSID convention .....	125
Bilateral investment treaties .....	127
System of enforcement.....	132
The gaps in the current ICSID system.....	134
Conclusions.....	138
CHAPTER FIVE: PERSPECTIVE, CONCLUSIONS AND RECOMMENDATIONS ..	139
5.1 The New International Court of State and Corporate Disputes (ICSCD), and its Integration in the Current Dispute Settlement systems .....	139
Abbreviations.....	139
Introduction.....	139
Framework of ICSCD .....	139
The ICSCD structure and general principles.....	140
Establishing treaty as an 'International Codex' for all the current legal texts: Applicable law, precedence and jurisdiction .....	142
The Secretariat.....	145



Appointment.....	147
Number of Tribunal Members .....	148
5.2. Ad Hoc Tribunals of Companies Crimes .....	151
Abbreviations.....	151
Introduction.....	151
The AHTS as an Organ of the ICSCD.....	151
The Tribunals components - General.....	154
Panel Members' Qualifications.....	154
Duration of Terms .....	157
Proceedings .....	158
The ICSCD as the AHTS' Appellate Body .....	160
5.3. Control of the legality of States – Corporate contracts.....	163
Abbreviations.....	163
Introduction.....	163
General Principles for Determining the Validity of a Contract.....	166
The Negotiations Stage.....	166
The Substance of the Contract.....	168
CAIM as a tribunal for Contractual Disputes .....	169
Conclusion.....	178
5.4 The Integration of ICSCD in the Current Dispute Settlement Systems. ....	179
The Procedural Integration of Current Systems: ICSID, UNCITRAL, .....	179
Domestic Courts, and the Issue of Enforcement of Awards .....	179
5.4 The Need for a new international Legal System .....	187
The Integration of MNEs into the New System.....	189
MNEs under Binding List.....	190

The Integration of Sovereign States into the New System .....	192
Waiver of Sovereign Immunity.....	196
Jurisdiction, Applicable Law and Precedence .....	201
Precedence in the new system.....	206
The Solution : A Creation of Precedent Tradition .....	210
The Question of Enforceability .....	212
The ICSCD – Between Novelty and Reliance upon Existing Frameworks .....	216
5.5 Incentives for States and MNEs to Participate in New Legal System .....	219
CHAPTER SIX: CONCLUSIONS .....	223
Bibliography .....	231

## CHAPTER ONE: INTRODUCTION

### Definition of Terms

ICSCD - International Court of State and Corporate Disputes

### 1.1 Significance of the Study

At present, there is a lack of a specialised and unified international legal system dealing with commercial and investment disputes arising between sovereign states and Multi-National Enterprises (MNEs). This deficiency has led to a jumble of judicial solutions based on various international treaties and national laws. For example, the Alien Tort Claims Act was applied in cases such as *Kasky v Nike, Inc.*<sup>1</sup>, *Filartiga v Pana-Irana*<sup>2</sup>, *Unocal*<sup>3</sup>, *Shell*<sup>4</sup>, *Texaco*<sup>5</sup>, *Chevron*<sup>6</sup> and *Rio-Tinto*; The 'State Action' doctrine was used in cases such as *Kadic v Karadzic*<sup>7</sup> in order to widen the international content to include private actors, and the Criminal Liability and Punitive Damages, in cases such as *Exxon Valdes*<sup>8</sup>.

Many such cases have been subjected to criticism, for their lack of proper judicial venue. Court cases, such as *Doe v Exxon Mobile*<sup>9</sup>; *Sosa v Alvarez*<sup>10</sup>; *Brown v Amdahl Corp*<sup>11</sup>; and *Corrie v Caterpillar*<sup>12</sup> are some prominent examples that will be thoroughly discussed in this thesis, each with its legal deficiencies.

---

<sup>1</sup> *Kasky v. Nike, Inc.* 27 Cal. 4th 939 No. S087859. May 2002

<sup>2</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir.) 1980

<sup>3</sup> *John Doe v Unocal Corporation* (US Ninth Cir) No. 99-55576 April 27, 2001

<sup>4</sup> *Kiobel v Royal Dutch Petroleum Co.* 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

<sup>5</sup> *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 - Dist. Court, Calif. March 2004

<sup>6</sup> *Sarei et al. v. Rio Tinto PLC* (US 9<sup>th</sup> Cir) 02-56256/02-56390 Aug. 2006.

<sup>7</sup> *Kadic v. Karadzic*: Opinion of 2nd Circuit re: Subject Matter Jurisdiction U S Court of Appeals Second Circuit Nos. 1541, 1544 October 1995

<sup>8</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)

<sup>9</sup> *John Doe* (n 3).

<sup>10</sup> *Sosa v Alvarez-Machain* [2004] 542 US 692 (US Second Cir)

<[http://www.leagle.com/xmlResult.aspx?xmlidoc=20041234542US692\\_11212.xml&docbase=CSLWAR2-1986-2006](http://www.leagle.com/xmlResult.aspx?xmlidoc=20041234542US692_11212.xml&docbase=CSLWAR2-1986-2006)> accessed 10 October 2011.

<sup>11</sup> *Lungisile Ntsebeza et al. v. Citigroup, Inc., et al.* US District Court SD of NY, (1499 JES) Nov. 2004

<sup>12</sup> *Corrie et al. v. Caterpillar Inc.* (US 9<sup>th</sup> Cir) CV-05-05192-FDB Sept 2007

Some scholars<sup>13</sup> have commented that the most striking feature of the commercial international legal arena is its disorder stemming from an abundance of legal frameworks, documents, and judicial bodies. When observed from the perspective of the relationship between MNEs and states, it is quite astonishing to find so many bilateral and regional treaties concerning commercial activity while at the same time having so little (at least formal) binding legal-connection with the different court rulings they produce.<sup>14</sup>

This thesis proposes the establishment of an international court (ICSCD) encompassing all MNE-State disputes in the fields of commercial, trade, and investment law. The ICSCD will provide a solution to the existing acute problematic issues in the current international legal system by offering a new comprehensive international system that is legally binding. The new tribunal shall operate as an international economic expert regulatory body with one set of guidelines and wide representation to regulate international companies' activities from the contractual stage<sup>15</sup> through the business operation. The ICSCD shall have monitoring and follow-up systems that would minimise the inconsistencies<sup>16</sup> and incoherencies with regard to the many existing codes and guidelines<sup>17</sup>.

This thesis shall discuss the core problems of the current international commercial legal system by addressing a three-fold question regarding the applicability of the international law<sup>18</sup>, the puzzling nature of international and

---

<sup>13</sup> Jenny S Martinez, 'Towards an International Judicial System' *Stanford Law Review* 429, 432 (2003) 56.

<sup>14</sup> *ibid*

<sup>15</sup> Text to n 796 in ch 5.3

<sup>16</sup> See Gregory Husisian, 'Implementing an Integrated, Risk-Based Approach' (*Corporatcomplianceinsights.com*, 11 June 2010) 6

<<http://www.corporatcomplianceinsights.com/2010/compliance-strategies-for-multinational-corporations-implementing-an-integrated-risk-based-approach/>> accessed 3 September 2011

<sup>17</sup> *ibid*

<sup>18</sup> See *Metalclad Corporation v United Mexican States* [1999] ARB(AB)/97/1 (ICSID), Text to n 201.

domestic jurisdiction in MNEs-states disputes, and the lack of a coherent (formal) precedence tradition.<sup>19</sup>

Other issues concern the nature of most international agreements, whether regional (e.g. NAFTA, MERCOSUR, and ASEAN)<sup>20</sup> or bilateral agreements. All essentially contain very similar language and provisions in their treaties and agreements. However, the legal language is usually rather vague<sup>21</sup> when addressing significant issues such as national security or the legal liability and personality of MNEs.

These issues are yet to be debated, as can be seen in recent ruling at the US Supreme Court, whereby arguments in *Kiobel v Royal Dutch Petroleum* case<sup>22</sup> decided the question of whether corporations can be sued for their participation in human rights violations and other crimes against humanity.

For several decades, as there is no international tribunal with the single authorisation to decide in such cases, many plaintiffs turned to the American courts, which permit foreigners to file suit under the ATS for violations of international law, including human rights abuses. However, few cases have proceeded to trial. The Supreme Court decision in *Kiobel* case has determined that the ATS applies only to conduct within the United States or on the high seas, which generally means that foreign victims and plaintiffs shall find themselves without access to legal 'legitimate' tribunal, where they can submit their lawsuit against corporations. However, the court's decision was not broadly worded and plaintiffs probably will not dismiss their suits. Plaintiffs' lawyers may turn to the court, this time, through common law tort actions alleging violations of state law, and others may seek judicial panel in states courts.

---

<sup>19</sup> See Christopher S Gibson and Christopher R Drahozal, 'Iran-United States Claims Tribunal Precedent in Investor-State Arbitration' (2006) 23 Journal of International Arbitration, text to n 716 in ch 5.4,

<sup>20</sup> Text to n 192 in ch 2.2.

<sup>21</sup> See the discussion on vague language, text to n 169; For the banana dispute, see TB Simi and Kaushik Atul, 'The Banana War at the GATT/WTO' (2008) 1 Trade Law Brief; See the TRIMS short illustrative list; and State Counter list, text to n 185.

<sup>22</sup> *Kiobel v Royal Dutch Petroleum* (n 4).

The proposed ICSCD is being introduced at the most opportune time, according to the recent Kiobel case, which stresses the reasons why a creation of ICSCD is acutely important.

**Chapter Two** of this thesis deals with the Status and International Personality of corporations<sup>23</sup> in light of its various definitions and as a subject of international law.<sup>24</sup> The chapter presents a comprehensive classification of the key types of legal structures employed by MNEs in the course of their operations. Finally, the first section of the chapter will introduce a clear definition of MNEs. The second section of this chapter deals with the International Trade Treaties<sup>25</sup>, their limitations, and their effects on MNE operation. These treaties includes the GATT, GATS, TRIMS, TRIPs and NAFTA.

**Chapter Three** examines the limitations of the traditional law on MNEs<sup>26</sup>, starting with the legal effects of the UN Codes of Conduct. The first section of this chapter presents an overview of the implementation, limitation, and enforceability of the codes in the current legal system<sup>27</sup>. The chapter will introduce several case studies regarding the assistance of the codes and guidelines in solving disputes between MNEs and employees, non-governmental organisations, and governments. The second part of this chapter presents the OECD guidelines for multinational enterprises<sup>28</sup> by analysing their gaps , limitations, and inconsistency. Finally , the last section addresses the difficulties nations encounter when regulating MNEs.

**Chapter Four** explores the inadequacy in the current International Dispute Settlement System. The first part presents the relation between the WTO and MNEs and the legal effects of the WTO system on MNEs as a dominant force that sets in motion international legal dialogues. It progresses into the limitations and gaps in the current WTO system, which four case studies will finally illustrate.

---

<sup>23</sup> Text to n 80 in ch 2.1.

<sup>24</sup> *ibid*

<sup>25</sup> Text to n 150 in ch 2.2.

<sup>26</sup> Text to n 269 in ch 3.1.

<sup>27</sup> Text to n 242 in ch 3.1.

<sup>28</sup> OECD Guidelines for Multinational Enterprises (OECD)

<[http://www.oecd.org/document/28/0,3343,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html)>  
accessed 30 December 2010

These cases demonstrate the struggle of forces inherent in the World Trade Organisation's forums. The second part of the chapter analyses the International Centre for Settlement of Investment Disputes (ICSID)<sup>29</sup>. The analysis contains the relationship between the ICSID convention and BITs as they are closely interrelated, both originating in states' consent to international arbitration. Additionally, the chapter will discuss ICSID's limitations, legal effects, and enforcement based on various case studies.

**Chapter Five** presents the perspective, conclusions, and recommendations of this research<sup>30</sup>. The first section of this chapter introduces the new International Court of State and Corporate Disputes (ICSCD), and its integration in the current dispute settlement systems. Additionally, the first section of the chapter will present a description of the ICSCD structure along with the General Principles Establishing Treaty as an 'International codex' for all the current legal texts: Applicable Law, Precedence, and Jurisdiction.

The second section of this chapter presents the *ad hoc* tribunals of Companies Crimes<sup>31</sup>. It proposes a structure for a novel *ad hoc* Tribunal System (AHTS) for the settlement of disputes between MNEs and States. The proposed system is designed to serve as an organ of the ICSCD. As such, the ICSCD Establishing Treaty would create the AHTS. Furthermore, this section proposes the creation of the ICSCD as the AHTS' Appellate Body<sup>32</sup>, which may serve as a successful solution for the problem of the inconsistent decisions of various courts and tribunals.

The third part of the chapter presents a Contract Approval and Interpretation Mechanism (CAIM)<sup>33</sup> as an organ of the ICSCD. As such, the CAIM's main purpose is to harmonise state-MNE contract law and, consequently, provide a coherent regulative body for contractual disputes.

---

<sup>29</sup> ICSID Convention, Regulations and Rules <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)> accessed 14 May 2014.

<sup>30</sup> Text to n 569 in ch 5.1.

<sup>31</sup> Text to n 579 in ch 5.2.

<sup>32</sup> Text to n 606 in ch 5.2.

<sup>33</sup> Text to n 612 in ch 5.3.

The fourth part analyses the integration of ICSCD in the current Dispute Settlement Systems<sup>34</sup> as of the ICSID<sup>35</sup> and the UNCITRAL<sup>36</sup>, Domestic Courts, and the Issue of Enforcement of Awards. This section shows where existing domestic court systems and international arbitration solutions, such as the ICSID and the UNCITRAL, could engage in the novel UN organ. Furthermore, it discusses the function of the Establishing Treaty of the ICSCD and the ways in which the proposed system may secure a coherent use of applicable law, case-law precedence, and jurisdiction by using existing international agreements and codes.

The fifth section of this chapter presents the conclusion<sup>37</sup> that there is a need for a unified international legal system that specialises in commercial and investment disputes arising between sovereign states and MNEs. Hence, the integration<sup>38</sup> of MNEs and sovereign states into the new system shall be proposed by applying a 'Binding List'<sup>39</sup> and other means of enforcement. On this regard, the issue of the Waiver of Sovereign Immunity<sup>40</sup> shall be discussed, as well as the Jurisdiction, Applicable Law, and the benefits of creating a Precedence Tradition<sup>41</sup>. Additionally, the question of Enforceability of the ICSCD awards shall be argued<sup>42</sup>.

The final section of this chapter provides the incentives for States and MNEs to participate in a new legal system<sup>43</sup>. For example, substantive incentive for states may be given by guaranteeing a reliable source of powerful regulation whereby states may take part in its configuration on its initial establishment. Multi-National Enterprises joining the register-list of companies shall receive tax benefits and other commercial reliefs to benefit their business within the framework of the ICSCD. These benefits will be given in every country where the MNE operates, and their ICSCD courts' expenses shall be covered partly by an annual

---

<sup>34</sup> Text to n 653 in ch 5.4.

<sup>35</sup> Text to n 500 in ch 4.3.

<sup>36</sup> Text to n 673 in ch 5.4.

<sup>37</sup> Text to n 773 in ch 5.5.

<sup>38</sup> Text to n 678 in ch 5.5.

<sup>39</sup> Text to n 682 in ch 5.4.

<sup>40</sup> Text to n 667 in ch 5.4.

<sup>41</sup> Text to n 760 in ch 5.4.

<sup>42</sup> Text to n 662 in ch 5.4.

<sup>43</sup> Text to n 774 in ch 5.6.



membership fee they pay on an equal basis regardless of the states' and MNEs' participation in specific cases.

**Chapter Six** presents the conclusion that the establishment of a new international legal system for MNEs-States dispute settlement in the form of the ICSCD may be more efficient and unified than the current one. The proposed system shall be comprehensive and legally binding. Hence, the new tribunal shall operate as an international economical expert regulatory body, with one set of guidelines and wide representation to regulate international companies' activities from the contractual stage throughout its business operation.

## 1.2 Theoretical Framework

The ICSCD is a synthesis of the positive aspects of the current international commercial tribunals coupled with several significant improvements. As a result, the ICSCD offers a solution to all three aforementioned problems plaguing the current state of affairs: the applicability of the international law, the abstruse nature of international and domestic jurisdiction in MNEs-states disputes, and the severe lack of a coherent, formal tradition of precedence.

The thesis discusses on a theoretical level the need for a judicial system that would rectify the current chaotic multi-layered international commercial<sup>44</sup> trade<sup>45</sup> and investment<sup>46</sup> legal system created by various international agreements and treaties. As MNEs increasingly base their commercial and investment activities in several countries, the 'old' international and national legal systems should progress accordingly. Hence, a dispute between an MNE and state shall reside on international law level as global problems require global solutions. The disorder in the current international legal system resulted from the absence of a unified, coherent, and comprehensive international law system and tribunal concerning MNEs - state disputes.

The classical approach of the international law sees nations as the main entities that have the responsibility and the obligation for guarding human rights.

---

<sup>44</sup> Text to n 246 in ch 6.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*

This approach does not impose direct human rights obligations on MNEs, for example, as they do not possess the role of relevant legal actors in the global legal arena. There is not even a consensus regarding the definition of the MNE as a legal personality that can be held liable under international law. None of the seven main treaties that deal with human rights recognise the MNE as a liable entity.

The following chapter presents a different approach for solving the main issues in the current international legal system regarding jurisdiction, applicable law, and the tradition of precedence. This shall be done by applying a framework and methodology based on the "Legal Process School", which was a movement within American law that attempted to chart a third way between legal formalism<sup>47</sup> and legal realism<sup>48</sup> that developed during the 1950s and 1960s.

This school of thought was developed for the American Federal System of Law and its principles were applied directly to the proposed new international legal system presented in this research. This theory is concerned with how authority deals with the differences between state and federal law and proposes a progressive outlook on law making. Just as issues that pass between state borders, this theory can be applied to issues that pass between international borders.

### **The problem**

The first main principle of the Legal Process School's framework that relates to this research is Institutional Settlement, which holds that law should allocate decision making to the institutions best suited to decide particular questions. Accordingly, the issue of the Lack of Proper Judicial Venue can be seen in cases such as *Doe v Exxon*, *Sosu v Alvures*, *Brown v Kadic v Karadzic* and *Ameco*

---

<sup>47</sup> See Legal Information Institute, Cornell Law School 'A theory that legal rules stand separate from other social and political institutions. According to this theory, once lawmakers produce rules, judges apply them to the facts of a case without regard to social interests and public policy'.

<sup>48</sup> *ibid*, 'A theory that all law derives from prevailing social interests and public policy. According to this theory, judges consider not only abstract rules, but also social interests and public policy when deciding a case'.

*Cadiz*<sup>49</sup>. This principle of Institutional Settlement was also applied in analysing the problem of parallel Procedures<sup>50</sup> as can be seen in cases as *SARL Bunventi & Bontant Corp*, *MNE Gas Natural Argentina* and *SGS v Pakistan*, which are examples of forum shopping<sup>51</sup>.

The second related principle of the Legal Process School is 'The Rule of Law', which requires the availability of judicial remedies sufficient to vindicate fundamental legal principles.<sup>52</sup> This principle was used to analyse issues concerning:

- a. Lack of Tradition of Precedent<sup>53</sup> that currently prevents a reliable and predictable system of law as can be seen in NAFTA Article 1136<sup>54</sup>, OECD guidelines<sup>55</sup>, ICSID Article 54<sup>56</sup>, and UN code of conduct<sup>57</sup>, which all state that they are not establishing precedence of case law.
- b. Vague Language that causes ambiguity and inconsistency in the interpretation of causes of treaties as seen in the GATT, TRIMS, TRIPS, FTA NAFTA .
- c. Ambiguity of the Applicable Law that clearly illustrates the importance of the principle of the Rule of Law, as it can be seen in cases such as *Unocal*, and *Talisman*<sup>58</sup>.
- d. According to the principle of Rule of Law, the Legal Process School's theory mandates that the establishing treaty of the ICSCD will decide legal challenges such as the determination of International Personality<sup>59</sup>.

---

<sup>49</sup> In the matter of: OIL SPILL BY THE AMOCO CADIZ OFF THE COAST OF FRANCE US (7th CIR) no.954 F.2d 1279; Jan 1992

<sup>50</sup> Text to n 612 in ch 5.2.

<sup>51</sup> Text to n 613 in ch 5.2.

<sup>52</sup> Richard H Fallon, Jr., Reflections on the Hart and Wechsler Paradigm, 47 Vand. L. Rev. 953, 964-6 (1994).

<sup>53</sup> Text to n 732 in ch 5.4.

<sup>54</sup> NAFTA Article 1136 <[www.sice.oas.org/trade/nafta/chap-112.asp](http://www.sice.oas.org/trade/nafta/chap-112.asp)> accessed May 25 2014

<sup>55</sup> Text to n 298 in ch 3.2.

<sup>56</sup> ICSID Article 54 <<https://icsid.worldbank.org/ICSID/StaticFiles/facility/partD-chap09.htm>> accessed May 26 2014

<sup>57</sup> UN Code of Conduct ILO <<http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/main.htm>> accessed May 26 2014

<sup>58</sup> *ibid*.

<sup>59</sup> Text to n 550 in ch 5.1.

The lack of consensus regarding the definition of MNEs personality is shown by the following cases: *Santa Clara v Southern Pacific*, *ICJ Reparation Case*, and *Citizens United v Federal Election Commission*.

### **The solution**

To address the above issues regarding a progressive outlook of law making, this thesis employs the Legal Process School framework. It shall be established by creating an international treaty initially proposed to be under the auspices of the UN. This treaty shall provide a codex of law to deal with international commercial law issues. In this manner, the treaty offers a novelty, for instead of referring generally to 'international law' as the applicable law, in case of most trade and investment agreements, it provides a defined framework of references. Most importantly, these references are to be ordered, debated, and positioned in a coherent way. This systematic reference system for international agreements shall also address the contradictions and potential discrepancies between various agreements. It will conclude with principles, codes, and provisions that are to be espoused or abandoned by the treaty.

When the ICSCD is formed, these codes must be integrated in a new 'international codex'. The establishing treaty will provide the legal binding statutes in order to rule by them. Thus, the Establishing Treaty shall function as a legal text that will eventually be regarded as the largest contextual framework for courts' interpretation of contracts and agreements.

To advance the international law concerning MNEs- state dispute mechanism, this thesis proposes a new court- the ICSCD, where several international courts, such as the International Court of Justice (ICJ), International Criminal Court ICC, and the ICSID, had been used partly as models for building the ICSCD. Although, the ICJ and the ICC chambers are quite different from the presented new tribunal, the ICSCD borrowed some structural principles from these courts, as Figure 1 summarises. Additionally, the rationale behind the choice of the ICJ and ICC as Models can be described as follows:

1. Both courts are recognised as international bodies, aiming at universal membership. The ICJ was established in 1946 as the judicial organ of the

UN, and even though the ICC is independent from the UN, it was created by the UN General Assembly under the “Rome Statute of the International Criminal Court”. According to the UN Charter, all UN member states are automatically members of the ICC. Nations, however, must exclusively become members of the ICJ. Currently, there are 139 signatories and 99 ratifications to the *Rome Statute*. The objective is that the ICSCD will be a permanent court that will be recognised by UN member states. Moreover, the legality and powers of the ICSCD shall be established by a vote in the United Nations general assembly, which would create a binding treaty for all nations affiliated with the UN , to uphold this treaty.

2. Although the ICC and the ICJ are unrelated organisations and consist of different merits, both aim at universal jurisdiction. The ICJ as an organ of the UN, resolves disputes between different states, and the ICC deals with cases from around the globes, concerning genocides and crimes against humanity. Hence, if the ICSCD would have universal jurisdiction as well, states that are part of the UN may go directly to ICSCD and or they might be called for its mandate and jurisdiction by the registered MNE.<sup>60</sup>

3. Both Courts receive funding from the UN: the ICJ as an Organ of the UN, and the ICC where it examines cases referred from the Security Council, as in the Sudanese President Al-Bashir case for his crimes in Western Sudan and Darfur<sup>61</sup>. However, The ICC, as an independent body, is funded mainly by its member states. Each state contribution is determined according to its income, as it practiced by the UN. In some cases, the United Nations may provide funding, approved by the General Assembly in situations referred to the court by the Security Council. The ICSCD shall be funded partly by the

---

<sup>60</sup> Text to n 685 in ch 5.4.

<sup>61</sup> ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur, ICC-OTP-20080714-PR341<[www.icc-cpi.int/en\\_menus/icc/situations and cases /situations/situation icc 0205/press releases/Pages/a.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/Pages/a.aspx)> accessed 22 April 2014

member state fees as well, and the remainder of the ICSCD's budget, shall be sourced from the UN general funds.<sup>62</sup>

Figure 1 summarises the relative characteristics of the three international tribunals; the ICJ, the ICC<sup>63</sup>, and the new ICSCD Tribunal, which shall be presented in more detail in Chapter Five of this thesis.

---

<sup>62</sup> David J Scheffer, 'The United States and the International Criminal Court' (1999) 93 *The American Journal of International Law* 12, 17.

<sup>63</sup> Renee Dopplick, Inside Justice, 'Comparison of the ICJ and the ICC' [http://www.insidejustice.com/law/index.php/intl/2008/11/10/differences\\_icc\\_icj](http://www.insidejustice.com/law/index.php/intl/2008/11/10/differences_icc_icj) accessed 12 August 2013.

**Figure 1: ICJ, ICC, ICSCD - characteristic summary**

Feature	ICJ	ICC	ICSCD
Year Court Established	1946	2002	2023
Languages	English, French	English, French	English, French
UN-Relationship	Official court of the UN, commonly referred to as the "World Court."	Independent.  May receive case referrals from the UN Security Council.  Can initiate prosecutions without UN action or referral.	Independent.  May receive cases brought by Contracting State, including any constituent subdivision or agency of a Contracting State, and a Registered MNE arising directly out of an investment or commercial related agreement or contract.
Location	The Hague, The Netherlands	The Hague, The Netherlands	The Hague, The Netherlands
Jurisdiction	UN member-states (i.e. national governments)	Individuals	UN member states, MNEs.
Types of Cases	(1) Contentious between parties.  (2) Advisory opinions	Criminal prosecution of individuals	(1) Commercial dispute between MNEs and states. (2) Advisory opinions
Subject Matter	Sovereignty, boundary disputes, maritime disputes, trade, natural resources, human rights, treaty violations, treaty interpretation, and more	Genocide, crimes against humanity, war crimes, crimes of aggression	Commercial and investment disputes, expropriation, contract breaching, treaty violations, treaty interpretation, and more.

Authorizing Legal Mechanism	States that ratify the UN Charter become parties to the ICJ Statute under Article 93. Non-UN member states can also become parties to the ICJ by ratifying the ICJ Statute. Each state must provide consent to any contentious case by explicit agreement, declaration, or treaty clause.	Rome Statute	Establishing Treaty <sup>64</sup> ratified by UN member states. Each state and MNE must provide consent and declaration, determining that the ICSCD is the exclusive judicial system for their Commercial and investment disputes. <sup>65</sup>
Appeals	None.  The ICJ decision in a contentious case is binding upon the parties. If a State fails to comply with the judgment, the issue may be taken to the UN Security Council, which has the authority to review, recommend, and decide upon enforcement.	Appeals Chamber.  Article 80 of the Rome Statute allows retention of an acquitted defendant pending appeal.	Appellate Chamber <sup>66</sup> within the system. The ICSCD is the sole judicial body empowered to hear an appeal concerning the competence of the tribunal, the AHTS, or the ICSCD awards.

---

<sup>64</sup> Text to n 547 in ch 5.1.

<sup>65</sup> According to the UN Charter, Chapter XVI: MISCELLANEOUS PROVISIONS Article 103, 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. However, as noted in Article 105, of the charter 'The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose'. In light of the Article 105, the General Assembly may apply similar provision in event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under ICSCD's Establishing Treaty.

<sup>66</sup> Text to n 574 in ch 5.



Precedent	No <i>stare decisis</i> . Prior case law is persuasive authority.	No <i>stare decisis</i> . Prior case law is persuasive authority.	A structured precedence <sup>67</sup> framework which offers an institutionalisation of the current precedence rulings, in which it will be clear which cases, might constitute precedents.  Awards granted by the ICSCD shall create binding precedents.
Enforcement	Primary enforcement of ICJ orders is covered by Article 94 . Recommendations for specific measures that shall include appeals for compliance.	In condition that States shall formally agree, to carry out a sentence imposed by the Court.  limited enforcement mechanisms that the Rome Statute grant to the ICC	Use of local authorities to enforce appearance before the court and court decisions <sup>68</sup>
Contract Approval and Interpretation Mechanism (CAIM)	None	None	1) Shall approve <sup>69</sup> contracts between the Contracting Parties in in the contractual stage.  (2) Shall act as an arbitrator in disputes arising from such contracts.

The principal framework of this research is to synthesise the relevant current international law into a unified set of laws that shall be used as the applicable law in the ICSCD. Thus, there is no intention to dismiss the current legal system. The

---

<sup>67</sup> Text to n 714 in ch 5.5.

<sup>68</sup> Text to n 655 in ch 5.5.

<sup>69</sup> Text to n 613 in ch 5.3

proposed ICSCD consists of an *elaboration* of ideas already present, although vaguely, in current treaties and in *de facto* international judicial defaulted frameworks. However, in contrast to non-unified, clear law, these references are to be ordered, debated, and positioned in a coherent way in the initial stage of the Establishing treaty<sup>70</sup>.

Thus, the Establishing Treaty shall refer specifically and explicitly in certain cases to international trade treaties such as GATT, TRIMS, TRIPS, and GATS; regional agreements such as NAFTA, MERCOSUR and ASEAN; BITs; and other international agreements and charters. Additionally, if an assembly of treaties and arbitral bodies addressing international investment and trade disputes already exists, the ICSCD inherits their best merits and leaves behind their many deficiencies.

The ICSCD shall also refer to any relevant domestic litigation cases worldwide to create the most advanced and up-to-date international commercial arbitration<sup>71</sup> or court ruling for the purpose of the proposed system. Customary international law is another source of legal material that will be used by ICSCD courts. As such, this research will mention some other courts that were used as an inspiration for the ICSCD framework such as, following ICSID experience, references to case law from the ICJ. This is true also concerning arbitral tribunals as well as treaties, in particular the Vienna Convention on the Law of Treaties, and references to documents adopted by the International Law Commission.

### 1.3 Contribution of this Study

Since the 1970s, MNEs have been recognised as major influential international actors, controlling resources exceeding those of many states. In many ways, the Multinational Corporation<sup>72</sup> or enterprise has been the dominant institution in the international economy, at least since the end of the Second World

---

<sup>70</sup> Text to n 547 in ch 5.1.

<sup>71</sup> Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 The European Journal of International Law 301, 318.

<sup>72</sup> Patricia Hogue Werhane, *Persons, Rights, and Corporations* (Prentice-Hall Inc, Englewood Cliffs, NJ 1985) 31.

War.<sup>73</sup> Surprisingly though, the law has not followed this trend. While in all the industrial states there are enormous bodies of legislation, judge-made laws, and commentaries concerning the governance of corporations, nearly all such initiatives are situated in a private law context and precede the wave of regulation, taxation, labour law, environmental controls, and other forms of governmental intervention familiar today. Moreover, nearly all such laws were developed with a view that a single firm should operate out of a single state.

The contribution of this study is its unification and integration of the different international legal bodies under the auspices of the proposed ICSCD system, which may bring order to the international legal system and eliminate the currently prevailing chaos of MNE-state disputes. It also provides answers to the questions of a lack of coherence, expertise, and finality of awards by providing a comprehensive international yet legally binding system.

In contrast to any domestic court, the ICSCD shall have a large panel of expert-judges from multiple nationalities, thus minimising the likelihood of a biased tribunal. Furthermore, as a comprehensive system specialising in international commercial and investment law, the ICSCD shall rely solely on its courts' prior decisions, and will thus offer coherence of judgments. Consequently, it will minimise the issues of interpretation of foreign law, as well as those different interpretations arising from conflicting international and domestic laws.

Finally, in the ICSCD Establishing Treaty, the categories of what is considered an MNE or a corporation shall be well-defined, and thus MNEs will be liable in courts by definition<sup>74</sup>. In addition, as an international organisation, the ICSCD shall not be concerned with questions of jurisdiction regarding the precise nationality of a MNE, as all MNEs will be liable to its jurisdiction by definition.

As to the question of enforceability, the ICSCD shall offer an obliging enforcement mechanism against both states and MNEs. Thus, it will dispense with questions of whether a company is based in the United States or if a sovereign is immune from execution of an award.

---

<sup>73</sup> Robert Gilpin, *The Political Economy of International Relation* (Princeton University Press, Princeton, NJ 1987) 2.

<sup>74</sup> Text to n 777.



## CHAPTER TWO: THE GLOBAL ECONOMY ENVIRONMENT OF MNEs

### 2.1 Status and International Personality of Corporation

#### Introduction

This chapter discusses the difficulties in defining MNEs as international legal persons that may be liable under international law and the various definitions provided by different international bodies. The first section examines the status of MNEs as subjects of international law, following literature on the theories that may be found treating the nature and status of corporations. The second section of this chapter provides a comprehensive classification of the key types of legal structures employed by MNEs in the course of their operations. Finally, it offers a definition of MNEs for the purpose of this research.

This chapter emphasises the international personality of MNEs. However it is important to note that domestic legal personality is determined by the domestic legal system of each State. Despite that each state uses different rules and methods, most of them use their rules of conflict of laws where the legal capacities and status of such a body are determined by its 'personal' law.<sup>75</sup>

The problem lies in a lack of clear definition of MNEs' legal personality when it involves international law that determines its own subjects. As MNEs are not subjects of international law by definition of a treaty, this leads to the use of customary international law and general principles of international law under Article 38 (1) of the Statute of the International Court of Justice.

Professor Malcolm N. Shaw has stated 'The personality question will depend upon the differences between municipal and international personality. If the entity is given a range of powers and is distanced sufficiently from municipal law, an international person may be involved, but it will require careful consideration of circumstances'.<sup>76</sup> This work shall propose that general principles pertaining to legal personality need to be agreed upon through a single economic international

---

<sup>75</sup> Chittharanja Felix Amerasinghe, *Principles of the Institutional Law of International Organizations*. 1st edition. Cambridge: Cambridge University Press, 1996. ISBN 0521562546 71-72.

<sup>76</sup> Malcolm Shaw, *International Law* (6th edn, Cambridge University Press, Cambridge 2008) 249.

regulatory body with single set of guidelines. The unity of such system under the auspices of a single appellate body is also a solution for what David R Sedlak coins the potential of an 'endless appeals process' wherein every ruling of a tribunal may be questioned in another tribunal or committee without a sealing of an appellate body.<sup>77</sup> Establishment of a new international court for corporate-states disputes (ICSCD) is thus highly beneficial, as it would provide monitoring and follow-up systems that would prevent inconsistencies and incoherencies arising from many existing codes and guidelines while addressing the personality question. Moreover, the ICSCD Establishing Treaty will try to define MNEs.

### **The international legal status of MNEs**

This research proposes that MNEs should be a subject of international law. Although MNE is a creation of domestic law, its nature lies in its international operation, crossing numerous national jurisdictions. With the internationalisation of production, political-economic emphasis has shifted from trade to investment. From border controls to the domestic regulatory framework at large, the line between 'domestic' and 'international' became increasingly blurred, to the point where the distinction may no longer be as meaningful as in the past.

As such, during the MNEs' 'life', it should be treated as a subject of international law under the Establishing Treaty. However, it shall be terminated or end its operation according to its originated domestic law and regulations. In other words, MNE shall be created and terminated under its origin national law, however, during its international operation, shall be legally obligated under international law.

For this reason, the ICSCD agreement shall be considered as binding for all the MNEs' sections and subsidiaries, regardless of each-one's location or position. Further, and likely of a greater significance in some cases, the ICSCD will include a novel *binding list of MNEs* that shall be considered as sufficient and inclusive. The general principle of this list will be whether an MNE's separate parts function as

---

<sup>77</sup> David R Sedlak, 'ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?' (2004) 164; Dohyun Kim, 'Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System' (2011) 86 New York University Law Review 242.

one economic unit and will take into account not only the much-elusive formal control of the MNE, but also its effective control.

According to the ICJ, it seen in the perspective that the corporate personality represents a development brought about by new and expanding requirement in the economic field.<sup>78</sup> The issue of whether a 'subject' is an entity that international law treats as a person, that can influence and be influenced by international law, was raised by the ICJ in 1949. It was also addressed by the Second Circuit judicial decisions under the Alien Tort Claims Act (ATCA), where a corporation is seen as a subject of international law as much as an individual or an international organisation.

The first case that symbolised a change in the way the legal and business community conceived of organisation's personhood was that of *Santa Clara v Southern Pacific*.<sup>79</sup> This case helped define the international personality of corporations in terms of the Fourteenth Amendment of the US Constitution since the US Supreme Court declared that the railroad is a 'person' within the meaning of the Amendment. As the Equal Protection Clause applies to all persons, it therefore provides that all persons have a right to equal protection under the laws and consequently administered corporations with a generalised freedom to use property in opposition to state government restrictions.<sup>80</sup>

Clapham argues that the international legal rights and privileges corporations have (as individuals) indicated that they are international legal persons. According to Clapham, 'We need to admit, that international rights and duties depend on the capacity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity'.<sup>81</sup> He further argues that international personhood can emerge in all cases where a corporation can and should be treated as a person.

---

<sup>78</sup> ICJ, *Barcelona Traction, Light and Power Company Ltd*, (1970) 3 ICJ Reports 40, para 39.

<sup>79</sup> U.S. 394 6 S. Ct. 1132. 30 L. Ed 118.

<sup>80</sup> Peter d'Errico, 'Corporate Personality and Human Commodification' (1997) 9 *Rethinking Marxism* 99-113.

<sup>81</sup> Andrew Clapham, 'Human Rights Obligations of Non-State Actors,' (2006) 88 *863 International Review of the Red Cross* 79.

Although Clapham used the term 'limited international legal personality' rather than 'subjects', he referred the justification of the ICJ's Reparation Case in which the UN was treated as an international legal person as it acted like a legal person. It is only in the twentieth century that the international personality of organisations was recognised.<sup>82</sup> On this particular case, the court pointed out that acknowledging the UN's personality is a necessity in order for it to achieve the objectives assigned to the organisation.<sup>83</sup> As a result, the court stated that the characteristics of an organisation have to be acknowledged in order for it to be recognised as a legal personality. According to the court's ruling, the organisation was assigned rights, goals, purposes, tasks, and principles and was deemed capable of maintaining and enforcing them through international judicial bodies. Moreover, it was equipped with functions, organs, and necessary means, and had legal capacity and privileges in municipal systems of member states.

Moreover, member state actions have to conform to the decisions taken by the union and oblige to give assistance to it, ensuring that membership of third party states is provided for and the conclusion of agreement is contemplated.<sup>84</sup> Thus, in the Reparation case, the ICJ concluded that the ability to act as a person is the principal determinant of personhood status.<sup>85</sup> In other words, according to the court, the functions and rights conferred to the UN by its constituent instrument were such that they necessarily implied the attribution of international personality to the organisation.

---

<sup>82</sup> Philippe Gautier, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' in JA Frowein and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Kluwer Law International 2000) 333, 341; David Kinley, 'From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 945; Nora Gotzmann, 'Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute' (2008) 1(1) *QLSR* 37, 45-46

<sup>83</sup> Jan Klabbbers, 'The Concept of Legal Personality' (2005) 2 11 *Ius Gentium* 35-36,

<sup>84</sup> Malcolm Shaw, *International Law* (4th edn, Cambridge University Press 1987) 138; Nicola Jägers, 'The Legal Status of the Multinational Corporation Under International Law' in Michael K Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999) 262-263; Gautier(n 82) 339, 349-50; Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumptions of Normative Responsibilities' (1993), 4.

<sup>85</sup> José E Alvarez, 'Are Corporations 'Subjects' of International Law?' (2010) 9 1 *Santa Clara Journal of International Law* 16.



Based on the above, the UN capacity to operate at an international level equates with international personality, as it indicates the autonomy of the organisation and its ability to act on its own.<sup>86</sup> In sum, legal personality is a formal concept whereby the key to controlling the international personality of organisations is the actual rights and competences given to them by member states.<sup>87</sup>

Corporations' legal conceptualisation as 'artificial' no longer aligns with the reality of their power, as the concept of a corporation being a 'person' is at the legal core of corporate power.<sup>88</sup> In other words, a subject is an entity that international law treats as a person, referring to something that can affect and be affected by international law and can enforce international law by bringing international claims.<sup>89</sup> The latest ruling of the US Supreme Court in *Citizens United v Federal Election Commission*<sup>90</sup> is the ultimate proof that today the court unequivocally treats corporations and individuals equally, that is, as 'persons'.

Observing the Reparation Case argumentation leads to the conclusion that MNEs under BITs and FTAs are indeed international legal persons or subjects of international law, as much as the UN is. In both cases, the member states and the stakeholders have a separate personhood from their respective founder bodies; thus, their rights as entities are recognised in treaties and under international law.

To lay any legal claim against a corporation, it is necessary to determine whether it is a legal person, as has been done in the Reparation Case. However, the ICJ concluded that despite that the UN was recognised as an international legal person, its capacities were not equal to those of a state.

In the *Barcelona Traction* case, the court decided based on the assumption that international law in this respect referred to the rules generally accepted by municipal legal systems in these matters.<sup>91</sup> However, applying rules extracted from private law sources in matters of public international law may lead to certain

---

<sup>86</sup> Gautier(n 82) 332-33.

<sup>87</sup> *ibid* 336-37

<sup>88</sup> d'Errico (n 80) 1-2.

<sup>89</sup> ICJ, *Barcelona Traction, Light and Power Company Ltd* (n 78) 16; Jose E Alvarez (n 85).

<sup>90</sup> US (2010) 558.

<sup>91</sup> Clapham (n 81) 37, para 50.

complications. The 'Amoco Cadiz' case is a good example illustrating the huge complications and doubts arising from non-uniform nature and legal status of multinational enterprises.

In March 16, 1978, a fully laden M/V Amoco Cadiz, en route from the Persian Gulf to Rotterdam, ran aground in French territorial waters off the coast of Brittany. The vessel broke in two, spilling its entire cargo of about 1.6 million barrels of oil over the ocean surface, about 215 km away from the northwest coast of France.

The injured parties, including coastal property owners, municipalities, and the French Republic (as well as the insurers of the cargo), filed claims arising from the oil spill, alleging negligent operation as well as faulty design of the supertanker. The key questions were: Who would be liable? Would various regimes limiting liability be applicable? Would the party found liable have the resources to pay such claims?

The Amoco Cadiz was a Liberian flagship with Monrovia as its homeport. Its registered owner was Amoco Transport Co., a Liberian corporation with its principal place of business in Hamilton, Bermuda. The company had purchased the ship from Amoco Tankers Company, another Liberian company. For ship construction, Amoco Tankers had contracted Astilleros Espanoles, SA, a Spanish corporation with its principal place of business in Madrid and its shipyard in Cadiz.

Both transport and tankers were wholly owned subsidiaries of the Standard Oil Company (Indiana), a corporation organised under the laws of Indiana that had its principal place of business (headquarters) in Chicago, Illinois. Still another subsidiary of Standard of Indiana, Amoco International Oil Company ('AIOC'), a corporation organised under the laws of Delaware with its principal office in Chicago, had actually proposed the purchase of the Amoco Cadiz and had worked with Astilleros on the design, construction, and maintenance of the Amoco Cadiz and her sister ships.

Amoco International Oil Company was the vessel operator on the fateful voyage. The voyage was on a time charter to Shell International Petroleum Company Ltd. However, two other affiliates of the Shell group were listed as the

owners of the crude oil on board and still another affiliate of the Royal Dutch/ Shell group, Petroleum Insurance Limited, had insured the cargo and later became a claimant as subrogate after it had paid off the cargo owners.

The Amoco Cadiz illustrates that, unless the MNE's personality is defined by a treaty or some other international legally binding juridical definition, the issue of whether a corporation may be treated as subject to legal responsibility shall remain vague. Additionally, this case clearly sheds light on the legal problems of foreign flag ships, although more than half a century ago, Harolds<sup>92</sup> pointed out the serious problem between international treaties and local law enforcement.

In 1949, an official inquiry was made into the Panamanian labour legislation and the composition of the Panamanian fleet under the auspices of the International Labor Organisation, which is a specialised agency of the UN.<sup>93</sup> For the purpose of the inquiry, thirty Panamanian ships were selected at random and subjected to inspection. The findings were rather worrying. While Panama had signed the international conventions for safety of life at sea, there was little domestic Panamanian legislation and inspectors in charge of the enforcement of the standards were lacking.

Harolds reviewed another interesting case illustrating the manner in which foreign operators often 'scramble' their ownership, namely *Markakis v Mpampa Christos*<sup>94</sup>. In this case, a Greek seaman was injured on a Liberian flagship, owned by a Panamanian corporation, while the vessel was in Virginia waters. According to Harolds, the Liberian flag was a 'flag of convenience', just as the Panamanian corporation was a 'corporation of convenience'. The vessel was actually operated by a London-based corporation controlled by a Greek family. Nonetheless, the court applied the law of the flag, which afforded a complete remedy. In addition to a good judicial discussion of the conflict of laws and matters of international comity and policy involved in the problem, this is the first case to hold that, under Liberian

---

<sup>92</sup> Louis R Harolds, 'Some Legal Problems Arising out of Foreign Flag Operations', 28 Fordham Law Rev. 295 article 5 (1959).

<sup>93</sup> Report of Committee of Enquiry of the International Labor Organization, Conditions in Ships Flying the Panama Flag (1950).

<sup>94</sup> *Markakis v Mpampa Christos*, No. 249, Docket 25288. June 1959.

law, there is a right of recovery based on negligence, as well as on unseaworthiness.<sup>95</sup>

In conclusion, if MNEs were to be considered as a subject of international law by the Establishing Treaty, the ICSCD juridical binding system would apply to all. Flag of convenience, Internet, cyberspace, and foreign operators 'scrambling' their ownership would thus become irrelevant as the MNEs, its parts, and subsidiaries would be subject to the clear jurisdiction of the ICSCD.

### **A matter of definition**

More than twenty years ago, in a pioneering article, Professor Detlev Vagts wrote, 'The present legal framework has no comfortable, tidy receptacle for the multinational enterprise'.<sup>96</sup> That conclusion is still true, even though the United Nations, the Organisation for Economic Cooperation and Development, the European Community, as well as academic and professional experts around the world, have given significant consideration to the multinational enterprise. One of the difficulties in defining MNEs stems from the observation that the enterprise has a numerous forms of legal organisation to choose from, each with its unique legal status.

The first of the four alternative types of definition<sup>97</sup> is an 'operating' definition, where the ownership threshold definition is 'a firm which owns or controls income generating assets in more than one country'. The second definition is a 'structural' definition, where multinationality is judged according to the company's organisation. The third is based on a 'performance' criterion, incorporating some relative or absolute measure of international spread (for example, number of foreign subsidiaries, percentage of sales accounted for by

---

<sup>95</sup> *Konstantopoulos v Diamante Cia De Vapores, SA*, 170 F Supp 662 (SDNY1959).

<sup>96</sup> Peter Muchlinski, *Multinational Enterprises and the Law* (Blackwell Publishers Ltd, Oxford 1999) 58.

<sup>97</sup> Peter J Buckley and Mark Casson, *The Economic Theory of Multinational Enterprise* (The Macmillan Press Ltd, London and Basingstoke 1985) 1.

foreign sales, etc.). Finally, the 'behavioural' criterion is based on the corporation's degree of egocentricity.

As noted before, the main reason for the difficulty of defining the MNEs stems from the observation that, despite operating globally, they are generally not based on international treaties and are not established under international law. However, as presented on Chapter 5 of this thesis, the remedy for this difficulty shall be seen in the form of the establishing new international treaty, which will bind MNEs by definition.

The first use of the term 'multinational' in relation to a corporation has been attributed to David E. Lilienthal, who, in April 1960, gave a paper to the Carnegie Institute of Technology on Management and Corporations 1985, which was later published under the title '*The multinational corporation*' (MNC). Lilienthal defined MNEs as 'corporations... which have their home in one country but which operate and live under the laws and customs of other countries as well'.<sup>98</sup> This definition thus recognises the MNE as a unination enterprise with foreign operations.

Economists have historically favoured a simple all-embracing formula, defining a multinational enterprise' as 'any corporation which owns (in whole or in part), controls and manages income generating assets in more than one country. This definition distinguishes an enterprise engaging in direct investment that gives the enterprise not only a financial stake in the foreign venture, but also managerial control, from one that engages in portfolio investment and thus has only a financial stake in the foreign venture without any managerial control. Thus, based on this classification, the MNE is a firm that engages in 'direct investment' outside its home country. In this thesis, the term 'enterprise' is preferred over 'corporation', as it avoids restricting the object of study to incorporated business entities and to corporate groups based on parent-subsidiary relations alone.

### **The United Nations (UN) and the Economic and Social Council (ECOSOC) view of MNE definition**

---

<sup>98</sup> Muchlinski, *Multinational Enterprises* (n 96) 12.

From an economic perspective, international production can take numerous legal forms. However, legal form is not essential in the classification of an enterprise as 'multinational'. By contrast, the UN has moved away from this simplistic view towards a distinction between 'multinational corporations' (MNCs) and 'transnational corporations' (TNCs). In their report,<sup>99</sup> the UN Group of Eminent Persons adopted the simple economist's definition of MNCs as 'enterprises' that own or control production or service facilities outside the country in which they are based. Such enterprises are not exclusively incorporated or private, as these terms also apply to 'cooperatives' or 'state-owned' entities.

However, during discussions of the report at the Fifty-Seventh Session of ECOSOC<sup>100</sup> in 1974, several representatives were of the opinion that the definition adopted in the US study, *Multinational Corporations in World Development* (while the term 'multinational' was still in use, in conformity with the earlier ECOSOC resolution), was too broad. In their view, it implies 'the term multinational, signifies that the activities of the corporation or enterprise involve more than one nation'. Wallace expressed that 'the definition needed to be sufficiently broad to cover all types of foreign direct investment activities, including those by state-owned companies'.<sup>101</sup>

In response to such opinions, for the purpose of the UN program on MNEs, the ECOSOC adopted the term 'transnational corporation'. Henceforth, the entities economists refer to as multinationals would be known as transnational in UN parlance.<sup>102</sup> Thus, the Group's report broadly defines multinational corporations as 'enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be cooperatives or state-owned entities'.<sup>103</sup>

---

<sup>99</sup> *ibid* 46.

<sup>100</sup> United Nations Economic and Social Council, UNorg, 'About Ecosoc' suppl. 2. E/5466 1974.

<sup>101</sup> Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State* (Martinus Nijhoff Publisher 2002) 111.

<sup>102</sup> Peter Mucklinski and Janet Dine, *Multinational Enterprises and the Law* (SOAS University of London 2007-8).

<sup>103</sup> Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* (Springer Verlag New York 1982) 111.

On this final point, some held that state-owned enterprises should be excluded, as not being geared primarily to profit making, and others concurred that the term 'transnational [in the sense of multinational] corporation' was applicable only to private enterprises.<sup>104</sup>

Peter Drucker, referred to by many as the world's leading managerial thinker, was one of the first to analyse the corporation as an institution in his groundbreaking work, *Concept of the Corporation*, published in 1946. Even back then, he thought it significant that all corporations have the same institutional order and purpose.<sup>105</sup>

In 1984, the ECOSOC<sup>106</sup> requested the preparation of a report for a specific agenda item for the Twelfth Session of the Commission on Transnational Corporations entitled '*Work related to the definition of transnational [multinational] corporations*'. This report defined such 'corporations' as '...enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of these entities, which operate under a system of decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others'.<sup>107</sup>

### **The Organisation for Economic Co-operation and Development (OECD) Guidelines on MNE personality**

In 1990, the final rendering of the OECD Guidelines draft Code was published. By that time, neither the definition nor the Code itself had received much international attention, nor was there evidence that the ultimate formulation of the definition has served as a basis for legal applications in any judicial or quasi-judicial forum. However, in 1996, the World Investment Report emphasised the

---

<sup>104</sup> Wallace, *Legal Control* (n 103) 111.

<sup>105</sup> Joel Bakan, *The Corporation* (Constable & Robinson Ltd, London 2004) 2.

<sup>106</sup> Commission on Transnational Corporations 1984 session 8.

<sup>107</sup> Muchlinski, *Multinational Enterprises* (n 96).

importance of definitions, 'whether of investment, investors or other key concepts... because they are not mere descriptions but form part of an instrument's normative substance'.<sup>108</sup>

By contrast, two decades prior to this publication, in 1976, the more politically and economically homogeneous group of states belonging to the OECD arrived<sup>109</sup> at an agreed definition of the MNE for the purposes of the OECD Guidelines on Multinational Enterprises. According to the Guidelines, the crucial characteristic of a MNE is: 'The ability of one company to control the activities of another company located in another country. Other factors are not decisive. Thus, the sharing of knowledge and resources among companies or other entities would not be enough, by itself, to indicate that such companies or entities constitute a MNE'.<sup>110</sup> This definition is broad enough to encompass both equity and non-equity based direct investment, irrespective of the legal form or ownership.

A year after the original OECD Guidelines were issued, the *Institut de Droit International*<sup>111</sup> adopted a resolution on multinational enterprises, which provides a legal definition of the MNE as 'Enterprises which consist of a decision-making centre located in one country and of operating centres, with or without legal personality, situated in one or more other Countries should, in law, be considered as multinational enterprises'.<sup>112</sup> There is no evidence, however, that this definition ever gained general acceptance as the authoritative legal definition of the MNE, as the question of the definition of transnational [multinational] corporations continued to be on the agenda of every annual session of the UN Commission on Transnational Corporations.

Since its first session in 1975, a definitive definition has been perpetually deferred, pending the outcome of the negotiations on the Code of Conduct, for which the definitions and scope of application were the major issues. Even in

---

<sup>108</sup> Wallace, *Legal Control* (n 103) 117.

<sup>109</sup> Barry E. Hawk, OECD Guidelines for Multinational Enterprises, 46 Fordham L. Rev. 241 (1977-1978)

<sup>110</sup> Muchlinski, *Multinational Enterprises* (n 96) 13.

<sup>111</sup> The Institut de Droit, (1977) 57 International Resolution adoptees par l'Institut a la session d'Oslo Annuaire Tomell 338-342,

<sup>112</sup> Wallace, *Legal Control* (n 103) 116.



subsequent Code initiatives, such as the 1992 World Bank Guidelines, the question of definition remained unresolved.

### **MNE definition according to the World Bank Guidelines**

The World Bank Guidelines, while specifying that they apply solely to *bona fide* investments, established and operating in full conformity with the laws of the host state, actually leave the terms ‘multinational enterprise’ and ‘foreign direct investment’ undefined. For the purposes of the World Bank Guidelines, this omission is irrelevant, since its sole addressees are the host governments.<sup>113</sup> However, governments organised on a national scale find it difficult to exert controls or sanctions against international firms, since competition between host nations for the benefits of foreign direct investment ensures that a restrictive policy toward MNEs will only succeed in driving out foreign investors to a more favourable climate.

In conclusion, the above definitions should be seen as no more than broad conceptual guidelines specifying the kinds of firms that are MNEs and those that are not. Much of the decision-making in this context depends on the purpose for the definition and on the available evidence of international business activities. If a code is to be binding, a legal or at least authoritative definition is clearly called for to clearly specify the entities to be covered.

### **The Legal Forms of Multinational Enterprise**

Constant variability of the MNE’s legal form poses a series of problems, particularly if such definitions rely in whole or in part on the criteria of size, or legal or organisational structure. The number of subsidiaries may increase or decrease from month to month, or joint ventures may be formed or dissolved and ‘mergers’ or takeovers may occur between different parent companies.

Moreover, very few enterprises share the same organisational form, partly because of the differences in the corporate laws of the home state governing the parent, and partly due to different strategies or operational requirements on the part of the corporate management itself. Since there are no specific rules of

---

<sup>113</sup> Buckley and Casson, *The Economic Theory of Multinational Enterprise* (n 97) 1.

international law governing the organisation of MNEs, their form seems to be subject to 'juridical improvisation'.

The number of possibilities for organisational variations within the MNE structure is further augmented as each module of the enterprise may adopt a number of legal organisational forms. This is governed by the municipal and commercial laws of the state of incorporation under which an MNE is instituted and regulated. For example, in England the MNE may exist in the form of a partnership, corporation (public or private), limited liability company, or joint-stock company; in France it may be a Société à responsabilité limitée, or Société par actions; in Germany one may find a gesellschaft mit beschränkte haftung (g.m.b.h.), Aktiengesellschaft (A.G.), Kommanditgesellschaft (K.G.), or offene Handelsgesellschaft (O.H.G.), to name a few.<sup>114</sup>

While acknowledging that not all forms are equally amenable to MNE affiliation, the purpose of this discussion is not to elaborate on the different municipal corporate forms, but to emphasise the numerous combinations affecting legal status of any given multinational enterprise. Nevertheless, among an almost infinite range of organisational possibilities, there are some major organisational forms worth discussing in more detail.

From a historical perspective, Coke<sup>115</sup> described the corporation as 'invisible, immortal, and rest(ing) only in intendment and consideration or the law', while Blackstone introduced another characterisation, referring to the corporation an 'artificial person'.<sup>116</sup> Coke and Blackstone,<sup>117</sup> however, asserted that a corporation could not commit an assault, a treason, a felony, or other crime, or serve as an executor or trustee, and could not appear in court without being presented by attorney.

These offenses were seen by both authors as personal and not applicable to an 'invisible' entity lacking a 'soul'.<sup>118</sup> According to these limitations, nineteen-

---

<sup>114</sup> *ibid* 13.

<sup>115</sup> Edward Coke, *Institutes of the Laws of England* 1628

<sup>116</sup> *Case of Sutton's Hospital*, 10 Coke 250a, 253, 303, 77 Eng. Rep. 960, 970-71 (1612).

<sup>117</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press Oxford 1765)

<sup>118</sup> *Ibid* Rep 960, 973 (1612).

century jurists debated whether corporations could be liable for torts or criminal offenses requiring proof of malice or intent. Finally, the courts discarded these restrictions of corporate identity. Consequently,<sup>119</sup> 'the extensive history of inconsistent utilisation of conflicting theories of corporate personality indicates that the theories are employed to support results, rather than as guiding principles to help reach them'. This is also true at the international corporation arena today.

The classification that had been used thus far divides MNE legal forms based on contract, equity based corporate groups, joint ventures, informal alliances, publicly owned MNEs, and supranational forms of international business. The first three categories are the most common forms of legal organisation open to privately owned and operated firms, whereas the fourth emerges from the observable tendency of MNEs to adopt business alliances that have no clear legal form, but may generate legal liabilities.

The fifth common form considers the distinct legal features of state-owned MNEs, and the last considers examples of existing forms of supranational business entities developed by regional organisations of states. It contrasts the publicly owned MNE with the so-called 'public international corporation'—a creature of the public sector and international treaty that may perform business functions similar to those carried out by MNEs.

From the above, it may be appropriate to offer an analysis of more complex legal structures, such as 'Supranational'<sup>120</sup> Forms of International Business enumerated by Peter Muchlinski,<sup>121</sup> or those enumerated by Robert Tindall,<sup>122</sup> which include 'linkages based on cross-shareholders and external non-legal co-ordination devices', 'jointly owned holding companies', 'jointly owned operating companies', and the like. However, the key issue concerning the real structure of the MNE is whether it can be ascertained by merely examining its legal form. Since the legal form of the entity varies according to the dictates of the different legal

---

<sup>119</sup> Philip I Blumberg, *The multinational Challenge to Corporate Law* (Oxford University Press, New York, NY 1993) 45.

<sup>120</sup> Albert Z Guttenberg, *The language of planning: essays on the origins and ends of American planning thought* (University of Illinois Press 1993).

<sup>121</sup> Muchlinski, *Multinational Enterprises* (n 96).

<sup>122</sup> Wallace, *Legal Control* (n 103).

systems, the actual organisation of any one unit as a branch, a subsidiary, or an associate may be of little consequence.

Moreover, the legal structure, essentially designed for cash flow and tax purposes in accordance with governmental regulations, is often not an accurate reflection of the true distribution of management and control functions. In fact, according to Wallace, 'some authorities on the organisation of MNE's have concluded that "legal structure" can be ignored, after all it is "beneficial" rather than "legal control" which counts....Similarly it is "effective control" over the "appointment of the majority of directors on the subsidiary's board" which counts, whatever the legal form through which that control is exercisable'.<sup>123</sup>

### **The modern state system and the MNE**

While, in theory, the absence of a central authority makes each state the final arbiter of whether it will abide by treaties and remain in an international organisation, the interdependent world economy of the last half of the twentieth century imposed serious constraints on state's legal manoeuvres.<sup>124</sup>

The primary difficulties affecting the MNEs, according to this section, involve those of jurisdictional conflict (under and overlap), extraterritoriality, and the conflict between territorially defined states. Correspondingly, the issues pertaining to jurisdiction, choice of laws and regulation, for example, remain unresolved. Hence, according to the proposed new system, MNEs shall remain an initial creation of national law. However, they shall be a subject<sup>125</sup> of international law and under its jurisdiction until its dissolution in the origin nation. Nevertheless, MNEs, in some cases, could be brought to trial in national tribunals under international law.

As mentioned before, over the last three decades, various attempts to control and regulate MNE activities had been made by governance and other international organisations. All of these efforts attempt to exert some degree of

---

<sup>123</sup> *ibid.*

<sup>124</sup> Alan M Rugman, *The Oxford Handbook of International Business* (Oxford University Press, New York (2008) 13.

<sup>125</sup> Text to n 82.

control over the MNEs through international action. However, it is vital to remember that here the emphasis is on control<sup>126</sup> and autonomy, rather than on sovereignty.

### **The deep economic integration and the Internationalisation of production**

In extant literature, the term 'global' is often used interchangeably with 'very international'.<sup>127</sup> As MNEs affect the modern interstate system in multiple ways, it is important to view their current international status.

Due to the increasing internationalisation of production, deep integration and mutual interdependence became a reality, requiring that MNEs coordinate international economic flows.<sup>128</sup> However, it is difficult, if not impossible, to disentangle the complex transnational production networks of MNEs that would allow a state to exert a significant degree of control over the system.

With the internationalisation of production, political-economic emphasis has shifted from trade to investment. From border controls to the domestic regulatory framework at large, the line between 'domestic' and 'international' became increasingly blurred, to the point where the distinction may no longer be meaningful. The main elements representing this tendency arose in the 'services sector', which has been characterised in recent years by the rapid internationalisation of companies that had lagged behind manufacturing companies in the 1970s and 1980s in terms of international presence.

Three major forces behind this trend are the desire of companies to gain access to local markets, the opening up of those markets to foreign investors through deregulation and privatisation processes (including in infrastructure industries), and the increasing tradability of many services.<sup>129</sup> In a recent survey,

---

<sup>126</sup> Stephen Bottomly, 'Taking Corporations Seriously: Some Considerations for Corporate 1990) 19 Federal Law Review 203.

<sup>127</sup> Fiona McMillan, 'Corporate Disclosure On-Line: An Appropriate Response to Globalization' (1998) 21 2 University of New South Wales Law Journal 55.)

<sup>128</sup> UNCoTa Development, *World Investments Prospects Survey 2007–2009* (New York and Geneva 2007).

<sup>129</sup> *ibid* 38.

around a third of responding companies in the services sector indicated that they anticipated an increase of over 30% in their FDI expenditures over the period 2006-2009.<sup>130</sup>

Since the 1980s, many non-state and public-private governance arrangements have emerged focusing on setting and implementing standards for global production in the areas of labour rights, human rights, and environmental issues. Key examples of this trend include firms and industry associations that adopt self-regulatory codes, NGOs that promote standards for voluntary adoption by firms, and multi-stakeholder organisations involving combinations of different business types.<sup>131</sup>

NGO and (limited) state participation promulgate and implement codes for member and non-member firms.<sup>132</sup> Since they promulgate voluntary norms, these institutions could be viewed as 'standards' bodies, more akin to the International Organisation for Standardisation (ISO) or Codex Alimentarius Commission than to traditional state 'regulatory' agencies. However, because of the substantive nature of their norms (which address social and environmental externalities) and the importance of monitoring and enforcement (due to the strategic structure of those externalities), these institutions can be viewed as essentially a form of transnational regulation. Despite this, they are no means a substitute for an international legal binding authority.

Keohane and Nye (1971) defined transnational relations as '...contacts, coalitions, and interactions across state boundaries not controlled by the central foreign policy organs of governments'.<sup>133</sup> Similarly, Diebert has characterised the post-modern world order as 'a place inhabited by de-territorialised communities, fragmented identities, transnational corporations, and cyber spatial flows of finance... a world that is a pastiche of multiple and overlapping authorities'.<sup>134</sup> As

---

<sup>130</sup> Mathias Koenig-Archibugi and Michael Zürn, *Non-State Actors in Global Environmental Governance: New Arrangements Beyond the State* (Palgrave Macmillan 2005) 66.

<sup>132</sup> Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, New Jersey 2009).

<sup>133</sup> Rugman, *The Oxford Handbook* 196.

<sup>134</sup> *ibid* 197.

such, the powerful status of the MNEs as leading influential entities continues to increase.

### **MNEs and Cyberspace**

From an institution-based perspective, the arrival of the Internet has sparked a new debate prompted by the question of whose rules of the game should e-commerce follow. Pundits argue that globalisation is undermining the power of national governments as markets, and MNEs, are migrating to cyberspace. Nevertheless, as electronic commerce grows rapidly in both the business-to-consumer and business-to-business spheres, there is little evidence that the modern nation-state system is retreating.<sup>135</sup>

While the scope of this study does not allow for a complete exploration of the impact of the information revolution on states and the state system, one can assume that the movement of markets and MNEs to cyberspace will have serious implications for a system based on geography and sovereign territoriality. If software, for example, is imported in the form of disks and manuals, it will be subject to such things as border controls and tariffs. However, if it is transmitted digitally or downloaded from the Internet, control becomes problematic and autonomy is directly constrained.<sup>136</sup>

If, for example, an Indian programmer located in New Delhi edits a program on a computer in New York, there is no question that economic value has been created. However, the question of whether the transaction took place in India or the United States remains. Which jurisdiction gets to tax it or control it? Does either government even know that this sort of transaction has taken place?

It is difficult to map physical space onto cyberspace where Net addresses are relational organisational constructs and often do not reflect physical location. Servers routinely shift clients from one 'location' to another to balance loads, as a buyer can log on to any server remotely. Following just three or four hypertext links removes any sense of physical location as one could be in Bangalore as well as

---

<sup>135</sup> Daniele Archibugi and Carlo Pietrobelli, 'The globalisation of technology and its implications for developing countries Windows of opportunity or further burden?' (2003) 70 *Technological Forecasting & Social Change* 861–83.

<sup>136</sup> Rugman, *The Oxford Handbook* (n 124).

Boston.<sup>137</sup> Geographic jurisdiction may be meaningless in cyberspace. Peng (2009) argues that the Internet is 'no more a borderless medium than the telephone, the telegraph, postal service, facsimile, or smoke signal (of the ancient times)'.<sup>138</sup>

An example of the current chaotic international economic legal system can be found in the late 1990s, when Yahoo! hosted third-party auctions, some of which sold Nazi memorabilia. Although perfectly legal and protected under the First Amendment of the Constitution in the United States, sales of Nazi items are illegal in France. Yahoo! was thus challenged in a French court.

During the process, Yahoo! removed Nazi materials from its French language portal to comply with the French law. However, in November 2000, the French court ruled that Yahoo! must prevent French computer users from accessing any Yahoo! site in any language on which such items were sold, or face a fine of 100,000 French Francs (US\$ 17.877) per day.<sup>139</sup>

Yahoo! responded by applying to a US court to declare that this decision could not be enforced in the United States because it violated the First Amendment and that American firms were not obliged to follow French rules outside France. The US court supported this argument. However, by early 2001, the Yahoo! executives changed their approach and decided to self-censor, removing all items that 'promote or glorify violence or hatred' from the company site.<sup>140</sup>

At the heart of this case is the controversy of whether France has the legal or ethical right to assert its law to order Yahoo!, which apparently only had a virtual presence in France, to change behaviour that was in full compliance with the US law. Some analysts see the French decision as dangerous because, taken to the extreme, it would imply that every jurisdiction on the planet regulates everything on the Internet. Others contend that cyberspace entries into foreign markets, just as physical businesses or retail premises do in the real world, must follow local

---

<sup>137</sup> *ibid.*

<sup>138</sup> Mike W Peng, *Global Strategy* (South-Western Cengage Learning, Mason 2009) 174.

<sup>139</sup> *Yahoo! Inc. v La Ligue Contre Le Racisme et L'Antisemitisme*. 144F. Supp. 2d 1168. 1171 (N.D. Cal 2001).

<sup>140</sup> *LICRA v Yahoo*, District Court N.D. California, San Jose 145 F. Supp. 2d 116829 Media L. Rep. 2008 (Cite as: 145 F. Supp 2d 1168).



rules.<sup>141</sup> In the absence of legal unification among nations under the "umbrella" of international commercial treaty, such clashes seem inevitable.

### **Networks and Alliances**

The rapid technological advances and increased reliance on technology are two of the primary drivers of a significant change in the mode of organisation of the world economy from hierarchical multinational firms to networked alliances. Network metaphors are used to describe the emerging world economy, where a transition is occurring from standardised mass production to flexible production, as well as that from vertically integrated, large-scale organisations to disaggregation of the value chain and horizontally networked economic units.<sup>142</sup>

A networked world economy entails a complex web of transactions, rather than a series of dyadic or triadic cooperative arrangements between firms. A large multinational firm may well be involved in tens, if not hundreds, of alliances linking various parts of its organisation with other companies. These webs of alliances are multilateral, rather than bilateral, akin to a polygamous, rather than a monogamous relationship.<sup>143</sup> Finally, networks and alliances may well directly affect state control.

As networks are diffuse, it is difficult, if not impossible, to locate the centre of the operation and discrete borders do not exist. Many alliances are not equity based, but rather constellations of companies tied together, often on a project basis. Hence, it is far from clear which, if any, government, represents the home country and whether any state can exert substantial regulatory control over these networks of firms. States are consequently increasingly enmeshed in a web of interdependence, where the costs of extrication are becoming prohibitive.<sup>144</sup>

Firms may be disaggregated to the point that the firm is nothing but a name attached to a large number of subcontractors, becoming a 'virtual' corporation.<sup>145</sup> In such arrangements, the degree of control or even knowledge of the firm's centre, much less the home country government over labour practices or environmental

---

<sup>141</sup> Peng (n 138) 176.

<sup>142</sup> European Commission Economic and Financial Affairs , Market functioning in Network Industries, ISSN 1725-3209 (2013).

<sup>143</sup> Rugman, *The Oxford Handbook* (n 124) 195.

<sup>144</sup> *ibid.*

<sup>145</sup> *ibid.*

standards of subcontractors in other countries is questionable. Again, the impact of these new forms of organisation is to disengage the market from the state (and its control) and to increase dependence of the state on the MNE for technology and technological development<sup>146</sup>

### **The Proposed Definition of MNE**

MNEs current definitions are not as such provided by international treaties and are not comprehensively and conclusively established under international law, despite their global operation. This thesis' research suggests a definition of MNEs as follows: A corporation which owns, controls and manages income generating assets and investments in more than one country . This definition is broad enough to encompass both equity and non-equity based direct investment, irrespective of the legal form or ownership.

The definition would also include state-owned enterprises, as they may have the same function and competence to generate assets as private or public MNEs. The ICSCDs' Establishing Treaty shall determine the definition of MNE or an international corporation. In addition, as an international organisation, the ICSCD courts will not have to deal with questions of jurisdiction concerning the precise nationality of a MNE, as all MNEs will be liable to its jurisdiction by definition.

Studying any aspect of corporate law immediately reveals the complexity<sup>147</sup> of its subject<sup>148</sup> as the problem of arriving at an agreed definition encompassing various business forms. If the purpose of the proposed new legal system is to create a unified international system under a common applicable law and an agreeable legal codex, there shall be no relevance to domestic law definition in international legal context. In case where domestic law and the Treaty defined corporation differently, the last shall prevail.

---

<sup>146</sup> *ibid.*

<sup>147</sup> David A. Ljalaye, *The extension of corporate personality in international law* (Oceana Publications Inc 1978).

<sup>148</sup> Ernst Freund, *The legal nature of corporations* (Lenox Hill Pub 1971)

The above-proposed definition shall be used as a model of MNE international personality throughout this research and be part of the international Codex<sup>149</sup>.

## 2.2 International Trade Treaties and their effect on MNE Operations

### Introduction

The four WTO agreements directly concerning international trade and investment, as well as the powerful NAFTA regional agreement, are all designed to enhance the global free market and minimise protectionist measures by domestic legislators.<sup>150</sup>

As a result, these agreements focus on prohibiting governmental restrictions, while practically excluding the permitted ones out of the discussion, thus leaving the sovereign state with numerous problematical issues to address. Broadly speaking, all of the agreements confine the latter to general obligations to take into account concerns such as national security, public health, the environment, and the stability of the financial system. In some cases, more specific permitted restrictions can be drawn by elimination such as identifying aspects excluded from the legal text, which thus implicitly might be legally allowed.

### The GATT, GATS, TRIMS, TRIPs and NAFTA: gaps and imitations

#### *The General Agreement on Tariffs and Trade (GATT)*

Dominik Eisenhut<sup>151</sup> points out the acute difference between two types of security clauses in international treaties, one in which governments have some space for self-judging to what *they* consider necessary for national security, and the other in which security is defined simply as ‘necessary’, thereby leaving much more room for *WTO tribunals* to determine the term. The GATT XXI Article, which deals with national security, falls under the former category, and hence has some

---

<sup>149</sup> Text to n 548.

<sup>150</sup> The Office of the United States Trade Representative (USTR) <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> accessed 25 July 2012.

<sup>151</sup> Dominik Eisenhut, *Archiv des Völkerrechts*, Bd. 48, H. 4, 2010, S. 431-466, ISSN: 0003-892X Standort: USB Köln(38)-FHM Ga 00252 (2010).

legal potential to empower governments in disputes with MNEs. However, as Matthew Schaefer argues, national security clauses are rarely used in WTO dispute settlement cases, and are thus mostly irrelevant.<sup>152</sup> From another angle, the GATT Article XX details the cases in which governments are entitled to exempt themselves from granting the MFN and national treatment to MNEs, and to undertake measures that restrict their activities.<sup>153</sup>

However, in practice, these reservations are exposed as weak, for they are extremely vague and general in comparison to the actual provisions of the agreement. The case of the US-Thailand tobacco dispute dating back to the late 1990s exemplifies this point. The United States petitioned the WTO in the claim that Thailand's imposed embargo on importation of cigarettes is inconsistent with the MFN and national treatment principles in the GATT. The Thai position was based on the health consequences of the market opening to cigarettes. The GATT panel eventually opted to adopt the more precise wording of the MFN and national treatment's articles on the vague obligation to secure public health, and ruled that the import ban was illegal.<sup>154</sup>

In a similar case (2009), Canada requested consultations with Korea under the umbrella of the WTO, alleging that Korea prohibited the importation of Canadian bovine meat and meat products. While the rational underlining the internal Korean measures is health concerns, Canada holds a strong position, referring directly to specific articles in the GATT agreement.<sup>155</sup> As in the Thai case, it is hard to find reasons for a WTO tribunal to adopt the general language or wording of the health concerns over the very specific obligations posed by the articles to which Canada referred. This point becomes even more acute when one takes into consideration the political imbalance inherent in both cases between

---

<sup>152</sup> Matthew Schaefer, 'Sovereignty, Influence, Realpolitik and the World Trade Organization' (2001) 25 HICLR 341, 367; Dominik Eisenhut, 'Sovereignty, National Security and International Treaty Law: The Standard of Review of International Courts and Tribunals with Regard to 'Security Exceptions' (2010) 48 AV 431, 434.

<sup>153</sup> General Agreement on Tariffs and Trade 1947 (Annexed to the General Agreement on Trade and Trade 1994), art XX (hereinafter GATT).

<sup>154</sup> Sombert Chantornvong and Duncan McCargo, 'Political Economy of Tobacco Control in Thailand' (2001) TC 48-49.

<sup>155</sup> Canada referred to Articles I:1, III:4 and XI:1 of the GATT 1994.

developing and developed countries, which favours the side of the United States and Canada, as well as the strong influence of MNEs on the WTO system.<sup>156</sup>

*The General Agreement on Trade in Services (GATS)*

By opening the growing service sector to the reign of international law, the GATS agreement imposes a new set of concerns onto the sovereignty of states and deepens the imbalance between them and the MNEs.<sup>157</sup> Thus, while allowing a wide range of privileges to foreign service suppliers, the GATS leave an extremely small space for governmental regulation.<sup>158</sup>

The first aspect of the agreement that enables some governmental control over trade in services are the GATT-like general exceptions in Article XIV, which specify the types of legitimate reasons for restrictions on trade. These include national security, public order and public morals, public health and environment, the prevention of fraudulent practices, and the protection of citizens' privacy and safety.<sup>159</sup> As Stephen Canner points out, the GATS does not include an absolute ban on performance requirements and thereby leaves room for governments to impose the unmentioned measures.<sup>160</sup> In addition, the GATS is structured as a 'hybrid' combination between general rules and a 'bottom-up' approach. As the agreement does not include a general national treatment obligation, different

---

<sup>156</sup> WTO Dispute Settlement: Dispute DS391, Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada, 13 November 2000. For more on the relationship between developing countries and the WTO dispute settlement, see Marc L. Busch, 'Developing Countries and GATT/WTO Dispute Settlement' (2003) QSBC 1.

<sup>157</sup> For more on this issue, see the radical criticism on the General Agreement on Trade in Services (hereinafter GATS) in Ralph Nader, *In Pursuit of Justice: Collected Writings 2000-2003* (Seven Stories Press 2004) 293.

<sup>158</sup> Scott Sinclair, *GATS: How the World Trade Organization's New 'Services' negotiations Threaten Democracy* (Social Development Publications 2000).

<sup>159</sup> GATS art XIV.

<sup>160</sup> Stephen J Canner, 'The Multilateral Agreement on Investment' (1998) 31 C Int'l LJ 657, 663.

sectors and sub-obligations are contingent upon country-specific exceptions.<sup>161</sup> This situation constitutes what Brewer frames as 'conditional MFN'.<sup>162</sup>

The Banana dispute involving the EU and the Caribbean Islands demonstrates exceptions to the MFN principle. In reality, this may lead, to a long debated dispute, involving powerful political pressure infused by MNE's influence. In this dispute, the EU persisted on keeping its laws and regulative measures favouring the importation of bananas from its former colonies in the Caribbean Islands. In response, the United States and several South American countries petitioned the WTO challenging these laws as inconsistent with the GATT.<sup>163</sup>

### *Agreement on Trade-Related Investment Measures (TRIMs)*

This agreement essentially constitutes an extension of the GATT, focusing specifically on trade-related investment issues. As such, the TRIMs restricts its interests to the pointing out of trade-related investment measures that are inconsistent with the GATT provisions. This is the reason why many scholars view the TRIMs as 'redundant', as well as 'weak' in protecting investors from protectionist policies.<sup>164</sup> To an extent, this criticism is right, for the agreement's prohibitions on governmental measures are confined to short 'Illustrative List' specifying types of performance requirements that violate GATT Article III and XI. Thus, the absence of an explicit definition of such measures enables governments to create 'counter-lists' aiming to protect the local economy and the interests of the citizenry by including decisive measures, such as equity requirements, technology

---

<sup>161</sup> Jurgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment' (2002) UPJIEL 713, 735. For more on the Issue of the 'top-down' approach in the GATS, see Ellen Gould, 'Financial Instability and the GATS Negotiations' (2008) 9 BP CCPAI 1, 8.

<sup>162</sup> Thomas L Brewer and Stephen Young, *The Multilateral Investment System and Multinational Enterprises* (2nd edn, Oxford University Press, 2001) 126.

<sup>163</sup> Simi and Atul (n 21).

<sup>164</sup> On the redundancy of the Agreement on the TRIMs, see Paul Civello, 'The TRIMs Agreement: A Failed Attempt at Investment Liberalization' (1999) 8 MJGT 97, 108. Some scholars argue that, due to the weakness of the MFN and national treatment principles in the TRIMs, governments are allowed to decide to favour domestic over foreign investment, and countries from which to accept investment. See, for example, John H Barton, Judith L Goldstein, Timothy E Josling and Richard H Steinberg, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (4th edn, Princeton University Press 2008) 146.

transfer requirements, remittance restrictions, licensing requirements, employment restrictions and local sourcing, acquisition requirements, and management participation requirements.

However, the 'Illustrative List' very clearly demonstrates the imbalance between the legal power given to MNEs on the one hand and to the governments on the other. Thus, while the permitted governmental measures are either extremely vague (such as the national security clauses in the GATT), thereby leaving much room for interpretation, the prohibited measures in the TRIMs are 'illustrations', backed by a powerful obligation to refrain from applying 'any TRIM' that is inconsistent with GATT 1994.<sup>165</sup> In this light, when governments create laws protecting local consumers according to a 'counter-list' to that of the TRIMs, they may find it hard to defend them in international tribunals.

In practice, the interplay between the two agreements acts in favour of developed nations seeking to open markets to their MNEs. For example, when India imposed certain measures to protect its automobile industry in 1998, it was immediately challenged by the EU, which filed a complaint to the WTO. The EU allegation rested on the simple argument that these measures were inconsistent with Article 2 of the TRIMs and Articles III and XI of the GATT, both of which are referred to in Article 2. Although some of the actions taken by India do not directly violate the 'Illustrative List', the WTO tribunal ruled in favour of the EU, using the TRIMs as an interpretive guide for the GATT, and stated, *inter alia*, that India had acted inconsistently with its obligations under Article III:4 of the GATT.<sup>166</sup>

### *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*

As Anu Bradford shows, the TRIPs is a classic example of how the influence of MNEs on international negotiations leads to an extremely liberal agreement.<sup>167</sup> Thus, the TRIPs constitutes a hazardous addition to the WTO legal system, for it is

---

<sup>165</sup> TRIMs art 2:1.

<sup>166</sup> WTO Dispute Settlement DS146, 'India – Measures Affecting the Automotive Sector' (2002).

<sup>167</sup> Anu Bradford, 'When the WTO Works, and How it Fails' (2010) 300 WP CPLLT 1, 26.

more dependent upon changing domestic laws, thereby posing more acutely the question of international (and MNE) influence on domestic legal policy.

The TRIPs permits governments to 'adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development'.<sup>168</sup> In addition, it allows measures that 'prevent the abuse of IPRs by rights-holders or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology'.<sup>169</sup>

Carlos Correa suggests that governments are able to develop policies protecting local consumers.<sup>170</sup> However, as in the cases of the GATT and the GATS, these permitted measures are strongly qualified by the obligation that they are 'consistent with the provisions of the agreement', thereby confining their already vague language to the more specified, and thus more binding, wording used in the provisions.

#### *The North American Free Trade Agreement (NAFTA)*

NAFTA is certainly the most 'problematic' agreement in the international arena, for it broadens the MNEs' and the investors' protection to such an extent that national concerns are left almost without any legal grounds. In addition to MFN status and national treatment, the agreement includes, *inter alia*, a range of 'top-down' restrictions on performance requirements and expropriation, thereby prohibiting, for example, measures designed to guarantee the employment of local employees by foreign companies. Under these liberal provisions, national interests are confined to exceptions to these provisions, or mere narrow qualifications. For example, in addition to a general GATT-like provision not to grant MFN status and national treatment under security or public health concerns, each of the three

---

<sup>168</sup> Agreement on TRIPs art 8:1.

<sup>169</sup> *ibid* art 8:2.

<sup>170</sup> Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (3rd edn, Zed Books 2002) 7.



members of the agreement has excluded some sectors from the scope of the agreement.<sup>171</sup>

In addition, some performance requirements are permitted under NAFTA. This category includes measures with recognised benefits, such as those related to environmental protection or research and development, and measures that condition the receipt of investment incentives on the location or expansion of production facilities, or employment and employee training. Moreover, the provisions on performance requirements do not apply to government procurement, export promotion, or foreign aid and activities.

The agreement also contains a reservation to the embargo on restrictions on profit and technology transfers, which allows governmental regulation in the event of a serious imbalance of payments. In addition, indirect expropriation is permitted for a public purpose and on a non-discriminatory basis when it occurs upon payment of prompt, adequate, and effective compensation at fair market value, as well as when it is in accordance with due process of law and general principles of international law.<sup>172</sup>

However, all of the above permitted measures are only marginal when considered in the context of the 'top-down' approach, the powerful MFN status, and national treatment. In most cases, the three members of the agreement are faced with much more complex challenges in comparison to the WTO members when they try to protect farmers, workers, consumers, or natural resources.

In the case of Mexico, the only developing country in the NAFTA, the problem is the most acute. For example, the policy of the Mexican government to redistribute agriculture lands to benefit the farmers and small industries was forced to a halt under the NAFTA national treatment article. As a result, American and Canadian MNEs are free to purchase land in Mexico while competing with much weaker local individuals and companies, which are provided almost no

---

<sup>171</sup> Donald S Macdonald, 'Chapter 11 of NAFTA: What are the Implications for sovereignty?' (1998) 24 C-USLJ 281, 287.

<sup>172</sup> NAFTA, art 1006.4; Canner (n 160) 49; Kurtz (n 161) 735; Wallace, *Legal Control* (n 103) 311.

protection.<sup>173</sup> A deeper observation into this problematic issue reveals that there is no real international regulator or tribunal that oversee or inspect such operations, covering the full process, ranging from the contractual stage up to complex disputes, such as the proposed international court for the MNEs-States dispute.<sup>174</sup>

### *The Diplomatic Dispute Settlement System*

As a complimentary to the imbalanced relationship between MNEs and states inherent in the language of the five agreements, the WTO poses additional, and very critical gap in the form of its dispute settlement system. This gap firstly arises from the situation that the system is in its essence a *diplomatic* mechanism, as opposed to a regular legal system.

The WTO dispute system is based on a state-to-state mechanism, in which governments can file claims against other members of the organisation. This mechanism, anchored in the Uruguay Dispute Settlement Understanding, offers arbitration through WTO special tribunals and other forms of arbitration (e.g., the International Centre for the Settlement of Investment Disputes). The losing government is expected to comply with the rulings of such tribunals, as it is otherwise expected to compensate the winning government.<sup>175</sup> However, there are no legal means to ensure that the compliance or compensation will actually take place.

### *The lack of enforceability*

---

<sup>173</sup> See Antonio Yunez-Naude, 'Lessons from NAFTA: The Case of Mexico's Agricultural Sector' With the collaboration of Fernando Barceinas Paredes .Final Report to the World Bank.(Revised version, December, 2002).

<sup>174</sup> See above, 'ICSD' , Chapter 5.

<sup>175</sup> Raymond Vernon, 'The World Trade Organization: A New Stage in International Trade and Development' (1995) 36 HILJ 329, 337; Judith Hippler Bello, 'The Dispute Settlement Understanding: Less is More' (1996) 90 ASIL 416; Brewer and Young (n 162) 123; Lancaster University Management School, 'Trade Dispute Settlement Mechanisms: The WTO Dispute Settlement Understanding in the Wake of the GATT' (2005) WP LU 1, 2; Chad P Brown, *Self-Enforcing Trade: Developing Countries and Dispute Settlement* (The Brookings Institution 2009) 45-62; JG Merrills, *International Dispute Settlement* (5th edn, Cambridge 2011) 215-18.

The lack of enforceability has resulted in political pressure becoming a well-established practice in the WTO dispute system<sup>176</sup>. Trade sanctions, cross-retaliation, and diplomatic pressure are effective ways to ensure compliance or compensation.<sup>177</sup> For example, in the Banana industry dispute, the EU used its political and economic power to influence the settlement in critical points; once it even managed to block the tribunal ruling, by pressuring the weaker countries involved in the case.<sup>178</sup>

This diplomatic character of the system clearly benefits MNEs because, while the sovereign state is held accountable for its actions, the former cannot be charged under the WTO dispute settlement, thus becoming 'invisible'. The state-to-state dispute settlement does not allow legal procedures involving any actor that is not a sovereign state, thereby preventing governments and citizens from directly holding MNEs accountable for damaging actions to the community or the environment. Thus, the dispute cases concerning all agreements of the WTO are related to violations of governments imposing either economic or legal restrictions on foreign trade and investment. Consequently, MNEs' problematic conduct is left out of the process. This invisibility stands in contrast to the concrete power MNEs enjoy in the international legal arena, as evident by the outcomes of the MNEs' lobbying in the WTO, which has often resulted in not only changing the language of agreements, but also in influencing rulings in disputes.<sup>179</sup>

In this environment, governments and citizens are left to seek refuge in local legal systems, which are increasingly becoming incapable of dealing with the complexity of MNEs that encompass diverse areas and nations. An example can be found in the case of a class action in the state of Iowa against Microsoft. The lawsuit initially sought a compensation valued at 330 million dollars and alleged

---

<sup>176</sup> Text to n 428 in ch 4.1,

<sup>177</sup> See Sinclair (n 158), 3; Glenn Rikowski, 'Transfiguration: Globalisation, the World Trade Organization and the National Faces of the GATS' (2002) *ISC* 1, 8; William H Lash, 'The Decline of the Nation State in International Trade and Investment' (1996-97) 18 *Cardozo Law Review* 1011.

<sup>178</sup> Simi and Atul, (n 21) 2.

<sup>179</sup> See David L Levy and Aseem Prakash, 'Bargains Old and New: Multinational Corporations in Global Governance' (2003) 5 *BP* 131; Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003-04) 19 *CJIL* 1.

that Microsoft was engaging in monopolistic and anticompetitive conduct that caused customers to pay more for software than they would have if there had been a competition. The case was eventually settled out of court. Under the terms of the settlement, Microsoft was forced to provide almost 200 million dollars in cash payments to consumers and in vouchers to volume licensees and Iowa state or local governmental entities.<sup>180</sup>

This direct, and rather successful, action against such a powerful MNE is, however, impossible under the WTO and NAFTA systems. Hence, this example helps to demonstrate once again how the few protections of national interests in the WTO agreements become irrelevant when put to the test in reality. While measures preventing monopolistic behaviour can be found in both the American legal system and in the WTO agreements,<sup>181</sup> the history of the WTO dispute settlement system shows that no similar cases have ever been brought before it. Moreover, the Microsoft case presents an important third party, i.e. the citizenry. This party, which its central place in the legal system and is taken for granted in democratic countries, is completely 'invisible' in the WTO system, whether as a legal actor or as a 'backstage influence'.

The NAFTA further deepens the imbalanced relationship described above. Chapter 11, which focusing on investment, describes an investor-to-government dispute settlement mechanism, alongside the diplomatic procedure of the state-to-state system. This system favours MNEs, because, in addition to them remaining 'invisible' as legal actors, they are able to sue governments *directly*, without the mediation of their home-countries, and to be compensated monetarily.<sup>182</sup>

The explosive combination between the option to sue a government directly and the extremely liberal language of the NAFTA was demonstrated in 1998, by the lawsuit of the American Ethyl Corporation against the Canadian government. Ethyl claimed that the a law banning importation of some types of gasoline into

---

<sup>180</sup> Microsoft-Iowa Class-Action Settlement website, <http://www.iowamicrosoftcase.com>; TechRights website, <http://techrights.org/comes-iowa-trial-exhibits>. accessed 30 April 2011.

<sup>181</sup> For example, GATS art VIII and IX.

<sup>182</sup> Canner (n 160) 657 665; MJ Rojas, 'A New Era: The Regulation of Investment in Mexico' (1993) 1 US-Mexico Law Journal 50.

Canada violated its rights as an investor under the agreement, and specifically constituted as indirect expropriation because it jeopardised the company's profit. Although the Ethyl interpretation of expropriation was clearly far-reaching, the case resulted in a reconciliation according to which Canada lifted the ban and paid the company 13 million dollars in compensation.<sup>183</sup> Thus, in addition the nullification of the ability to hold MNEs accountable and the 'invisibility' of the citizenry, the NAFTA offers MNEs the option to directly influence domestic laws.

### **Conclusions**

Both in the legal content of the WTO agreements and in their complimentary dispute settlement system, one can find a troubling imbalance between the positions of the sovereign state and the MNE. The five agreements, which together encompass a wide range of trade and investment issues, hold the state as the exclusive accountable party. On the other hand, the MNE remains an 'invisible' actor in this system, influencing international trade as well as the international legal system, while being 'untouchable' by the exact same system.

This weak language allows future radicalisation of the liberal language of the WTO agreements. If the imbalance between the vague language of the national and the precise language of those afforded to MNEs protections will stay intact, the prohibitions on performance requirements, for instance, might develop into an absolute ban, which will completely disable any governmental act to protect national resources, consumers or workers.

In addition, the diversity of these agreements points to the situation that international law is in a process of covering an increasing number of trade issues. When the language and dispute settlement system favour so bluntly MNEs over sovereign governments, it is self-evident that this process shall result in greater MNEs' involvement and control over different sectors. The shortcomings of the TRIPs and the GATS are especially important in this manner, for they involve the delicate issues of the drug and pharmaceutical industry (TRIMs) and governmental-oriented services, such as social services, medical insurance, and

---

<sup>183</sup> Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 IL 1033, 1046.

even education (GATS).<sup>184</sup> The extremely liberal agreement of the NAFTA already implements in the regional arena some of the aforementioned predictions. This will be further discussed in the next section, focusing on the case of a NAFTA-like agreement in the international level.

## 2.3 NAFTA, FTA, ASEAN and MERCOSUR

### Introduction

The following chapter explores the MNE-government relationships in four regional agreements, namely the Association of Southeast Asian Nations (ASEAN), Southern Common Market (MERCOSUR), North American Free Trade Agreement (NAFTA), and Free trade area (FTA), with an emphasis on the leeway these agreements provide for governmental action.

The first section examines the general and sector-specific exceptions to the non-discrimination principle, leading to the exceptions and qualifications in two specific important investment issues- expropriation and performance requirements.

Following the legal analysis, the second part of this chapter examines the extent to which these agreements are enforceable. Finally, in concluding this chapter, it will be suggested that the inherent problems of the four agreements result from an absence of a *unified, coherent, and comprehensive* international trade law system and the absence of single international tribunal with international recognition to rule in state-MNE disputes.

### Legal Issues

#### *General and Sector-Specific Exceptions*

All of the agreements surveyed here, with the exception of MERCOSUR, incorporate similar types of general safeguard measures regarding trade in goods, and all use exception lists that exclude certain sectors from the scope of the non-

---

<sup>184</sup> None of these issues are presented explicitly in any of the WTO agreements. However, they are all debated by scholars as trade aspects that could be penetrated by MNEs according to radical interpretations of the agreements. Further on the subject, see Susan L Robertson, Xavier Bonal and Roger Dale, *GATS and the Education Service Industry: The Politics of Scale and Global Reterritorialization* (University of Chicago Press 2002) 472.

discrimination principle. While these safeguards are designed to provide a leeway for governments protecting public interest against MNEs activities, in reality, as it can be seen in several case studies, their limited and vague language prevents them from being used efficiently in court.

**The FTA** does not allow any use of safeguards in the important cases of trade in services and investment. It does, however, offer a narrow 'emergency action' getaway for trade in goods. Thus, FTAs' Chapter 11, permits governments to impose certain measures, such as increasing duty rates, in cases of 'cause of serious injury to a domestic industry'.<sup>185</sup>

In addition, Chapter 12 of the FTA provides more specific exceptions to the non-discrimination principle in trade in goods, which can be achieved in two ways. First, the FTA incorporates the general exceptions of GATT, which essentially provide vague provisions to implement governmental measures in cases of concern for 'public morals', 'human, animal or plant life or health', 'national treasures', or 'exhaustible natural resources'.<sup>186</sup> The second way in which the FTA provides for specific exceptions is by enlisting certain sectors excluded from the non-discrimination principle, such as export of logs.<sup>187</sup>

**NAFTA** essentially repeats the FTA's problematic lack of general safeguards in the areas of services and investment, as well as the vague language of the GATT-like 'emergency action' in trade in goods.<sup>188</sup> NAFTA also details specific sectors that are not included in the non-discriminatory principle. Mexico, for example, excluded the supply of electricity as a public service and satellite communications; Canada, on its part, excluded the sectors of maritime matters and telecommunications transport networks.<sup>189</sup>

However, NAFTA does offer additional protective measures for its members in the heavily detailed investment section. In that respect, Chapter 11 of NAFTA explicitly states that a member country should not be deprived from the right to

---

<sup>185</sup> FTA art 1101.

<sup>186</sup> General Agreement on Tariffs and Trade art XX (1994, hereinafter GATT).

<sup>187</sup> FTA art 1203.

<sup>188</sup> NAFTA ch 11 and 12 on investment and trade in services, respectively. 'Emergency Action' in trade in goods appears in ch 8 of NAFTA.

<sup>189</sup> NAFTA Annexes III and IV on Mexico's and Canada's reservations, respectively.

adopt measures ensuring that investments are undertaken in an environmentally sensitive manner. In addition, the chapter also states that investments should not be encouraged by relaxing health, safety, or environmental measures. However, these provisions are vague and thereby insufficient for protecting environmental and health regulation from the extremely pro-investment spirit of Chapter 11.

Ferguson argues that, despite of these precautions, investors use Chapter 11 as a tool for protecting their investments at the expense of environmental regulation.<sup>190</sup> The case of *Methanex Corp v the United States* stresses this environmental reservation that was challenged by a Canadian mega-corporation—the world's largest methanol producer, controlling one quarter of the global methanol market.<sup>191</sup>

In this case, the California's authorities banned a harmful type of gasoline, which had leaked into ground water, by an environmental and public health emergency act. The corporation, which is the gasoline producer, was quick in filing a complaint to a NAFTA tribunal, alleging that California's regulation was both discriminatory and tantamount to an expropriation, since it prohibited the sales of the corporation's product in California.<sup>192</sup>

Although the tribunal eventually dismissed the corporation's far-fetched allegations, it did so mostly on the grounds of not finding any discriminatory action, rather than basing it on a comprehensive examination of the environmental and public health claims that were nonetheless mentioned. The *Methanex* tribunal, however, completely ignored Article 1114.<sup>193</sup> Thus, the *Methanex* case demonstrates the fragility of the safeguards provided by NAFTA, and similar findings will be shown for each of the four agreements reviewed in this chapter.

---

<sup>190</sup> NAFTA art 1114; Julia Ferguson, 'California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA' (2000) 11 Colorado Journal of International Environmental Law and Policy 499, 505. In addition, NAFTA Article 1603 conditions temporary entry of investors in maintaining 'public health and safety and national security'.

<sup>191</sup> [2005] 44 ILM 1345 TGM; Alan C Swan, 'NAFTA Chapter 11 - "Direct Effect" and Interpretive Method: Lessons from *Methanex v United States*' (2009) 64 University of Miami Law Review 21.

<sup>192</sup> Ferguson (n 190) 507; Swan (n 191) 21; Alberto R Salazar, 'NAFTA Chapter 11, Regulatory Expropriation and Domestic Counter-Advertising Law' (2010) 27 Arizona Journal of International and Comparative Law 31, 42.

<sup>193</sup> Swan (n 191) 72-73.



In **ASEAN**, trade in goods is treated less rigidly than in its North American counterparts. Article 6 of ASEAN, the agreement that relates to trade in goods, includes language similar to that of the NAFTA and FTA. However, as Kruger, Denner and Cronje elucidated, the language concerning the conditions for the invocation of a safeguard measure and the duration of its implementation is even less clear in the former than in the latter.<sup>194</sup> In addition, AFAS is structured according to a 'bottom-up' approach, where countries are bound only to the particular industries and specific commitments. Furthermore, in the more liberalised AFTA, one can find an allowance to suspend some of the obligations provisionally, in cases where an import surge causes damage to a domestic industry.<sup>195</sup>

In the area of investment, however, the ASEAN legal framework is much closer to the North American model. For instance, the ACIA (not in force), is structured according to a 'top-down' approach, including an expanded enumeration of transfers relating to a covered investment, and even guarantees compensation to investors in cases of strife due to armed conflict or a state of emergency. Therefore, this agreement does qualify investment provisions by the GATT Article XX general exceptions and thus constitutes a major leap towards radical liberalisation.<sup>196</sup>

---

<sup>194</sup> Paul Kruger, Willemien Denner and JB Cronje, 'Comparing Safeguard Measures in Regional and Bilateral Agreements' (2009) 22 ICTSD Programme on Agricultural Trade and Sustainable Development Research Paper 15-17, 32

<<http://ictsd.org/downloads/2009/07/safeguardweb.pdf>> accessed 26 June 2011.

<sup>195</sup> Siow Yue Chia, 'Accelerating ASEAN Trade and Investment Cooperation and Integration: Progress and Challenges' in Philippe Gugler and Julien Chaisse (eds), *Competitiveness of the ASEAN Countries: Corporate and Regulatory Drivers* (Edward Elgar Publishing 2010) 108, 114; UNITES STATES International Trade Commission, 'ASEAN: Regional Trends in Economic Integration, Export, Competitiveness, and Inbound Investment for Selected Industries' (2010) UNITES STATESITC Investigation Paper 2-18, 332-511

<<http://www.unitesstatesitc.gov/publications/332/pub4176.pdf>> accessed 26 June 2011

<sup>196</sup> Diane A Desierto, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter' (2011) 49 1 Columbia Journal of Transnational Law 37. See also Hew and others, 'AIA-Plus: Building on Free Trade Agreements (ASEAN and Five DPs- CER, China, India, Japan, Korea)' (2006) REPSF Research Project 04/010, 36-37. <<http://www.aseansec.org/aadcp/repsf/docs/04-010-Chapter2-InvestmentJurisprudence.pdf>> accessed 26 June 2011; Nagesh Kumar, 'Investment Provisions in Regional Trading Arrangements in Asia: Relevance, Emerging Trends, and Policy Implications' (2007) 46 Asia-Pacific Research and Training Network on Trade Working

**MERCOSUR** members are prohibited from imposing safeguard measures, for investment, trade in goods, or trade in services. However, the MERCOSUR framework uses exceptions much more frequently than NAFTA does. Bernier and Roy argue these exceptions allow governments considerable room for manoeuvre in the application of some measures. In trade in services, for instance, the important sectors of financial services, maritime transport, land transport, and the movement of natural persons are excluded from the scope of the MERCOSUR non-discrimination provisions.<sup>197</sup>

### *Expropriation*

Article 1110 of NAFTA, Article 1605 of FTA, Article VI of IGA, and Article 14 of ACIA, as well as MERCOSUR's Article 4 of the Protocol of Colonia, and Article 2 of the Protocol of Buenos Aires, contain more or less the same language concerning expropriation. All of those agreements prohibit any type of expropriation, with a vague exception under 'public purpose' or 'public utility' concerns, and on a non-discriminatory basis, accompanied by payment of compensation.<sup>198</sup>

These principles are standard principles of general international law, however, due to both the vagueness of the 'public purpose' reservation and the inherent ambiguity of the definition of expropriation. Consequently, this category becomes nothing more than a convenient supplementary tool in MNEs' allegations against governments.

*Cemex Asia Holdings Ltd v The Republic of Indonesia* may illustrate this issue. After the Mexico-based giant cement manufacturer bought 25 percent stake

---

Paper Series 18 <<http://www.unescap.org/tid/artnet/pub/wp4607.pdf>> accessed 26 June 2011; Chia (n 195) 122-23.

<sup>197</sup> Ivan Bernier and Martin Roy, 'NAFTA and MERCOSUR: Two Competing Models?' in Gordon Mace and Louis Bélanger (eds), *The Americas in Transition: The Contours of Regionalism* (Lynne Rienner Publishers 1999) 77-78; Sherry M Stephenson (ed.), *Services Trade in the Western Hemisphere: Liberalization, Integration, and Reform* (RR Donnelly and Sons 2000) 9, 161; Kruger. Denner and Cronje (n 194) 36; Won-Mog Choi, 'FTAs and Safeguard Norms: Their Variation and Compatibility' (2011) 6 *Asian Journal of WTO and International Health Law and Policy* 81, 89.

<sup>198</sup> The terminology of 'public purpose' is Unites States in *NAFTA* art 1110, and *FTA* art 1605. The terminology of 'public utility' is Unites States in *Protocol of Colonia* art 4, and in *Protocol of Buenos Aires* art 2. However, *IGA* art VI reads 'for public Unites States, or public purpose, or in the public interest'.

in an Indonesian state-owned cement production company, the MNE filed a claim against the government, alleging problems with management and subsidies. In support for its claims, Cemex invoked the liberal definition of expropriation in the IGA and used it in court. Although the role the expropriation allegation played in practice remains unknown, because the case was eventually settled on confidential terms, this case demonstrates how easily the meaning of this category can be manipulated.<sup>199</sup>

However, the real concern to state sovereignty lies in the condition that the surveyed agreements prohibit not only explicit, but also *indirect* expropriation. The latter is defined, for example, in the NAFTA, as any 'measure tantamount to nationalization or expropriation', in the *Protocol of Buenos Aires* as, 'any other measure of similar effect' to expropriation, and in IGA as, 'any measure equivalent thereto' to expropriation.<sup>200</sup>

It is precisely the cases to which these ambiguous and wide definitions apply that pose the most difficult challenges for governments disputing MNEs in courts. In the case of *Metalclad Corp v the United Mexican States*<sup>201</sup>, the problem grew to its extreme. A NAFTA tribunal was called to settle a dispute between an American corporation and Mexico over the future of a hazardous waste facility the investor was contracted to build and operate. Metalclad challenged the denial of the permit to build on the site, which, needless to say, was the result of fear of serious health and environmental perils. The company also challenged the last

---

<sup>199</sup> [2004] UNCTAD ARB/04/3 (ICSID); Timothy G Nelson, 'Investor-State Arbitration and Investment Treaty Protection - The South-East Asian Angle' (Resources Law Conference in South-East Asia, Kuala Lumpur, February 2009) 220  
<<https://www.skadden.com/content/Publications/Publications18690.pdf>> accessed 26 June 2011; 'Mexican firm, Cemex, reportedly settles ICSID case with Indonesia' (*INVEST-SD: International Institute for Sustainable Development Investment Law and Policy Weekly News Bulletin*, 10 January 2005) [http://www.iisd.org/itn/wp-content/uploads/2010/10/investment\\_investsd\\_jan10\\_2005.pdf](http://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_jan10_2005.pdf) accessed 26 June 2011; Bill Guerin, 'A Warning Etched in Cement in Indonesia' (*Asia Times*, 29 January 2005) <[http://www.atimes.com/atimes/Southeast\\_Asia/GA29Ae02.html](http://www.atimes.com/atimes/Southeast_Asia/GA29Ae02.html)> accessed 26 June 2011

<sup>200</sup> NAFTA art 1110; Protocol of Buenos Aires art 2; IGA art VI.

<sup>201</sup> Metalclad (n 18).

attempt of the local authorities to secure the public interest by declaring the landfill as a natural reserve and thus preventing the land from being used.<sup>202</sup>

In its ruling, the NAFTA tribunal determined that the denial of the permit was a measure of indirect expropriation, and that the declaration of the site as a natural reserve can be considered an act tantamount to expropriation. The tribunal awarded nearly seventeen million dollars in compensation for regulatory expropriation. On appeal, the Supreme Court of British Columbia upheld the tribunal's decision that the Mexican action was an indirect expropriation.<sup>203</sup>

Although the *Metalclad* dispute ruling is quite unique in its comprehensive interpretation of the expropriation definition of Article 1110,<sup>204</sup> it clearly demonstrates how the ambiguous language defining indirect expropriation in NAFTA, as well as FTA, ASEAN and MERCOSUR, can be used as grounds for radical rulings in favour of MNEs.

Salazar points out that the tribunal's interpretation of indirect expropriation as a regulative measure deprives the investor of, 'the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State'.<sup>205</sup> This significantly broadens the protection granted to an investor, from mere possession of a property to the use, and benefiting of, and even the expectations from, that property.

Salazar further argued that, under this kind of interpretation, numerous governmental regulative measures are susceptible to international legal scrutiny, and even possible nullification. It encourages MNEs to file claims against a wide-range of domestic policies, whereby all MNEs need to prove is that a regulation

---

<sup>202</sup> [2000] ARB(AF)/97/1 (ICSID); Michael Cornell Dypski, 'An Examination of Investor-State Dispute Resolution under the MERCOSUR and NAFTA Regimes' (2002) 8 Law and Business United States Review of the Americas 217, 232-33, in note 94; David A Gantz, 'The Evolution of FTA Investment provisions: From NAFTA to the UNITES STATES - Chile Free Trade Agreement' (2003) 19 American University International Law Review 679, 736; Salazar (n 192) 38.

<sup>203</sup> *ibid.*

<sup>204</sup> *ibid* Gantz 740.

<sup>205</sup> [2000] ARB(AF)/97/1 (ICSID), cited in Salazar (n 192) 38-9.

interferes with the use of their property, even without any actual taking of that property.<sup>206</sup>

Trakman added that, even under further moderate rulings of NAFTA tribunals, the definition of expropriation remains considerably unclear. Most of the tribunals hold that a measure constitutes as indirect expropriation when the governmental interference is 'substantial'. However, in this context, the term 'substantial' can be interpreted in both narrowly and broadly. The first respects the fundamental right of governments to regulate property rights; the latter holds investor's rights as more important.<sup>207</sup>

### *Performance Requirements*

Of the four agreements surveyed here, NAFTA and FTA contain the most comprehensive ban on performance requirements, each using a detailed list of explicitly prohibited measures. This list includes, for instance, domestic content requirements, where MNEs are not obliged to use local products, requirements resulting from import-export balancing where governments are not allowed to tie sales to foreign exchange earnings, and profit and technology transfer restrictions.<sup>208</sup>

In some cases, tribunals are called by MNEs to stretch this category to its limits in an attempt to promote their interests at the expense of state sovereignty. In *Pope and Talbot, Inc. v Government of Canada*, the softwood lumber company claimed that Canada's system of export permits and fees, as well as its allocation of quotas, violated, *inter alia*, Article 1106 of NAFTA, which addresses the issue of performance requirements.

The convoluted argument stated that, by requiring the company to export less softwood lumber than it otherwise would and by implementing a 'use it or lose

---

<sup>206</sup> *ibid.*

<sup>207</sup> Leon E Trakman, 'Foreign Direct Investment: Hazard or Opportunity?' (2009) 41 1 George Washington International Law Review 57.

<sup>208</sup> NAFTA art 1106; FTA art 1603; *ibid* 52. As Mary E Footer argues, NAFTA implements a much more holistic approach to trade and the regulation of foreign investment than ASEAN does. Mary E Footer, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 Michigan State University College of Law Journal of International Law 33, 38.

it' system of allocating quotas, Canada created a requirement to export up to a given level. The tribunal, acting responsibly, rejected this argument, and upheld the Canadian defence that Article 1106 must be interpreted narrowly. It concluded that, because these measures did not constitute verbatim 'requirements', Canada had not violated Article 1106.<sup>209</sup>

Both agreements offer a regulatory getaway, which is absent in MERCOSUR and ASEAN frameworks. However, this getaway is confined by qualifications that leave room only for a limited number of measures that are equitable and non-discriminatory, executed in good faith, and consistent with other provisions in each agreement.<sup>210</sup>

The ASEAN framework is moving towards a NAFTA-like treatment of performance requirements. For instance, the AICO national equity requirement was terminated in 2005, and Article 8 of the ACIA agreement is more similar to Article 1107 in NAFTA than to the IGA, in that it prohibits governments to require investors to appoint senior management from the host country while allowing them only to require that a majority of the board of directors be nationals of the host state.<sup>211</sup>

MERCOSUR refers to the category of performance requirements in a very broad fashion.<sup>212</sup> Thus, the Protocol of Colonia generally prohibits the parties to 'establish performance requirements as a condition to the establishment, the expansion or maintenance of investments that require or demand exporting performance'. However, it does, restrict specifically content requirements by

---

<sup>209</sup> Pope and Talbot, *Inc v Government of Canada* [2000] Interim Award, 23 Hastings International and Comparative Law Review 455 (ICSID) For more on this case, see the United States Department of State website, *Pope and Talbot, Inc. v Government of Canada* <<http://www.state.gov/s/l/c3747.htm>> accessed 26 June 2011.

<sup>210</sup> NAFTA art 1106; FTA art 1606.

<sup>211</sup> AICO art 3; ACIA art 8; NAFTA art 1107; Chia (n 195) 109; United States International Trade Commission, 'ASEAN: Regional Trends in Economic Integration, Export, Competitiveness, and Inbound Investment for Selected Industries' (2010) UNITES STATESITC Investigation Paper 332-511, 20 <<http://www.UnitesStatesitc.gov/publications/332/pub4176.pdf>> accessed 26 June 2011; Desierto (n 196) 36.

<sup>212</sup> Although, as Rachel Denae Thrasher and Kevin P Gallagher point out, the Protocol of Colonia incorporates the UNITES STATES model language for national treatment. Rachel Denae Thrasher and Kevin P Gallagher, '21<sup>st</sup> Century Trade Agreements: Implications for Development Sovereignty' (2010) 38 Denver Journal of International Law and Policy 313, 341-42.

stating, that it is prohibited to 'specify that certain goods or services are bought locally'.<sup>213</sup>

The vagueness of the performance requirement definition leaves its interpretation in the hands of the MERCOSUR tribunals. For instance, in a dispute between Argentina and Brazil concerning Brazil's application of restrictive measures to reciprocal trade with Argentina, the latter alleged that the Brazilian license requirements on imported lactate products constituted a breach on the agreement. Here, the tribunal was quite clear in its decision to prohibit any import license requirements, subject to some limited exceptions.<sup>214</sup>

### *The Question of Enforceability*

All the agreements reviewed above offer a state-to-state dispute settlement solution. However, this framework of solving trade and investment disputes is insufficient in that it leans almost solely upon political pressure.<sup>215</sup> However, ASEAN, MERCOSUR and NAFTA also offer an investor-to-state dispute settlement mechanism that is legally binding and enforceable. Although the NAFTA system is the only one seriously tested in reality, they all bring to light important questions concerning the imbalanced relationship between MNEs and sovereign states.

---

<sup>213</sup> Protocol of Colonia art 3.

<sup>214</sup> Welber Barral, 'The Brazilian Experience in Dispute Settlement' (2007) ECLAC Project Document GER/06/003 22  
<[http://www.eclac.org/comercio/publicaciones/xml/6/32116/The\\_Brazilian\\_Experience\\_in\\_Dispute\\_Settlement\\_LCW147.pdf](http://www.eclac.org/comercio/publicaciones/xml/6/32116/The_Brazilian_Experience_in_Dispute_Settlement_LCW147.pdf)> accessed 26 June 2011.

<sup>215</sup> On the ineffectiveness of the ASEAN dispute settlement mechanism, see Chia (n 195) 110 and Robert E Lurtz, 'Resolving Trade Disputes in Asia: An Essay about the Laws, Institutions, and Cultures' in Cristoph Antons (ed.), *Law and Development in East and Southeast Asia* (Routledge Curzon 2003) 340. On the same issue in MERCOSUR, see Gabriella Giovanna Lucarelli de Salvio and Jeanine Gama Sá Cabral, 'Considerations on the MERCOSUR Dispute Settlement Mechanism and the Impact of its Decisions in the WTO Dispute Resolution System' (2006) 4 CEBRI - Brazilian Center for International Relations 1. On FTA, see James R Cannon Jr, 'Binational Panel Dispute Settlement under Article 1904 of the UNITED STATES-Canada Free Trade Agreement: A Procedural Comparison with the UNITED STATES Court of International Trade' (1991) 22 *Law and Policy in International Business* 689, and Lawrence L Herman, 'Settlement of International Trade Disputes: Challenges to Sovereignty - A Canadian Perspective' (1998) 24 *Canada-United States Law Journal* 121, 122. On NAFTA, see Andrew Kayumi Rosa, 'Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution' (1994) 15 *Michigan Journal of International Law* 255.

The IGA, which was signed in 1987, does not include an explicit statement concerning investor-to-state disputes. Nonetheless, it clearly refers to disputes between a state and 'a national or company of any of the other Contracting Parties'<sup>216</sup>, as well as offering several settlement options at the discretion of the investor, including *ad hoc* tribunals under UNCITRAL rules. The ACIA further deepens the dispute settlement system, and provides for a more comprehensive and complex mechanism. In cases where agreement on the arbitrate body cannot be achieved, the IGA offers investors the decisive option to address directly the president of the International Court of Justice to make an appointment for the assembly of a tribunal. The *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* case first employed this method.<sup>217</sup>

The company brought the case to court by the company under the allegation that its brewery was taken over through the intervention of the Myanmar's military, in addition to some of its bank accounts being frozen. Those actions, as the company argued, violated IGA Article VI on expropriation.<sup>218</sup> Although Myanmar rejected the tribunal's jurisdiction in the case, it was forced to appear before it, in accordance with the decision of the president of the International Court of Justice, who was approached by the company. The principal objection of the government was that the IGA requires that an investment be specifically approved in writing for the purpose of the investment treaty, and that this approval was not given in the discussed case, because Myanmar was not a member of ASEAN at the time of signing the contract with the company.<sup>219</sup>

---

<sup>216</sup> IGA art X. Because ACIA has not yet entered into force, its enforceability has not been practically brought under a test. On ACIA in the matter, see Desierto (n 196) 37 and Jun Xiao, 'The ASEAN-China Investment Agreement: A Regionalization of Chinese New BITs' (2010) 9 Society of International Economic Law Working Paper 2010/09 14 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1629202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629202)> accessed 26 June 2011.

<sup>217</sup> [2003] ARB/01/1 (ICSID); Han-Wei Liu, 'A Missing Part in International Investment Law: The Effectiveness of Investment Protection Of Taiwan'S Bit'S Vis-À-Vis ASEAN States' (2009) 16 University of California Davis Journal of International Law and Policy 130, 167-68.

<sup>218</sup> Hew and others (n 196) 35.

<sup>219</sup> *ibid* 52-54. Interestingly enough, the AIA, which was signed in 1998, includes only a state-to-state dispute settlement clause. ); Liu(n 217) 167-68.



The company, on its part, turned to the AIA, arguing that under this agreement's broader definition of 'investor', its investment was protected. It further claimed that, although it does not include an investor-to-state dispute settlement option, the IGA's investor-to-state system could be used in their case as well. Although the tribunal upheld the government's objection and declined jurisdiction in the first arbitration award, the Myanmar case demonstrates how fragile and inconsistent the ASEAN investment framework is in practice, as its fragility and inconsistency can be used by MNEs to twist a government's arm.

This argument becomes clearer when one takes into account two of the other defence lines brought by the government of Myanmar against the company's allegations. Yaung Chi Oo presented itself as a Singapore-based company, and thereby entitled to enjoy investor's rights under ASEAN. However, as the government claimed, the owners were Myanmar nationals and ran the company from within the country. The argument was that, in IGA, the national identity of a company is determined by an 'effective management' requirement, and because Yaung Chi Oo was effectively managed from within Myanmar, it was not entitled to enjoy the regional agreements' benefits.<sup>220</sup>

The effective management requirement is important in limiting local companies' activities in that it withholds them from 'agreement shopping', whereby they can masquerade as a foreign entity to enjoy the protection of a liberal international trade agreement.<sup>221</sup>

The MERCOSUR offers investors similar arbitral options to those they can enjoy under ASEAN. Decisions under arbitration are deemed final, and the member state must execute the rulings.<sup>222</sup> However, as Dypski argues, the MERCOSUR investor-state dispute settlement system is rather simplistic and unsophisticated in the articulation of rules to cover specific situations. On the other hand, Leathley suggests that, because the Protocol of Colonia has not yet entered

---

<sup>220</sup> *ibid* 52-4.

<sup>221</sup> Hew and others (n 196); Gordon Smith, 'An Introduction to Investor-State Arbitrations' (2010) 13 *International Trade and Business Law Review* 3, 7.

<sup>222</sup> Dypski (n 202) 227-28; Christian Leathley, *International Dispute Resolution in Latin America: An Institutional Overview* (Kluwer Law International 2007) 162.

into force, this indicates governments recognize its potential power in terms of investor rights, including the dispute settlement mechanism. Leathley points out the numerous legal claims against Argentina in the beginning of the 2000s as an indicator of this potential.<sup>223</sup>

Under the pressure of local cotton textile producers, the Brazilian government brought one such complaint in 2000. Brazil complained about an Argentinean safeguard measure that imposed annual quotas on Brazilian-made cotton textiles. The arbitral body found that such a measure is not permissible under MERCOSUR rules, and gave the Argentinean government fifteen days to abrogate it.<sup>224</sup>

MERCOSUR suffers from the same problem ASEAN does regarding judicial jurisprudence and the applicable law. According to both the Buenos Aires and Colonia Protocols, the arbitrate body chosen should make its decision according to the Protocols, 'the rights of the Member State', 'the terms of private agreements related to the investment', and 'the principles of international law'. In other trade issues, the protocol of Olivos states that the applicable law shall be the different MERCOSUR agreements and protocols, as well as the 'principles and provisions of International Law'.<sup>225</sup> In other words, the MERCOSUR framework, in line with the other agreements reviewed here, is quite unclear about what constitutes an applicable law.

In 2007, a local court in Paraguay was called to rule precisely on the issue of a conflict found between the MERCOSUR language and that of the domestic law. In this case, a contractual dispute between Argentinean and Paraguayan companies prompted their two governments to petition the Court to issue an opinion on the applicability of the not yet enforced Buenos Aires Protocol, and on

---

<sup>223</sup> *ibid* 229-32; *ibid* Leathley 162. Leonardo Granato and Carlos Nahuel Oddone, 'Argentina facing international claims over foreign investments' (2006) Centro Argentino de Estudios Internacionales Programa Derecho Internacional Working Paper 6 <<http://caei.com.ar/es/programas/di/53.pdf> > accessed 26 June 2011.

<sup>224</sup> 'Aplicación de Medidas de Salvaguardia en Productos Textiles – Resolución [2000] 861/99 del ME (OSP); Emilio J Cardenas and Guillermo Tempesta, 'Arbitral Awards under MERCOSUR's Dispute Settlement Mechanism' (2001) 4 *Journal of International Economic Law* 337, 360-61; Barral (n 214) 22.

<sup>225</sup> Protocol of Buenos Aires art 2; Olivos Protocol art 34.

its jurisdiction over International Contracts, as opposed to domestic law. In what Barral terms a 'grandiose opinion', the court decided that MERCOSUR law should prevail over domestic regulations.<sup>226</sup> Although the FTA does not include an investor-to-state dispute settlement system, it does enable industries to petition their government to take legal action when another government has allegedly breached FTA provisions. As Hofgard shows, this option has been used more than once.<sup>227</sup>

In April 1989, the United States-based non-ferrous metal producers of copper, lead, and zinc petitioned the United States Trade Representative (USTR) to take action on Canadian federal and provincial subsidies for pollution control, smelter modernisation, and other measures for reducing emissions and improving workplace safety provided only to their Canadian counterparts.

The USTR considered the United States industries reasonably likely to face subsidised imports, and agreed to compile evidence related to such subsidies. Hofgard suggests that this is a classic example of how the FTA legal system allows parties to challenge another country's legitimate environmental protective measures.<sup>228</sup>

In another case, as a result of Canadian pork producers' complaints that the United States inspection system violated the FTA open border inspection harmonisation provisions, the United States government 'streamlined' its border stations, including stopping and inspecting each truck and conducting segregated sampling. The immediate consequence of this dispute was that longstanding United States health standards were reduced.<sup>229</sup>

The NAFTA investor-to-state dispute settlement system stands alone in that it has been consistently used by MNEs, as shown throughout this work. The

---

<sup>226</sup> See Barral (n 214) 24-5.

<sup>227</sup> Rebecca A Sanford, 'The Canada-United States Free Trade Agreement: Its Aspects, Highlights, and Probable Impact on Future Bilateral Trade and Trading Agreements' (1989) 7 Dickinson Journal of International Law 371, 375; Kurt C Hofgard, 'Is this Land Really our Land? Impacts of Free Trade Agreements on UNITED STATES Environmental Protection' (1993) 23 Environmental Law 635, 648-50.

<sup>228</sup> USTR Notice of Identification of Industries under the FTA 54 Fed Reg 29 214 (1989) *ibid* 648-49.

<sup>229</sup> *ibid* 649-50, 655.

NAFTA rules concerning the identity of the arbitral body are quite similar to those of the three other agreements surveyed here. However, the NAFTA stretches the investor-to-state, and the complimentary monetary compensation, to a radical point. Thus, Article 1116 provides the option for any person, in any investment dispute, to bring action directly against a government, whether there is a prior arbitration agreement or not.<sup>230</sup> Consequently, Yaung Chi Oo Company would not have had any problems bringing its allegations to court under NAFTA, as it had under IGA. This radical liberal approach may have serious ramifications, bearing in mind that, according to the agreement, an arbitration award is enforceable within the territory of the NAFTA member to the same extent as a court judgment.<sup>231</sup>

The ability to test the agreement's enforceability in practice brings to light yet another issue. In NAFTA, similar to the three other agreements surveyed here, the applicable law is international law.<sup>232</sup> However, Article 1136 explicitly states that 'an award made by a Tribunal shall have no binding force' on future disputes, i.e. it will have no precedential value.<sup>233</sup> This means not only that tribunals are expected to lean upon the new and evolving international trade and investment law respectively, they are also prevented from creating a stable and coherent arbitral system.

As Trakman points out, in cases of appeal in domestic courts, the lack of precedents becomes acute because domestic courts diverge greatly over the applicable standards of review, the permissible discretion accorded to Chapter 11 tribunals, and the reasons for modifying or nullifying Chapter 11 decisions. Trakman further argues that, in this diverse reality, investors are encouraged to 'forum shop' among the courts available in search of the most sympathetic

---

<sup>230</sup> Herman, (n 215) 123-33.

<sup>231</sup> *ibid* 123; Ferguson (n 190) 505.

<sup>232</sup> According to NAFTA art 1131, 'a Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.

<sup>233</sup> NAFTA art 1136; Adnan Kagalwalla, 'NAFTA Chapter 11 Tribunals and their Impact on Signatory States: A Parallel Judicial System and its Many Potential Dangers' (2008) 3 *Entrepreneurial Business Law Journal* 95, 105 .

tribunal.<sup>234</sup> A solution to this discrepancy may be found in the establishment of one international tribunal with international recognition to rule in state-MNE disputes.

Kagalwalla adds NAFTA tribunals can be capricious and arbitrary, and as a result meddle in domestic laws, damage the finality of domestic judicial awards, and potentially even harm the relations of two sovereign states. On the same note, Ferguson argues that the unpredictability of the system might prompt regulators to answer the threat of arbitration with soft regulation in the areas of health and the environment.<sup>235</sup>

In addition to the problem of jurisdiction and interpretation, it is important to bear in mind that all of the agreements discussed above offer legal remedy only to MNEs. Here, ASEAN offers a surprisingly unique solution. In contrast to NAFTA, Article X of IGA does not confine clearly the dispute to one brought only by an investor. Rather, the Article refers to 'any legal dispute' arising between 'any Contracting Party and a national or company of any of the other Contracting Parties'.<sup>236</sup> This vague language paves the way, at least theoretically, for claims brought by governments against MNEs.

Sornarajah argues that this potential option may help ensure that the regulatory function of the state will have the means of recourse to the same dispute-settlement mechanisms provided in the agreement in the event of the violation of its interests. He adds this is one of several aspects of more balanced treatment of investment in the ASEAN framework when compared to any other investment agreement.<sup>237</sup>

In 2008, Indonesia brought exactly such an action against a US-based giant mining corporation. The Indonesian government brought a case to an international arbitration panel, alleging that the MNE did not meet several of its contract obligations. The panel rejected Indonesia's request to terminate the contract. However, the tribunal agreed that the government had the right to select the buyer

---

<sup>234</sup> Trakman (n 207) 48.

<sup>235</sup> Ferguson (n 190) 505; Kagalwalla (n 233) 111-12.

<sup>236</sup> IGA art X.

<sup>237</sup> Muthucummaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010); Hew and others (n 196) 54. See also Desierto (n 196) 35.

of the government subsidiary company, and forced the company to sell some of its shares in its Indonesian subsidiary.<sup>238</sup>

## Conclusions

The above review of the four regional trade and investment agreements indicates the presence of legal disorder in MNEs- states disputes. As such, the law is presently extremely susceptible to manipulation by MNEs and other private interest groups. This disorder is a result of the absence of a *unified, coherent, and comprehensive* international trade law system and tribunal, evident in three aspects: first, in the ambiguity surrounding the applicable law; second, in the question of jurisprudence; and third, in the current problematic precedence tradition. In all of the agreements reviewed above, it is evident that the applicable law to be used by tribunals is quite unclear.

*Yaung Chi Oo* is a clear example of this problem for it demonstrates how easily MNEs can switch between agreements in their attempts to find a liberal clause that would serve their marginal specific purpose. This 'agreement shopping' is possible under the current incoherent legal framework in ASEAN, as well as in the other regional agreements, and it would be hard to eliminate its usage in the absence of a comprehensive legal framework.<sup>239</sup>

In addition, most of the agreements provide for a variety of arbitral solutions in the area of investment, ranging from *ad hoc* international tribunals to local courts. As shown by the different cases described above, the offered arbitration solutions contain acute problems, whether due to being capricious and varied in

---

<sup>238</sup> *Republic of Indonesia v Newmont* [2009] unreported *ad hoc* award under UNCITRAL Rules; 'Arbitration Scorecard: Contracts' (*Appleby*) <<http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202431683613>> accessed 26 June 2011; 'Q+A – Indonesia's Dispute with Newmont Unit over Share Sale' (*Intellasia News Online*, 17 August 2009) <<http://www.intellasia.net/news/articles/resources/111272054.shtml>> accessed 26 June 2011.

<sup>239</sup> *Yaung Chi Oo Corporation* tried to use agreements outside the ASEAN regional framework as well. In addition, as Hew points out, in this case, there was a usage of a certain clause in the Vienna Convention on the Law of Treaties that determines that two subsequent agreements on the same subject should be read together. Hew and others (n 196) 53-4.

the case of domestic courts, or temporary and inconsistent in the case of *ad hoc* judicial bodies.

Moreover, the reality of a wide-range of Treaties and local tribunals allow for Treaty and forum shopping' by MNEs. As Kagalwalla suggests, this 'parallel tribunal system' benefits MNEs, as it makes it easier for them to bypass regulations that are more stringently honoured by domestic courts.<sup>240</sup>

Additional challenge for international law today lies in the question of precedence, where on one hand, tribunals have no coherent legal tradition to base their rulings upon and, on the other hand, the existence of an inconsistent and unmonitored arsenal of precedents from all around the globe from which they can choose.

This incoherent body of precedence is directly related to the question of interpretation. That is, there is ambiguity in the language pertaining to important issues addressed by the agreements. It is clear that the interpretation of such issues leans heavily on precedents. This problem is most evident in the NAFTA tradition of interpreting indirect expropriation as 'substantial' taking. This tradition might be found risky in terms of sovereignty, for in a broad interpretation of a 'substantial' taking, a government can find itself accused of expropriation in the performance of perfectly standard regulation acts.

The problem is also evident in the case of the general language of the GATT-like exceptions. Here, tribunals tend to ignore these clauses in their rulings, thereby neutralising a potential important development of an interpretive tradition in the issues of public health and environment that would make them more relevant and usable in court.

The system should thus refrain from the hybrid fashion of the ASEAN and MERCOSUR frameworks concerning sector-specific exceptions, and choose either the NAFTA-style 'top-down' approach or the 'bottom-up' approach. It should also include an effective IGA-like state-to-investor dispute settlement option, which is lacking in all of the remaining agreements. In addition, it must incorporate novel

---

<sup>240</sup> Kagalwalla (n 233) 111. This problem becomes even more complicated in the case of appeals. Trakman (n 207) 48.

interpretations of indirect expropriation and performance requirements that take into account public interests. In other words, the language used should be clear and direct, as in the case of the performance requirements' definition in NAFTA, as well as balanced and reasonable, as MERCOSUR and ASEAN are in certain areas.



## CHAPTER THREE: THE LIMITATIONS OF TRADITIONAL LAW

### 3.1 *The UN Code of Conduct of Transitional Corporations - Legal Effects Since 1988*

#### Introduction

The intention behind the UN Code of Conduct is to govern the behaviour of business entities within society to enhance corporate responsibility and promote economic and political change.<sup>241</sup> The aim of the codes is to protect the economy of the host country from unilateral action by MNEs, which are influenced by economic and political factors of their home country.<sup>242</sup> However, the increasing involvement of multinational enterprises in the Third World is also a pathway for controversies, tensions, and disputes.

The tensions and the gaps may be magnified when MNEs are perceived by the developing world as serving the interests of 'foreigners', owing their steadfastness not only to another group within the same country but also to foreign nationals.<sup>243</sup> Some nations view MNEs not only as a threat to national sovereignty, but also as a vessel of division of benefits that impoverishes the developing countries.

Furthermore, MNEs are perceived as responsible for expanding disparities between nations as well as between economic classes, and are accused of destroying native cultural characteristics.<sup>244</sup> Precisely for these reasons, the UN Codes of Conduct were designed with the goal of assisting in addressing areas of controversy. Within the developing world, the focus has been on a possible conflict that may arise between foreign ownership rights in investment and industrial property. On the other hand, in the industrialised Western countries, the major

---

<sup>241</sup> Arghyrios A Fatouros, 'On the Implementation of International Codes of Conduct: Analysis of Future Experience' (1981) 30 *The American University Law Review* 941, 943-44; Ans Kolk, Rob van Tulder and Carlijn Welters, 'International Codes of Conduct Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?' (1999) 8(1) *Transnational Corporations* 143, 151.

<sup>242</sup> Hans W Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1, Kluwer 1980) 4.

<sup>243</sup> Seymour J Rubin, 'Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development' (1981) 10(4) *AM U J INT'L L & POL'Y* 1279-80.

<sup>244</sup> *ibid* 1281.

disputes have arisen between labour interests asserted by national trade unions and global management strategies of MNEs.<sup>245</sup>

The aim of this chapter is to examine the legal effects of the UN Codes of Conduct for MNEs. Hence, the first section will give an overview of the implementation of the codes in the current legal system. The next section shall examine the limitations of the codes, as well as discuss whether they can be legally enforceable. It will also explore the gaps between the Codes of Conduct and the existing conduction of the MNEs. Finally, this chapter will introduce several case studies regarding the assistance of the codes and guidelines in solving disputes between MNEs and employees, as well as non-governmental organisations and governments.

### **John Ruggie's Guiding Principles report**

Although, this chapter deals with the UN Codes of Conduct issues, it is worth mentioning John Ruggie's Guiding Principles report which the UN Human Rights Council officially endorsed, in June 2011. These principles set the framework for human rights implementing as to "Protect, Respect and Remedy" human rights in corporate conduction context.

The aim of the Guiding Principles is to establish a global standard for human rights issues influenced by corporate business conduction. The Ruggie's Framework rests on three pillars<sup>246</sup>. The first is the state duty to *protect* human rights through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to *respect* human rights. The third is the need for greater access to *remedy*, provided mostly by states, and by corporates.

However, since then, there were not many actions by companies in implementing the framework, despite the stated commitment to them. The rare

---

<sup>245</sup> Norbert Horn, 'Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making' in Norbert Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1, Kluwer 1980) 47.

<sup>246</sup> John Ruggie, 'Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Human Rights Council 17th Session Agenda item 2, 21st March 2011.

cases<sup>247</sup> related to this framework raise the issue of the enforceability of such voluntary guidance where there is no body to take 'ownership' once it is complete. As such, it tends to 'drift' and have little success in effecting genuine change.<sup>248</sup> This might be the reason of the EC announced in 2012 a system for developing guidance to support Ruggie's second pillar in association with the Institute for Human Rights and Business (IHRB)<sup>249</sup>. Similar to many other existing guidelines and codes of ethics, voluntary guidance with no enforceable power is doomed to remain ineffective as a real solution for state- corporate disputes.<sup>250</sup>

The John Ruggie's Guiding Principles might be implemented in the ICSCD in light of the Establishing Treaty, among other codes and guidelines.

### **Implementation of the Codes of Conduct**

Two approaches to the implementation of the Codes of Conduct place particular emphasis on the role of the legal form. In other words, there is an evident difference of opinion between the developing and the developed countries with respect to the legal form of the codes.<sup>251</sup>

From the first perspective, the developing countries and the international trade union movement are in favour of the approach, which stands for 'maximalist position'. This position favours a legally binding instrument, and advocates for internationally enforceable rules of conduct for MNEs.<sup>252</sup> According to their doctrine, a binding legal tool holds the following indisputable merits: (1) an international treaty would formally bind adopting states to give effect to the code

---

<sup>247</sup> See Stephen Foley 'Apple admits it has a human rights problem', The Independent 14th February 2012. <[www.independent.co.uk/news/world/asia/apple-admits-it-has-a-human-rights-problem-6898617.html](http://www.independent.co.uk/news/world/asia/apple-admits-it-has-a-human-rights-problem-6898617.html)> accessed 23 April 2014; Ethical performance, 'Foxconn factory first in Apple's supplier labour practices review', March 2012.

<sup>248</sup> Sabrina Basran, The Impact of Ruggie's Guiding Principles for Human Rights? CSR International <[www.csrinternational.org/the-impact-of-ruggies-guiding-principles-for-human-rights](http://www.csrinternational.org/the-impact-of-ruggies-guiding-principles-for-human-rights)> accessed 23 April 2014.

<sup>249</sup> Institute for human rights and business press release, 13<sup>th</sup> January 2012. <[www.ihrb.org/news/2012/new\\_project\\_to\\_develop\\_business\\_and\\_human\\_rights\\_guides\\_for\\_three\\_european\\_business\\_sectors.html](http://www.ihrb.org/news/2012/new_project_to_develop_business_and_human_rights_guides_for_three_european_business_sectors.html)> accessed 23 April 2014.

<sup>250</sup> *ibid.*

<sup>251</sup> Muchlinski, 'The Rise and Fall' (n 183) 660-62.

<sup>252</sup> Wallace, *Legal Control* (n 103) 300.

through good faith implementation and enforcement;<sup>253</sup> (2) a binding tool can generate a legal foundation for international administrative and judicial assistance in the application of the code; (3) domestic law could be influenced, directly, by the code provisions that will set forth duties of MNEs; and (4). adoption of a code would indicate that the adopting states are serious in their efforts to control MNEs.<sup>254</sup>

The second perspective implies that the developed countries and the international business community are advocates of the 'minimalist position', that is, the nonbinding approach that promotes the notion of voluntary, rather than legally enforceable guidelines.<sup>255</sup> Their point of view is that there are no gaps in international law; no void must be filled through the implementation of new international legal norms. Accordingly, MNEs are fully and extensively regulated by the states in which they operate.<sup>256</sup> The developed countries believe that the only possible and desirable code is one based on moral suasion. Therefore, the substances of such a code would reflect already established norms and acceptable practices of MNEs. Governments would not be asked or expected to assist in, or to ensure, the application of the code, because it will be in the businesses' self-interest and sense of civic responsibility to adopt and follow these codes.<sup>257</sup>

However, there are inherent problems and disadvantages in both positions, as neither the 'maximalist position' nor the 'minimalist position' is flawless. Thus, the faults prevent them from being implemented effectively.

The most difficult issue the legally binding position needs to deal with is the unwillingness of many states to formally bind themselves to specific provisions. Nevertheless, the fundamental error of this approach remains the belief that it can deliver legal certainty based on formal considerations that are, in fact, inadequate to guarantee such an outcome.<sup>258</sup>

---

<sup>253</sup> Fatouros (n 241) 949 .

<sup>254</sup> *ibid* 950.

<sup>255</sup> Wallace, *Legal Control* (n 103) 300.

Fatouros (n 241) 950.

<sup>257</sup> *ibid* 951.

<sup>258</sup> *ibid* 950.

Another concern lies in the core of legislation, where not all governments and corporations share the same aims and interests. The difference in economic policies and political ideologies requires understanding and attention. The lack of uniformity of interests and divergent levels of industrialisation and development between the different economic systems are an obvious obstacle to any legally binding, globally applicable international agreement.<sup>259</sup>

Moreover, the binding approach is witnessing objection not only from the developed countries, but also from the developing world as well. Some of the developing countries demonstrate fear of losing their flexibility in dealing with MNEs, as well as unwillingness to be bound by the increasing number of provisions that are imposing obligations upon host states.<sup>260</sup>

The assumptions behind the nonbinding approach are problematic as well. First, the practical ability of each state to regulate effectively the MNEs within its territory is hardly compatible with its formal jurisdiction over multinational enterprises. The second problem pertains to the economic power and the negotiating skills of MNEs. Multi-National Enterprises have a definite advantage in bargaining with small developing countries and can take advantage of the limited jurisdiction and differing laws of countries to evade effective regulation. In addition, from the legal perspective, as the international legal principles are not established, they cannot fully preclude the exercise of pressure by MNEs or their home governments.<sup>261</sup>

Hence, it seems as the two positions are confronted by two diametrically opposing dangers. On one side, there is a fear that a strong, specific, clear code with effective institutional machinery will be unacceptable by the developed countries. On the other side, if the code is vague and general, it will fail to have real effect and will lack provisions for effective implementation.<sup>262</sup> One can deduce that the two approaches actually suffer from similar problems and difficulties. The

---

<sup>259</sup> Wallace, *Legal Control* (n 103) 301.

<sup>260</sup> Fatouros (n 241) 950.

<sup>261</sup> Fatouros (n 241) 951.

<sup>262</sup> Arghyrios A Fatouros, 'The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1, Kluwer 1980) 123.

general dissimilarity between the various business and government interests, combined with the political, economic, ideological and cultural differences, is a significant obstacle to creating universally applicable international legal controls.<sup>263</sup>

Clearly, finding a solution is a practical necessity. Therefore, an intermediate stand, or a compromise. surfaced in a form of a 'zebra code' that contains some provisions adopted in binding form, and others adopted by means of nonbinding instrument. A zebra code is a code that can bridge the gap between the polar extremes by being accepted in its entirety as nonbinding yet remaining open to adoption by states wishing to bind themselves. This compromise is still speculative.<sup>264</sup>

The legal effectiveness of a code depends on a mixture of several important factors. One of them is the degree of specificity of the language used. A code written in broad terms sets few actual limits on the freedom of states or MNEs it seeks to regulate. This is in contrast to a specific, reasonably detailed set of guidelines that may significantly limit the available number of lawful options.<sup>265</sup> Codes may require or prohibit activity using mandatory language, permit activity via the use of permissive phrases, or may recommend activity by precatory or hortatory language.<sup>266</sup>

Another fundamental element for the effective application of a legal instrument is procedures and institutional machinery. Compliance likelihood is determined by the compliance mechanisms included in the codes and the extent to which the claims put forward are measurable. The more specific the codes are, the better they can be measured and monitored. Monitoring is expected to enhance codes' comprehensiveness and compliance likelihood.<sup>267</sup> For example, on the international level, the instrument may suggest modes of implementation that use existing international machinery. In the absence of proper machinery, the

---

<sup>263</sup> Wallace, *Legal Control* (n 103) 300.

<sup>264</sup> Fatouros (n 241) 950; Wallace, *Legal Control* (n 103) 300-1.

<sup>265</sup> *ibid* 955.

<sup>266</sup> *ibid* 956. See also Stem Niklasson, 'The OECD Guidelines for MNEs and the UN Draft Code of Conduct: Some Political Considerations' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1, Kluwer 1980) 144.

<sup>267</sup> Kolk, van Tulder and Welters (n 241) 153-54.

instrument can create a new one. Unanimity regarding the legal aspects of the codes of conduct is yet to be determined and the conflicts of interests between the various parties are yet to be resolved.

### **Limitations and Enforceability of the Codes**

It is important to clarify that the codes of conduct and the guidelines are voluntary and thus not legally enforceable.<sup>268</sup> Moreover, the nature of the documents is declaratory and the resolutions do not create law.<sup>269</sup> Baade argues the voluntary guidelines followed by companies could not lead to the creation of customary international law, as the guidelines do not purport to be, and are not accepted as, law by companies or by states'.<sup>270</sup>

Thus, the MNE guidelines and codes are deficient on two levels—international and domestic. They are neither entirely non-binding internationally nor entirely unenforceable domestically.<sup>271</sup> This gap is evident between national legislation and regulations, on one hand, and formal international treaties or conventions, on the other.<sup>272</sup> Customary international law imposes few, if any, obligations on entities other than states, while individuals and companies may have international law-derived rights, but not obligations, vis-à-vis states. Therefore, MNEs' compliance with codes and guidelines, whether voluntary or not, cannot in and of itself invoke customary international law.<sup>273</sup> Furthermore, even a non-binding instrument with vague and general language is unlikely to have a serious impact on MNEs behaviour.<sup>274</sup>

The legislative competence of the United Nations is restricted and its ability to enforce law is uncertain. Furthermore, nations assert their absolute sovereignty over all matters within their national realm and typically refuse to relinquish any measure of control to a single global authority. Therefore, international law is

---

<sup>268</sup> Baade (n 242) 8.

<sup>269</sup> Wallace, *Legal Control* (n 103) 306.

<sup>270</sup> Baade (n 242) 9.

<sup>271</sup> *ibid* 10.

<sup>272</sup> Timothy W Stanley, 'International Codes of Conduct for MNC's: A Sceptical View of the Process' (1981) 30 *The American University Law Review* 941, 976.

<sup>273</sup> Baade (n 242) 11.

<sup>274</sup> Fatouros (n 241) 123.

dependent upon the agreement of the world states.<sup>275</sup> The lack of central world authority only stresses the need for such authority in the form of a new economic international tribunal that would embrace international norms and various codes in light of its establishment treaty, which shall set a clear rules and regulation for MNEs' conduction.

### **The gaps between the codes and the current MNE conduct**

There is a substantial discrepancy between the willingness of governments and multinational enterprises to accept the codes and be committed to follow their guidance. At the ideological, moral, and ethical level, MNEs are aware of the importance of codes, as these reinforce human rights, fight to abolish child labour, and attempt to improve social welfare. However, as firms are oriented toward economic and financial gains while their main interest is profit maximisation, this profit orientation dictates the way they conduct business.

The environmental realm is an additional dominion in which MNEs, states<sup>276</sup>, and even religions<sup>277</sup> are committed to protect the natural environment. Corporations, such as Nike<sup>278</sup> and Apple<sup>279</sup> pledged to minimise their impact on the environment, and environmental issues became one of their main concerns. Today, firms pay more attention to air pollution, water quality, and recycling.

Actually, the conflict of interest between the social needs of the developing world and the economic interests of the MNEs is very hard to resolve. The firms focus primarily on financial gains, as, in an attempt to increase efficiency and productivity, they strive to maximise their profit to cost ratio. In contrast, the

---

<sup>275</sup> Stanley (n 272) 968, 978.

<sup>276</sup> Israel Ministry of Foreign Affairs, 'Bahrain Environmental Code of Conduct for Middle East' (Israel Ministry of Foreign Affairs 1994). <<http://www.mfa.gov.il/MFA/Peace%20process/Guide%20to%20the%20Peace%20process/Bahrain%20environment>> accessed 21 March 2011

<sup>277</sup> Geoffrey St Marie, 'The Hindu Environmental Code of Conduct' (eHOW 2010) <[http://www.ehow.com/facts\\_6781005\\_hindu-environmental-code-conduct.html](http://www.ehow.com/facts_6781005_hindu-environmental-code-conduct.html)> accessed 21 March 2011.

<sup>278</sup> 'The Ethical Environment' (The Open University UK) <<http://openlearn.open.ac.uk/mod/oucontent/view.php?id=397353&section=3.1>> accessed 21 March 2011.

<sup>279</sup> Apple, 'Apple and the Environment' (Apple Website 2011). <<http://www.apple.com/environment/>> accessed 21 March 2011.



developing world countries mostly perceive MNEs as financial saviours whose duty is to improve the livelihood and the standards of living of their countries.

The second type of gap stems from the nature and legal influence of the codes as they are paradoxical and controversial. They are a creature of the firm, yet are used to temper the power of the firm in relation to its dealing with its employees.<sup>280</sup> Examination of the codes and guidelines, as discussed below, indicates that they suffer from a few issues that harm their efficiency.

**Inconsistency** - The demands placed on MNEs by different international organisations are diverse. This inconsistency raises a dilemma pertaining to the codes regarded as authoritative. For example, in general, the ILO code is more detailed and, in some cases, calls for a higher standard than the OECD guidelines do. Even where the same subject matter is dealt with, the ILO tends to expressly refer to a greater number of elements. This is an important issue, as even small differences in wording between the codes can result in different obligations.<sup>281</sup>

**Failure to create international rules** - Although the codes rely heavily on national laws and practices, they do not establish an international system. The requirement for MNEs to obey national laws is an absolute duty, according to the codes. There is no exception made for national laws that breach the fundamental tenets of the codes themselves, or those of the other relevant international instruments. The case of national regimes that legitimise discrimination against women is a case in point here.<sup>282</sup>

**The myth of symmetrical interests** - The codes claim to construct balanced schemes that purport to deal even-handedly with MNEs and their employees. However, if it is accepted that an imbalance in economic, social, and political power of employers and employees exists, the symmetry of rights is spurious.<sup>283</sup>

---

<sup>280</sup> Jill Murray, 'Corporate Codes of Conduct and Labor Standards' (1998) Corporate Codes of Conduct, Paper 7, 20. <<http://digitalcommons.ilr.cornell.edu/codes/7>> accessed 19 March 2011 4,

<sup>281</sup> *ibid* 15.

<sup>282</sup> *ibid* 16.

<sup>283</sup> *ibid* 17.

**Double standards** - Some codes imply higher level of self-regulation than others do. This issue shall be argue in details on the following section. Gaps may even surface due to practical problems, such as distinctions between states, differing legal systems or rules, and even diverse terminology.

Another issue of concern is the ability of MNEs to bypass the codes. In line with the implementation of guidelines, firms pass laws, patents, and regulations that empty the code of its substance. For example, simultaneous with the development of codes regarding the transfer of technology, MNEs can register patents and protect copyrights to shield their acquired knowledge and prevent the requirement to transfer their technologies to Third World countries.<sup>284</sup>

An additional gap stems from the international structure of MNEs. The format of multinational enterprises enables them to take advantage of the limited jurisdiction and differing laws of countries in which they operate to evade effective regulation.<sup>285</sup> The most acute gap is the modest impact of codes issued by international organisations. There is an evident paucity of references to existing international standards and the codes remain rather broad. Consequently, they have rarely been taken seriously by member countries and are not deemed sufficiently adequate or binding.<sup>286</sup> In fact, the gap is only deepening as consumer groups, non-governmental organisations, and firms are drafting and formulating codes of their own. While the aim of international organisations is to design codes that guide or restrict firms' behaviour, the goal of MNEs and business support groups is to draw up codes that influence other actors or to anticipate or prevent mandatory regulation.<sup>287</sup>

A fundamental gap stems from the framework in which decisions are made. Even though experts affect the drafting phase, higher political bodies always take important decisions in the elaborate processes. This indicates that the technical specialist input remains secondary, leaving the political objectives as the dominant

---

<sup>284</sup> Gabriel M Wilner, 'Transfer of Technology: The UNCTAD Code of Conduct' in Norbert Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1, Kluwer 1980) 181-83.

<sup>285</sup> Fatouros (n 241) 951.

<sup>286</sup> Kolk, van Tulder and Welters (n 241) 173.

<sup>287</sup> *ibid* 143-44, 171.

influence.<sup>288</sup> Thus, the central function that the political bodies appropriate themselves overshadows the technical input and the experts' points of view. This, in turn, hinders the implementation of the codes and damages their effectiveness.

In summary, the gaps between the interests of the developed and the developing world, the gaps amongst the aims of international organisations and those of firms and corporations, and the differences and inconsistencies among the various guidelines, damage the influence and the ability of the codes to be acknowledged as a binding instrument.

### **Case Studies**

The following section presents a few case studies in which the codes and guidelines assisted in solving disputes and disagreements between MNEs and employees, as well as non-governmental organisations and governments. Unfortunately, as there is very little practical experience with the codes of conduct and guidelines, the case studies are scarce.

**The Badger case (1979)** – This case has been a meaningful precedent as for the first time the OECD guidelines were successfully used against MNE conduction. Badger International, a subsidiary of Raytheon, sought to close its Badger Belgium NV subsidiary, whose assets at the time were approximately \$2.9 million. Belgian law entitled Badger's employees to termination payments that would have amounted to about \$5 million. It was argued that Badger International's failure to provide funds to honour these payments was a violation of the guidelines. In this case, the Belgian government, relying on the guidelines, called for a payment, despite the fact that neither Belgian nor US law required Badger International to pay the severance allowances.<sup>289</sup> Due to international pressures, a negotiated settlement was favourable to the Belgian employees.<sup>290</sup>

---

<sup>288</sup> Jürgen Friedrich, 'Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' (2008) 9 11 German Law Journal 1539, 1545.

<sup>289</sup> Stanley (n 272) 100.

<sup>290</sup> Thomas R. Van Dervort, *International Law and Organization* (Sage Publication, Inc Thousand Oaks, California 1998) 222.

The significant question raised in the Badger case was whether parent corporations have a new form of liability, by virtue of the guidelines, for the financial affairs of a foreign subsidiary, whose own funds are insufficient to meet the labour severance and other requirements imposed by local law.<sup>291</sup>

The second case study that had a tremendous influence is **The Nestlé case** (the WHO/UNICEF code on baby food). In this case, infant formula was developed as a consumer product in response to changing lifestyles and increasing disposable income in the developed world. As birth rates in the developed world declined and markets expanded slowly, producers began to export and market their products in the Third World. The problem arose because producers gave little thought to the impact of their product in a new context. Unstable and insecure sanitary conditions, such as contaminated water and absence of facilities to sterilise and refrigerate, in addition to prevalent poverty and illiteracy, transformed a relatively safe product in the First World into a potentially hazardous substance in the Third World.<sup>292</sup>

As a result, the World Health Assembly adopted the Code of Marketing for Breast-Milk Substitutes. The non-binding code is a fairly specific and detailed guideline. It restricts the more aggressive forms of marketing and advertising, but does not limit the sale of infant formula.<sup>293</sup> The WHO/UNICEF code proved to be one of the most successful code efforts to date, despite its limited scope. Nestlé pledged to implement fully the Code of Marketing for Breast-Milk Substitutes whereby the corporation guaranteed to abide by a voluntary code of conduct introduced by an international organisation.<sup>294</sup> The third case study that had a significant effect is **The Hertz case**, which dealt with the transfer of staff across borders during a labour dispute.<sup>295</sup>

---

<sup>291</sup> *ibid.*

<sup>292</sup> Kathryn Sikkink, 'Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF code' (1986) 40 *International Organizations* 815, 820.

<sup>293</sup> *ibid* 822.

<sup>294</sup> *ibid* 815.

<sup>295</sup> Roger Blanpain, 'The OECD Guidelines and Labour Relations: Badger and Beyond' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1, Kluwer 1980) 147.

These case studies demonstrate the need that MNEs should be aware, through clear codes, of the ramification of their actions. Hence, they must acknowledge that their operations have tremendous effects upon the livelihood of their customers and employees, and, as a result, they must carry a great responsibility for their business conduct. The existence and deliberation of cases leads to far-reaching exchanges of views on the codes and guidelines that, in turn, results in their more profound understanding and clarifications, leading to amendment of the codes and a significant change in the follow-up procedures.<sup>296</sup> The cases mentioned above also emphasise that debates and actions within the international system have the potential to create new consciousness regarding problems, and to de-legitimise previously accepted practices.<sup>297</sup>

### 3.2 The OECD Guidelines for *Multinational Enterprises*

#### Introduction

The creation of globalised economy, the growing importance of non-OECD countries, and global climate changes that attract more investments from foreign MNEs all indicate the need for a broader scope of international cooperation.<sup>298</sup> This chapter focuses on the turning point for the international trade standards and one of the most substantial features symbolising the emergence of transnational regime-the OECD guidelines.

The starting point of the guidelines was that economic development could best be promoted not by a policy of total openness toward foreign capital but rather through regulation that would ensure that foreign investment was channelled into areas where it could contribute the most.<sup>299</sup> The objective of this chapter is to evaluate whether the OECD efficiently fulfils its promises through its guidelines in the increasingly transnational world.

---

<sup>296</sup> *ibid* 148.

<sup>297</sup> Sikkink (n 292) 823.

<sup>298</sup> OECD, 'About OECD' (OECD).

<[http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1,00.>](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.>) accessed 15 November 2010.

<sup>299</sup> *ibid* 3.

### **The climate in which the OECD guidelines were developed**

Many countries have reached the level of 'enhanced engagement', which is an intermediate stage between membership and non-membership.<sup>300</sup> Currently, the OECD is in 'extensive contact' with more than 70 non-member countries. Even the European Commission, which is a non-state actor, is informally considered a part of the organisation, due to its observer status and participation in the workings of the OECD. The OECD has relations with other international organisations and bodies, such as the International Monetary Fund, the World Bank, the International Labour Organisation, the Food and Agriculture Association, the International Atomic Energy Agency, and a host of UN bodies. Under the auspices of the Annual OECD Forum, the OECD has also established ties with informal actors such as the business community and numerous non-governmental organisations.<sup>301</sup>

Collaboration between different institutions has its advantages if the aim is to consolidate their principles into a single unified legal system, as proposed in this work. Cooperation between different bodies provides representation to diverse issues of interest and concern, such as financial problems, educational gaps, famine, and environmental issues. However, even within this scope, MNEs may still create conflicts of interests, disagreements, and dignity or prestige struggles.

As noted above, the integration of the values of economic growth, environmental stewardship, and the protection of the social realms has become increasingly important and thus necessitates functional codes outlining the way of proper conduct.<sup>302</sup> The OECD guidelines are voluntary instruments setting out standards and principles of behaviour that intend to improve the accountability of multinationals.<sup>303</sup> As they are non-binding instruments, developed outside of formal, state-centric processes of international rule making, they are decoupled

---

<sup>300</sup> *ibid.*

<sup>301</sup> OECD, 'Members and Partners' (OECD).

[http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761800\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html)  
accessed 15 November 2010.

<sup>302</sup> Hellen Keller, *Corporate Codes of Conduct and their Implementation: The Question of Legitimacy* (Yale University 2008) 34

<[http://www.yale.edu/macmillan/Hellen\\_Keller\\_Paper.pdf](http://www.yale.edu/macmillan/Hellen_Keller_Paper.pdf)> accessed 18 October 2011.

<sup>303</sup> *ibid.* 58.

from direct state authority and therefore lack the legitimacy offered by hard law.<sup>304</sup> Codes of conduct are commitments voluntarily made by corporations, associations, or other entities that put forth standards and principles for the conduct of business activities in the marketplace.<sup>305</sup> Their aim is to bridge the gap between private and public interests. However, in their function as arbiters of standards, codes represent social steering mechanisms and thus purportedly fulfil a governance function. Unlike most of the international public and private codes, the OECD guidelines assume a measure of political authority derived from the indirect endorsement of the governments of the respective international organisation's member states in the drafting process.<sup>306</sup>

Thus, similar to other codes of conduct, the OECD guidelines suffer from an 'identity crisis'. As a result, thirty years after the guidelines were first introduced, their nature and character is still debatable and uncertain. For instance, as mentioned before, the developing countries and the international trade union movement are in favour of the approach that stands for 'maximalist position'. This approach advocates a legally binding instrument and internationally enforceable rules of conduct for MNEs,<sup>307</sup> while the developed countries and the international business community are in favour of the 'minimalist position', which indicates the nonbinding approach that promotes the notion of voluntary, rather than legally enforceable guidelines.<sup>308</sup>

### **The MNEs and the OECD**

Obviously, the conduct of multinational enterprises has significantly progressed since the guidelines were first introduced in 1977. Some of these corporations in various fields, such as the sporting goods industry (Nike and

---

<sup>304</sup> *ibid* 32.

<sup>305</sup> OECD, 'Codes of Conduct: Expanded Review of their Contents' (2001) Working Papers on International Investment 6/2001, 3 <<http://www.oecd.org/dataoecd/57/24/1922656.pdf>> accessed 12 October 2011.

<sup>306</sup> Keller (n 302) 32.

<sup>307</sup> Wallace, *Legal Control* (n 103) 300.

<sup>308</sup> *ibid*.

Reebok),<sup>309</sup> clothing manufacturers (e.g., C&A, Levi Strauss and Gap),<sup>310</sup> the automobile industry,<sup>311</sup> and even global fisheries resources,<sup>312</sup> adopted and adhered to the guidelines supporting freedom of association, minimum wages, equal opportunities, and limited hours of work. Even countries that are not a part of the industrialised Western world, such as Vietnam, initiated fundamental principles with which Vietnamese enterprises recruiting workers for overseas employment should comply as well.<sup>313</sup>

The OECD committees contribute to the corporations' adherence to the guidelines. For example, in the case of *ECCHR, Sherpa and UGF v Cargill Cotton* regarding child labour in the Uzbek cotton trade, the UK NCP concluded that a number of concrete measures should be taken by Cargill Cotton to improve the human rights situation in Uzbekistan.<sup>314</sup>

However, even the National Contact Point (NCP) rarely implements a successful use of the framework provided by the OECD guidelines to solve real problems in the field. For example, in the case of *Thai and Filipino Labor Unions v Triumph International*, the Swiss NCP decided to close the case and did not even assess whether Triumph actions were in breach of the OECD guidelines.<sup>315</sup>

Host countries can also be reluctant to implement and monitor the guidelines as multinationals are a source of income for the developing world, providing revenues, technological progress, and regional development. In the globalised world, states are competing for scarce foreign direct investment and this prevents them from imposing overly far-reaching requirements on investors. The

---

<sup>309</sup> Kolk, van Tulder and Welters (n 241) 143, 156.

<sup>310</sup> Murray (n 280); Stanley (n 272); Jenkins, 'Corporate Codes of Conduct, Self-Regulation in a Global Economy' (Technology, Business and Society Program Paper 2, United Nations, April 2001) 9.

<sup>311</sup> *ibid* 5.

<sup>312</sup> Friedrich (n 288) 1539, 1545.

<sup>313</sup> VAMAS, Code of Conduct Applied to Vietnamese Enterprises Sending Workers for Overseas Employment (International Labour Organization 2010).

<sup>314</sup> OECD Watch, *ECCHR, Sherpa and UGF v Cargill Cotton* (OECD Watch 2011) <[http://oecdwatch.org/cases/Case\\_195](http://oecdwatch.org/cases/Case_195)> accessed 7 November 2011.

<sup>315</sup> *ibid*, *Thai and Filipino Labor Unions v Triumph International*.



fear that enterprises will relocate into more welcoming countries paralyses nations and forces them to compromise on their social and economic standards.<sup>316</sup>

Furthermore, corporations' adherence to the OECD guidelines is subject to growing criticism. There are critics that share the view that the guidelines are mere 'window-dressing', and thus argue that multinationals decided to adopt guidelines for one reason only - their motivation to escape or delay government regulation.<sup>317</sup> The scepticism raises some significant questions, such as whether commitment to guidelines really translates into concrete action and whether more responsible behaviour truly generates better social and environmental performance.<sup>318</sup> Even though the adoption of the guidelines stems from self-centred motives, the outcome is an improvement of the social and environmental conditions at a global level, as 42 governments adhering to the Guidelines<sup>319</sup> and member countries account for 85% of the world's foreign direct investment.<sup>320</sup>

### **The OECD gaps and limitations, inconsistency and the lack of uniformity**

In spite of the encouraging changes in the economic world and the considerable publicity surrounding the guidelines, their achievements, to date, have been relatively limited.<sup>321</sup> For instance, in a complaint filed in 2001 regarding evictions of subsistence farmers from the land of Mopani Copper Mines, a Canadian/Swiss owned mine located in Zambia, it seemed that the complaint was resolved to the satisfaction of all parties. However, in practice, contrary to the agreed resolution and according to the OECD guidelines, the eviction of

---

<sup>316</sup> Olivier De Schutter, 'Transnational Corporations and Human Rights: An Introduction' (2005) Global Law Working Paper 01/05 Symposium- 'Transnational Corporations and Human Rights' 9 <[www.law.nyu.edu/idcplg?IdcService=GET\\_FILE&dDocName=ECM](http://www.law.nyu.edu/idcplg?IdcService=GET_FILE&dDocName=ECM)> accessed 28 August 2011.

<sup>317</sup> Alain Lapointe and Corinne Gendron, *Corporate Code of Conduct: The Counter-Intuitive Effects of Self-Regulation* (Université du Québec à Montréal 2003) 2 <<http://www.crsdd.uqam.ca/Pages/docs/pdfArticles/LapointeGendroncodes.HTM>> accessed 18 October 2011.

<sup>318</sup> *ibid.*

<sup>319</sup> OECD, '2010 Update of the OECD Guidelines for Multinational Enterprises' <[http://www.oecd.org/document/33/0,3343,en\\_2649\\_34889\\_44086753\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/33/0,3343,en_2649_34889_44086753_1_1_1_1,00.html)>

<sup>320</sup> OECD, 'OECD Guidelines for Multinational Enterprises' (n 28).

<sup>321</sup> Keller (n 302) 54.

subsistence farmers from the mine land resumed in 2006 and still continues with devastating economic and social consequences for the individuals involved.<sup>322</sup> Thus, the new international legal system has to execute a follow-up with all resolutions to ensure that all agreed-upon measures to remedy a breach of the guidelines are actually implemented.<sup>323</sup>

In addition to the incoherency regarding the nature of the guidelines, their most substantial limitation is rooted in their core: in the OECD's unequivocal declaration. Thus, 'the voluntary guidelines followed by companies could not lead to the creation of customary international law, as the guidelines do not purport to be, and are not accepted as law by companies or by states'.<sup>324</sup>

The acute problem jeopardising the enforcement of the codes is the chaotic nature inherent in the international legal arena. Having no single authoritative organ or procedure for determining international interests dictates the characteristics of the global arena. The lack of a global parliament, government, or a compulsory jurisdiction that can supervise or enforce rules prevents the OECD guidelines from becoming influential and effective.<sup>325</sup>

Moreover, the OECD guidelines suffer from inconsistency and the lack of uniformity placed on MNEs by different international organisations. The codes differ considerably in terms of their content and level of detail. For instance, there are distinctive differences between the OECD guidelines and the ILO codes of conduct. In general, the ILO code is more specific and, in some cases, even calls for a higher standard than the OECD guidelines impose.

### **Double standards and the failure to establish an international rules**

Since some codes of conduct indicate a higher level of self-regulation than others do, the issue of double standards emerges. Obscurity is one of the significant problems that becloud the effectiveness of the codes, as, for example,

---

<sup>322</sup> The Umuchinshi Initiative, Can the OECD Guidelines Protect Human Rights on the Ground? A Case Study (University of Toronto 2008) 4.

<sup>323</sup> *ibid* 14.

<sup>324</sup> Baade (n 242) 9.

<sup>325</sup> Fatouros (n 241) 107-8; Stanley (n 272) 941, 980.

the ICC code, which bribery consists of 'rules' rather than principles or recommendations, as in the case of the OECD guidelines, and is presented in stricter language than the labour guidelines.<sup>326</sup>

The OECD guidelines also fail to create international rules, as the guidelines place a crucial reliance on national laws and practices. The requirement for MNEs to obey national laws is an absolute duty, according to the codes. There is no exception made for national laws that breach the fundamental tenets of the guidelines themselves, or those of the other relevant international instruments, as seen in the case of national regimes that allow legitimate discrimination against women.<sup>327</sup> Hence, the resolution that would eliminate the current gaps between the codes of the different organisations may lay the foundation of a unified body with diverse representation to the varied organisations. The maintenance of a single set of codes allowing expression to different domains, instead of numerous institutions with varied codes, would prevent inconsistencies, duplicity, and ambiguity.

### **The capability of multinationals to evade the guidelines**

The capability of multinationals to evade the guidelines is yet another source of concern. It is not uncommon for corporations to simultaneously implement guidelines, pass laws, patents, and regulations, thus removing any substance from the codes. It can be seen that, parallel to the progression of codes relating to the transfer of technology in the past, MNEs have protected copyrights and registered patents to shield their acquired knowledge and withhold the requirement to transfer their technologies to developing countries.<sup>328</sup>

### **Lack of guideline efficiency**

Another limitation pertains to efficiency issues. The effectiveness of the guidelines is plagued by the generalised presence of vague, low, and non-operational standards. Guidelines are often procedural, rather than substantive, limiting the corporate commitment to the adoption of management procedures to

---

<sup>326</sup> *ibid.*

<sup>327</sup> Stanley (n 272) 16.

<sup>328</sup> Wilner (n 284) 181-83.

deal with specific social or environmental issues without having to set any specific performance targets.<sup>329</sup>

Moreover, the weak impact of the guidelines could arise from the absence of formal implementation mechanisms. Flexibility of standards, lack of information, and confidentiality of reports are some of the most glaring deficiencies of the monitoring system. As long as corporations are free to self-select the guidelines they adhere to, the problems of legitimacy and effectiveness will persist.<sup>330</sup> Monitoring is crucial to ensure that codes do not simply remain rhetoric but translate into practice in relation to a company's operations.<sup>331</sup> In other words, provisions for the implementation of the guidelines and effective monitoring are necessary if they are to have any real influence. For a set of guidelines to be meaningful, it must have clear methods of implementation and means to guarantee compliance.<sup>332</sup> Despite the effort of the Committee on International Investment and Multinational Enterprises (CIME),<sup>333</sup> these activities are not satisfactory in coercing multinationals to adhere to the guidelines.

In summary, despite of the guidelines' promising features, they still suffer from various issues hindering their efficiency. The shortcomings are manifested through the toothless nature of the codes, their vague and ambiguous characteristics, lack of coercion and enforcement ability, and the fact that they do not cover most developing countries where MNEs operations are most problematic and international regulation is most needed.

## Conclusions

In spite of the criticism on OECD's nature and status highlighted in this chapter, one should not discount the contribution of the guidelines to the improvement of the legal international arena. The guidelines should not be

---

<sup>329</sup> Lapointe and Gendron (n 317).

<sup>330</sup> *ibid* 2-3.

<sup>331</sup> Keller (n 302) 55

<sup>332</sup> Jenkins (n 310) 25.

<sup>333</sup> OECD, 'Annual reports on the OECD Guidelines for Multinational Enterprises' 2010  
<[http://www.oecd.org/document/20/0,3343,en\\_2649\\_34889\\_39602772\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/20/0,3343,en_2649_34889_39602772_1_1_1_1,00.html)>  
accessed 22 December 2010.

conceived as hard law or rules; they need to be portrayed as an informal rule-setting phenomenon that can potentially provide meaningful contribution to transnational governance.<sup>334</sup>

The power of ICSCD shall be incorporated in the integration of different levels and logics of regulation. It will settle types of different logic - the voluntary and the mandatory - and be simultaneously private and public. That is, while proposed and designed by private actors, it will be framed and monitored by public authorities.<sup>335</sup>

The codes should not be seen as immutable but viewed as a tool to open up space for dialogue and learning. They will serve as a platform for political disputation rather than as a solution to the governance challenge posed by economic globalisation.<sup>336</sup> When the ICSCD is formed, these codes (or parts thereof) must be integrated in a new 'international codex' and gain legal binding statues in order to rule by them.

As the guidelines and codes of conduct are to play a substantial role as global regulation mechanisms, the ICSCD must establish a complex hybridisation whereby its assembled structure is carried by multiple actors, articulating public and private, national and international, and voluntary and compulsory sectors.<sup>337</sup>

The most crucial and important issue is 'not the code but the conduct'.<sup>338</sup> Although the substance of the guidelines is of grave importance, organisations must pay more attention to the enforcement mechanisms, follow-up procedures, and monitoring techniques, as they are the key to elevating the influence and effectiveness of the codes.

### **3.3 The Deficiencies in National Regulation of MNEs**

#### **Introduction**

---

<sup>334</sup> Keller (n 302) 36.

<sup>335</sup> Lapointe and Gendron (n 317) 4.

<sup>336</sup> Keller (n 302) 59.

<sup>337</sup> Lapointe and Gendron (n 317) 4.

<sup>338</sup> Keller (n 302) 61.

'The significant role in the world economy now played by MNEs leaves them not fully under the control of a single corporate office against whom national regulations can be applied'.<sup>339</sup> This UNCTC (1990) statement highlights the core issues explored in this chapter. While the preceding discussions focused on the current system, whereby international organisations attempt to control and regulate multinationals, this section deals with these issues on a state level and addresses the difficulties nations encounter when they come across MNEs.

Before elaborating on the different issues that states face in the attempt to regulate multinationals, it is important to note that the legal and political world is still organised around the concept of the nation-state. Nonetheless, MNEs' activities hold considerable sway over the nation state's policymaking process due to their disproportionately rapid growth in terms of economic and political might.<sup>340</sup>

MNEs' comprehensive geographic and economic expansion, and that they flow around the world, operating at an international level above the realm of governments,<sup>341</sup> has presented a broad range of difficulties for regulation and accountability. Multi-National Enterprises' dynamic economic and political power, in combination with nations' outmoded regulation system, generated a problematic regulatory task that makes the imposition of norms and regulations more complex. Corporations' uniquely powerful and influentially positioned within the international community give rise to contradictory actions and regulations.<sup>342</sup>

Even though the world economy may be global, the politics, regulation, law, and society are still largely national. To date, governance gaps exist as politics lags behind markets that extend beyond the reach of nation-states.<sup>343</sup> Global markets have grown rapidly without the parallel development of economic and social

---

<sup>339</sup> United Nations, *The New Code Environment* (Series A, No. 16, United Nations Centre on Transnational Corporations 1990) 22.

<sup>340</sup> Daniel Aguirre, 'Multinational Corporations and the Realization of Economic, Social Cultural Rights' (2004) 35 Cal W Int'l LJ 53, 54.

<sup>341</sup> World Development Movement, 'Developing Alternatives' (2000) World Development Movement Discussion Paper 3  
<[http://infotek.fph.ch/d/f/1530/1530\\_FRE.msword?public=FRE&t=.msword](http://infotek.fph.ch/d/f/1530/1530_FRE.msword?public=FRE&t=.msword)> accessed 8 August 2011.

<sup>342</sup> Aguirre (n 340) 54.

<sup>342</sup> World Development Movement, 'Developing Alternatives' (n 341) 54-5.

<sup>343</sup> Jurgen Habermas, *The Postnational Coalition: Political Essays* (MIT Press 2001).

institutions able to control their functions. Thus, the aim on this chapter is to highlight and discuss the problems the nation-states face because of the global transition towards a transnational order. These problems include the fragmentation of political authority, the diffusion of the boundary between the public and private spheres, and changes in the nature and meaning of geographic space.<sup>344</sup>

### **The problem of liberalisation and governments' misconception of foreign investment**

Liberalism raised the banner of privatisation, competition, and the reduction of state involvement in the economy. It strives to ensure that every aspect of society will be organised in a way that promotes the pursuit of corporate profit. This ideology promotes a situation in which governments are no longer expected to govern in the interests of their citizens, but rather serve the pursuit of free market economic growth.<sup>345</sup> A deficiency that stems from liberalism is a government's misconception of foreign investment. Governments overestimate the importance of foreign investment and are overly cautious not to incur the wrath of foreign investors. In a transnational system, multinationals are both governed and governors, both objects and subjects of international politics.<sup>346</sup> Companies use their leverage over home state regulation and over existing multilateral institutions to generate rules that eliminate the legal risks of their activities.<sup>347</sup>

In practice, multinationals operate where lacunas or gaps of the law exists, therefore no existing single unified forum is holding them accountable for inappropriate conduct as they function as actors in the international political system exercising private political authority. Currently, powerful MNEs are essentially regulating themselves, as evident in the case of biotechnology and GMO products.

---

<sup>344</sup> Stephen J Kobrin, 'Globalization, Transnational, Corporation and the Future of Global Governance', in Andreas G Scherer and Guido Palazzo (eds), *Handbook of Research on Global Corporate Citizenship* (Edward Elgar 2008) 3.

<sup>345</sup> Thomas F McInerney, 'Putting Regulation before Responsibility: The Limits of Voluntary Corporate Social Responsibility' (2005) 2(3) *Voices of Development Jurists* 5 17.

<sup>346</sup> Kobrin (n 344) 28.

<sup>347</sup> Frank J Garcia, 'The Moral Hazard Problem in Global Economic Regulation' (2008) paper 227 Boston College Law School Faculty Papers 3  
<<http://lawdigitalcommons.bc.edu/lfp/227>> accessed 10 August 2011.

The EU Parliament approved very important legislation on biotechnology and GMO products to foster promotion of these products in the European zone after multinational biotech companies successfully conducted their lobbying activities.

To achieve their target, these MNEs used their governments to threaten the EU members with trade war in the event that the EU members created difficulties to the import of GMO products from the United States. Thus, this case is a good example of how the voice of the majority of consumers is weakening, and the supremacy of governments is declining, while multinationals are getting bigger and stronger.<sup>348</sup>

Multinationals' ability to conduct their activities in a jurisdiction that offers them better conditions can affect the capacity of governments to hold them accountable for their social, environmental, and fiscal performance. Regulatory competition impairs the accountability relationship between governments and MNEs, since it induces the principle of relaxing its demands on the agent and abstaining from punishment, due to the fear that the agent will move to a different jurisdiction. As a result, the relationship is reversed, leaving governments accountable to multinationals, rather than vice versa.<sup>349</sup>

The consequence is that governments should delegate to an international commission the ability to monitor the activities of MNEs,<sup>350</sup> as the objective is to protect national interests and universal values from global practice. Because multinationals participate in the formulation and implementation of rules in policy areas that were previously the sole responsibility of states, they have the responsibility to comply with the standards. Moreover, if they fail to do so, they should be sanctioned.<sup>351</sup> The establishment of the ICSCD could potentially

---

<sup>348</sup> Dilek Demirbas, 'The EU Regulation on GMOs, Multinationals Biotechnology Companies and their Lobby Group, EuropaBio' (2003) 13 Eubios Journal of Asian and International Bioethics 11.

<sup>349</sup> Mathias Koenig-Archibugi, 'Transnational Corporations and Public Accountability' (2004) 39(2) Government and Opposition 234, 242.

<sup>350</sup> World Development Movement, 'Developing Alternatives' (n 341) 4; Kobrin (n 344) 10.

<sup>351</sup> World Development Movement, 'Developing Alternatives' (n 341) 4; Andreas G Scherer, Guido Palazzo and Dorothee Baumann, 'Global Rules and New Private Actors: Toward a New Role of the Transnational Corporation in Global Governance' (2006) 16(4) Business Ethics Quarterly 505, 506.



substantially reduce the power of multinationals, while creating more political space for states.<sup>352</sup>

### **Global scale conflicts**

In addition to the domestic policy problem discussed above, various conflicts on a global scale threaten to delay the process even more. Intergovernmental regulation of MNEs was hindered by conflicts of interest that have repeatedly emerged between states. Extensive international regulation on a global scale can only exist in a world in which principal issues pit the state against the enterprise, rather than state against state, with the enterprise only as a willing or unwilling intermediary.<sup>353</sup>

Multinationals and foreign investments are not governed by a coherent international regime, due mainly to the fundamental disagreement regarding the prime objective of such a regime. Some of the contentious issues are whether it should protect foreign investment from discriminatory policies of governments or it should curb the power of corporations for the sake of national economic sovereignty.<sup>354</sup>

Extraterritoriality issues encompass fundamental deficiency that threatens the ability of states to effectively regulate and govern corporations. Borders are 'transcended' rather than crossed; relations become increasingly 'supra-territorial' as distance, borders, and geographic space lose economic and political significance.<sup>355</sup>

The deficiency posed by market-led globalisation is that of externalities, whereas, in the past, regulation was the chief restraint on companies' tendencies to externalise costs. However, when the global market started to outstrip

---

<sup>352</sup> Mireille Delmas-Marty, 'Globalization and Multinational Corporations' (1 January 2008) 2 <[http://www.goodplanet.info/eng/Contenu/Points-de-vues/Globalization-and-multinational-corporations/\(theme\)/284](http://www.goodplanet.info/eng/Contenu/Points-de-vues/Globalization-and-multinational-corporations/(theme)/284)> accessed 18 August 2011.

<sup>353</sup> Robert O Keohane and Ooms Van Doorn, 'The Multinational Firm and International Regulation' (1975) 29(1) *International Organization* 169, 184.

<sup>354</sup> Robert Owen Keohane, 'Global Governance and Democratic Accountability' in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Cambridge Press 2003) 13-14.

<sup>355</sup> Jan A Scholte, 'Global Capitalism and the State' (1997) 73(3) *International Affairs* 427.

regulation, it created the conditions for increased externalisation by multinationals.<sup>356</sup> MNEs consist of international entities extending beyond national jurisdictions in terms of economic resources and decision-making responsibility.<sup>357</sup> They have transcended national legal systems and have ignored the feeble international regulations.<sup>358</sup>

MNEs elude national regulations because they operate in multiple jurisdictions.<sup>359</sup> They move from one jurisdiction to another with relative ease.<sup>360</sup>

The outcome of these standards reduction is the erosion of state sovereignty in the field of policymaking, which affects states' ability to determine development priorities and fulfil ESCR obligations<sup>361</sup>. In this context, extraterritorial jurisdiction refers to those fields in which one country will apply its laws to international transactions while recognising the potential conflicts and disagreements with foreign nations.

MNEs' actions may be lawful under foreign law, while raising the issue of 'judicial imperialism', as well as the 'clash of competing national laws' in a 'horizontal legal system'. For example, MNEs might exploit contradicting regulations by two governments, making their conduct unlawful under one law but lawful under the other.<sup>362</sup>

The following cases may demonstrate the difficulties that extraterritoriality invokes. In 1977, the United States adopted the Foreign Corrupt Practices Act,<sup>363</sup>

---

<sup>356</sup> Garcia (n 347) 2.

<sup>357</sup> Deltev F Vagts, 'The Multinational Enterprise: A New Challenge for Transnational Law' (1969) 83 Harv L Rev 739, 740-43.

<sup>358</sup> Aguirre (n 340) 54.

<sup>359</sup> World Development Movement, 'Developing Alternatives' (n 341) 55.

<sup>360</sup> Wallace, *Legal Control* (n 103) 11.

<sup>361</sup> Aguirre (n 340) 54.

<sup>362</sup> World Development Movement, 'Developing Alternatives' (n 341) 57.

<sup>363</sup> Michael K Addo, 'Human Rights and Transnational Corporations--an Introduction' in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999) 3-4.

<sup>364</sup> Stuart S Malawer, 'Extraterritoriality of U.S. Economic Legislation and U.S. Multinationals' (2011) <<http://www.global-trade-law.com/Extraterritoriality%20of%20U.S.%20Legislation%20to.ppt>> accessed 30 August 2011.

<sup>365</sup> 15 USC 78dd-1 and 78dd-2 (2001).

which applies to American corporations, citizens and residents, as well as foreign corporations that share trade in the US securities market.

The FCPA criminalises any offer, authorisation of payment, or payment of anything of value to certain foreign recipients, including foreign government officials.<sup>364</sup> The impact of this unilateral extraterritorial extension of US law on US MNEs has been controversial for several reasons. Most importantly, the FCPA was portrayed as cultural imperialism because payments considered commonplace in one culture may be deemed corrupt in another.<sup>365</sup> Thus, the US multinationals' view was that the act places them at a competitive disadvantage against corporations from other countries that lacked similar legislation.<sup>366</sup>

The notion that the international system is lacking functional equivalence of laws, in addition to the fundamental differences between the national legal systems, had limited the power of nations to control their multinationals. Consequently, national governments had realised that applying a law extraterritorially creates a competitive problem since it puts their multinationals at a competitive disadvantage.<sup>367</sup>

The second example pertains to Internet gambling, which is legal in several locations, such as Antigua, yet illegal in the United States. Despite this notion, the US government acted against offshore gambling operations, rather than penalising individual Americans who play electronic poker on the net. In response, Antigua brought the dispute to the WTO, accusing the United States of protectionism against international gambling corporations. In early 2007, the WTO ruled that the United States discriminated between domestic and foreign companies.<sup>368</sup>

---

<sup>364</sup> 15 USC 78dd-1(g), 78dd-2(i); 15 USC 78dd-1(a)(3), 78dd-2(a)(3)

<sup>365</sup> Steven R Salbu, 'Transnational Bribery: The Big Questions' (2001) 21 NW J Int'l L & Bus 435, 446, 454.

<sup>366</sup> Christopher Hall, 'The Foreign Corrupt Practices Act: A Competitive Disadvantage, but for How Long?' (1994) 2 Tul J Int'l & Comp L 289, 303.

<sup>367</sup> Reuven S Avi-Yonah, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization' (2002) University of Michigan Public Law and Legal Theory Research Paper 18

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=323224](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=323224)> accessed 28 August 2011.

<sup>368</sup> Daniel Pimott, 'WTO Rules Against US in Internet Gambling Case' *Financial Times* (London 2007).

In this case, it was unclear where the transaction actually took place, and it was difficult to determine where the offenders (for instance, the gambler and the website) are physically located. These cases raise questions of viability of the economic governance system in a world where location determinacy is violated. The indeterminacy of location and the increasing irrelevance of geographic proximity are components of a significant change that require reorganisation of world economy governance.<sup>369</sup>

When forced to attempt to regulate multinationals' economic activity individually, states face a collective action problem. Therefore, territorially based jurisdiction is inadequate and incapable of addressing many of the challenges of economic globalisation.<sup>370</sup> Hence, the ideal way to overcome this problem and bring some measure of regulation to international business arena is by creating a new legal system in the form of the ICSCD where MNEs shall be subject to its jurisdiction by a binding list.

The issues of extraterritoriality are also manifested in the realm of workforce mobility. Multinationals frequently move from one division to another and from country to country. Differing laws, regulations and compliance standards increase confusion further, as the rules change at every stop.<sup>371</sup> Since laws and standards governing corporate behaviour vary from one jurisdiction to another, they form part of the decisional criteria on where firms locate the type of business they conduct, and the relationships they establish.<sup>372</sup> Hence, multinationals are able to select from a broad array of regulatory frameworks and, in doing so, avoid 'punitive' government regulations by relocating to another country, or by forming short-term strategic alliances with other corporations more advantageously placed with regard to regulatory restrictions.<sup>373</sup> For instance, when, in October 2006, the EU imposed anti-dumping duties on leather shoes imported from China and Vietnam, Ask Yue

---

<sup>369</sup> Kobrin (n 344) 16-17.

<sup>370</sup> Garcia (n 347) 2.

<sup>371</sup> Husisian (n 16) 9.

<sup>372</sup> United Nations, *The Determinants of Foreign Direct Investment: A Survey of the Evidence* (United Nations Centre on Transnational Corporations 1992) E. 92 II. A. 2 ST/CTC/121.

<sup>373</sup> Alan R Hedley, 'Transnational Corporations and their Regulations: Issues and Strategies' (1999) 40 *International Journal of Comparative Sociology* 217.

Yuen, the world's largest contract shoe manufacturer, was quick to move its production to Indonesia.<sup>374</sup>

In this instance, the new system may create a legal ground where MNEs activities are legally monitored and regulated by an ICSCD commission. In the event that codes are declared universal, binding, and cover substantial economic area, monitoring institutions would be in a much stronger position than national bodies to demand full disclosure from MNEs. They would also be better situated to detect irregularities and enforce compliance.<sup>375</sup> The proposed ICSCD shall constitute a unified organisation that covers the gamut of regulations and prevents misunderstandings, duplicities, inconsistencies, and incoherencies.

### **The MNEs and the developing countries**

The previously discussed deficiencies elucidated problems faced by developing and developed countries alike. However, developing countries are characterised by unique features that affect their ability to regulate corporations effectively. The following section focuses on the special traits that distinguish between home and host countries with respect to the weakness of developing countries.

The main problem stems from the situation that many MNEs are powerful and more economically significant than the developing nations in which they operate. In some developing countries, state structures are weak and lack the ability or the means to ensure that their rules are followed. They have poor enforcement authorities that hinder vigorous litigation and sometimes suffer from corruption that distorts the state functions.<sup>376</sup>

Moreover, developing countries' inadequate means and lack of material and organisational resources for policy formulation and implementation prohibit them from regulating the firms efficiently. Furthermore, they are unable to act effectively

---

<sup>374</sup> *The Economist* (2007) 382(8511) 69.

<sup>375</sup> Hedley, (n 373) 228.

<sup>376</sup> McInerney (n 345) 30-31.

as agents of accountability between multinationals and citizens,<sup>377</sup> and are either unable or unwilling to hold multinationals accountable for inappropriate conduct.

### **The lack of enforcement mechanisms**

Another substantial problem that taints various national and international systems is the lack of uniform international enforcement mechanisms. International and national regulatory systems have historically lacked coherence as governments' commitment to them has been weak. Currently, there are limited means of binding enforcement mechanisms that can be evoked when companies are in violation of regulations. In addition, there is no equivocal indication to show how compliance will be monitored or verified. Moreover, host countries and MNEs have not yet shown the political will to endorse and enforce regulations and codes; they seem to respond only to the bottom line, as their focus is solely on profit maximisation and economic growth.<sup>378</sup>

The main problem of enforcement is that compliance is not taken seriously; a written program has minor effect if compliance is insufficiently supported, receives little visibility, or is implemented poorly. The aim is not just to have a compliance program, but to have an effective one.<sup>379</sup> The issue is not that firms necessarily evade regulatory initiatives, but rather that they may change their practices so frequently that regulations are often slow to catch up.<sup>380</sup> At the domestic level, the situation is even more complicated, as enforcement mechanisms are responsibility of different departments. In the US, for instance, enforcement is divided among OFAC, the departments of justice, commerce, and state, federal agencies, and even state banking authorities.<sup>381</sup> The lack of an integrated approach and the multiple opinions that accompany every decision leads to inconsistencies.

---

<sup>377</sup> Koenig-Archibugi (n 349) 244.

<sup>378</sup> Aguirre (n 340) 54.

<sup>378</sup> World Development Movement, 'Developing Alternatives' (n 341) 66.

<sup>379</sup> Husisian (n 16) 3.

<sup>380</sup> McInerney (n 345) 20.

<sup>381</sup> Husisian (n 16) 6.

The problem of enforcement is linked to the lack of international consensus on what should be included in binding rules or how such rules should be phrased and interpreted.<sup>382</sup> The new system must provide the answer to the issue of binding rules, deciding on the most efficient enforcement mechanism.

Therefore, the creation of global standards via the ICSCD can generate benefits for all parties. For businesses, multilateral cooperation reduces the transaction costs of economic exchange, thus increasing economic efficiency and coordination, which may help generate clear decision-making rules for any future changes in the regulations. For the states, cooperation will reduce social externalities generated by economic exchange.<sup>383</sup> Moreover, on one hand, the new legal system offers various incentives both to MNEs and states to accept the ICSCD Jurisdiction, and on the other hand, MNEs shall be forced to it, by definition.

Since the new tribunal needs to succeed where previous institutions had failed, its challenge is to implement a workable mix of various legal means, which shall be consistently enforceable. Moreover, at its initial stage of establishing a new international treaty, the tribunal should enable international dialogue among nations to achieve their support and collaboration.

### **MNEs before the US courts, Case study: The Problematic Usage of US Courts in Solving States - MNEs Disputes.**

#### *The Legal Framework*

This chapter explores the role that the US legal system plays in the international commercial dispute settlement arena. The first question concerns the premise upon which international disputes are brought before US courts. The next issue revolves around the ways in which establishment of ICSCD may solve the problems inherent in the US legal system.

---

<sup>382</sup> Göran Norén, *The Role of Business in Society* (Svenskt Näringsliv 2004) 18.

<sup>383</sup> Daniel.W, Drezner 'Who Rules? The Regulation of Globalization' (University of Chicago Press, August 2002) <<http://danieldrezner.com/research/whorules.pdf>> accessed 11 August 2011. 15/

The jurisdiction of federal and state US courts over international commercial disputes is governed primarily by two federal acts. The first, the *Foreign Sovereign Immunities Act* (FSIA), provides the rules for jurisdiction over sovereigns; the second, the *Alien Tort Statute* (ATS), is the legal basis for initiating proceedings against MNEs.<sup>384</sup>

The *Foreign Sovereign Immunities Act* provides the sole basis for obtaining jurisdiction over a foreign state in US courts, as it grants absolute immunity to foreign states from US courts' jurisdiction. However, Section 1605 provides for several exceptions to the sovereign immunity rule, essentially based on a waiver of the immunity privilege or based on commercial activity by the foreign state that influenced the United States. Due to their importance, the first sections of this chapter discuss the interpretation of these exceptions in the courts.<sup>385</sup>

The ATS, a provision in the 1789 Judiciary Act, provides jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US'.<sup>386</sup> This definition has been interpreted in the last decades to include MNEs and has since generated great controversy, leading to an on-going discussion inside courts and among scholars. The following sections elaborate on the key elements of this discussion, namely the legal status of MNEs and the question of extraterritoriality.

### *The Legal Status of MNEs*

Under the judiciary tradition governed by ATS, two questions arise concerning the liability of MNEs in cases brought before US courts. First, it has to

---

<sup>384</sup> The Alien Tort Statute (hereinafter ATS) [1789]; Foreign Sovereign Immunities Act (hereinafter FSIA) [1976] <[http://archive.usun.state.gov/hc\\_docs/hc\\_law\\_94\\_583.html](http://archive.usun.state.gov/hc_docs/hc_law_94_583.html)> accessed 10 October 2011; SI Strong, 'Enforcement of Arbitral Awards against Foreign States or State Agencies' (2006) 26 *Northwestern Journal of International Law and Business* 335

<sup>385</sup> Gary B Born, *International Civil Litigation in United States Courts* (3rd edn, Kluwer Law International 1996), 58-60.

<sup>386</sup> Chimène I Keitner, 'Kiobel v Royal Dutch Petroleum: Another Round in the Fight over Corporate Liability under the Alien Tort Statute' (2010) 14 *The American Society of International Law Insight* 1.



be shown that an MNE assisted a government in international tort actions. Second, it has to be proved that the defendant is a person liable before the court.<sup>387</sup>

Suits brought before US courts against MNEs usually involve human rights violations or environmental damages allegations by private persons or organisations. Since only a state actor can generally violate international law, the ATS typically requires a proof of state action where courts are asking the plaintiff to prove whether the MNE was implicitly involved in a state actor's tort.<sup>388</sup>

In a case brought before the US Court of Appeals for the Second Circuit against Coca-Cola, a small sized company owned by a Jewish family alleged that its commercial holdings in Egypt were wrongfully seized, and were subsequently sold to the US-based MNE. The court dismissed the claim, under the argument that the MNE had no information about the family-owned company ownership rights before it acquired its present Egyptian buildings.<sup>389</sup>

In another case, brought by the Presbyterian Church of Sudan against a Canadian-based MNE, the plaintiff alleged that the company had aided the Sudanese government in massacring its own citizens by providing airstrips to service bombers and helicopters used by the government. The court found that the activities alleged could not be viewed as the type of substantial assistance that could constitute an aiding and abetting claim to the government, because airstrips

---

<sup>387</sup> Mary Mullally, 'Alien Tort Statute' (2005) 1 In-House Perspective 8-10; Douglas M Branson, 'Holding Multinational Corporations Accountable? Achilles Heels in Alien Tort Claims Act Litigation' (2010) 30 University of Pittsburgh Legal Studies Research Paper 1, 16

<[https://samba.huji.ac.il/+CSCO+0h756767633A2F2F636E6372656662E666665612E70627A++/sol3/papers.cfm?abstract\\_id=1671620](https://samba.huji.ac.il/+CSCO+0h756767633A2F2F636E6372656662E666665612E70627A++/sol3/papers.cfm?abstract_id=1671620)> accessed 10 October 2011.

<sup>388</sup> Branson (n 387) 10-13; 'Supreme Court, SDNY Issue Alien Tort Statute Decisions with Important Implications For Multinational Corporations' (Baker Botts LLP, 30 June 2010) 2 <[http://www.bakerbotts.com/file\\_upload/2010JulLitSupremeCourtRefusesToDecideCaseAdressingCorporateLiability.htm](http://www.bakerbotts.com/file_upload/2010JulLitSupremeCourtRefusesToDecideCaseAdressingCorporateLiability.htm)> accessed 10 October 2011; Anthony J Bellia and Bradford R Clark, 'Alien Tort Statute and the Law of Nations' (2011) 78 University of Chicago Law Review 445, 539-44.

<sup>389</sup> *Bigio v Coca-Cola Company* [2006] 448 F3d 176 (US Second Cir) <<http://openjurist.org/448/f3d/176/bigio-v-coca-cola-company-05-2426-cv>> accessed 10 October 2011.

are to be considered, according to the court, natural resource for business development.<sup>390</sup>

With respect to the question of the nature of the corporation in the international legal arena, the problem facing US courts is far greater. First, the problem of whether a corporation can be considered to have a role in the international legal arena remains unresolved. In two precedential cases, the US Court of Appeals for the Second Circuit has determined that corporations may never be held liable in any ATS context, thereby leaving the stage only to individuals being sued.<sup>391</sup>

Thus, in *Sosa v Alvarez-Machain*, the Court narrowed the ATS to a permission to give court's jurisdiction only over the issues strictly mentioned in the 1789 ATS, namely piracy, ambassadors, and safe conduct. In *Kiobel v Royal Dutch Petroleum*, the court determined that 'because no corporation has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernible - much less universally recognized norm of customary international law that we may apply pursuant to the ATS'. Accordingly, the plaintiffs' ATS claims, 'must be dismissed for the lack of subject matter jurisdiction'.<sup>392</sup>

As seen above, the cases of US court of appeals have reached their decisions based on various approaches including FSIA and ATS, which are usually considered mostly jurisdictional statuses. Despite great dispute over the nature of federal common law, in its *Sosa* decision the Supreme Court made it quite clear that federal common law is to be the governing rule for a cause of action for violations of international law under the ATS. However, Bradley states by determining that federal common law governs the ATS, the court has actually caused more confusion, for it granted US courts the discretion to incorporate state

---

<sup>390</sup> *Presbyterian Church of Sudan v Talisman Energy Inc* [2009] 582 F3rd 244 (US Second Cir) <<http://www.docstoc.com/docs/12581037/Presbyterian-Church-of-Sudan-v-Talisman-Energy>> accessed 10 October 2011; Branson (n 387) 10-13

<sup>391</sup> Branson (n 387) 16.

<sup>392</sup> [2004] 542 US 692 (US Second Cir) <<http://www.leagle.com/xmlResult.aspx?>> accessed 10 October 2011; [2010] 06-4800-cv (US Second Cir) <<http://www.scribd.com/doc/38467709/Kiobel-v-Royal-Dutch-Petroleum>> accessed 10 October 2011; Keitner (n 386) 5.

law, international, law or the law of the country where the tort took place.<sup>393</sup> In contrast to the efforts made by the US court of appeals in reaching a specific decision to the essence of each case, the Supreme Court in *Kioele* decided upon the extraterritoriality issue instead, without consider the various issues mentioned here.

Branson notes that the problem of finding corporations liable under the ATS is compounded by the tendency of MNEs to use their multinational bases to evade prosecution. In yet another case brought against Coca-Cola, labour leaders were allegedly tortured for labour activism by the government and a local bottling company collaborating with the MNE. Here, a Miami district court found the contract between the Bottler Company and Coca-Cola gave the latter only an ability to protect the trademark, not the day-to-day control that could cause ATS liability to reach up a corporate chain.<sup>394</sup>

However, US courts, in some cases, hold parent corporations liable for their subsidiaries' misconducts. In *the Matter of the Oil Spill by the Amoco Cadiz off the Coast of France*, the Court of Appeals held the entire Amoco MNE responsible for clean-up costs occasioned by a tanker's grounding and ensuing oil spill on the French shores. The court found Tankers Inc. Amoco International Oil (a sister company), Amoco Transportation (a parent company), Amoco (a grandparent company), and Standard Oil of Indiana (a great grandparent company) to be one entity comprising the aforementioned elements of an integrated international enterprise.<sup>395</sup>

In addition, in some cases, the US court system is a quite convenient arena for holding MNEs accountable, using their American bases as grounds for initiating proceedings. In a case involving two major MNEs incorporated in the Netherlands and the UK, the Supreme Court found that even a minimal territorial presence in

---

<sup>393</sup> *Sosa* (n 10); Treaty establishing the European Economic Community (Treaty of Rome) [1958]; Alexandra Bradley, 'Corporate Liability Under the Alien Tort Statute: Federal Common Law as the Standard for Third Party Liability' (2009) 16 Human Rights Brief 13, 16.

<sup>394</sup> *Sinaltrainal v Coca-Cola Company* (US Eleventh Cir) 2009; Branson (n 387) 17.

<sup>395</sup> [1992] 954 F2d 1279 (US Seventh Cir) <<http://openjurist.org/954/f2d/1279/in-the-matter-of-oil-spill-by-the-amoco-cadiz-off-the-coast-of-france-on-march-16-1978>> accessed 10 October 2011 Branson (n 387) 35-6.

the United States, such as a small shareholder relations office in New York, is sufficient for determining transitory personal jurisdiction.<sup>396</sup>

### *The Problem of Extraterritoriality*

Both FSIA and ATS are usually considered mostly jurisdictional statuses, and are thereby confined to the question of whether a certain suit shall be heard before a US court. This limitation leaves open the problem of the governing law upon a dispute after it has been granted a permission to be heard.<sup>397</sup>

Here, US courts operate in light of an absence of a clear rule. In some cases, international law is used, as evident in *Talisman*, where the court incorporated the Rome Statute of the International Criminal Court to fill in the gaps left by ATS. In other cases, the court pins its decision upon the relevant foreign law. For example, in an award enforcement request case involving an alleged breach of contract between an Indonesian governmental company and a foreign corporation, the Southern District of Texas Court and, later on, the Supreme Court, considered Indonesian law as part of their discussions.<sup>398</sup>

However, the most controversial question, and certainly the one of the greatest relevance for this thesis is to what extent, if any, may US federal and state law be implemented in cases involving states or MNEs that have weak connections to the US, if any at all. According to the recent *Kiobel* decision, it will be much more difficult for human rights activists to sue US corporations based on their overseas activities.

The majority opinion, led by Chief Justice Roberts acknowledges that there are fewer “direct foreign policy consequences” when applying US law at sea than applying it in foreign territory<sup>399</sup>. In doing so, he ignores the more obvious rationale

---

<sup>396</sup> *Ken Wiwa v Royal Dutch Petroleum Company* Nos. 99-7223, 99-7245. September 2000 ; Paul B Stephan, 'A Becoming Modesty: US Litigation in the Mirror of International Law' (2002) 52 DePaul Law Review 627, 632.

<sup>397</sup> William S Dodge, 'Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy' (2010) 51 Harvard International Law Journal 36, 42.

<sup>398</sup> *Karaha Bodas Co Llc v Perusahaan Pertambangan Minyak Dan Gas Bumi* [2004] (US Fifth Cir) *Presbyterian Church of Sudan v Talisman Energy Inc* [2009] 582 F3rd 244 (US Second Cir); Keitner (n 386) 2; Branson (n 387) 13.

<sup>399</sup> *Kiobel v Royal Dutch Petroleum Co* 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

that piracy was a clear violation of the law of nations and therefore allowing a claim of piracy was not an imposition of “the sovereign will of the United States” but merely enforcement of international law. This more natural reading would of course raise the question of why that is true of piracy but not of genocide, torture, or crimes against humanity.<sup>400</sup> It seems that Roberts's argument leaves sufficient opportunity for plaintiff to maintain their suits and to future extraterritorial ATS claims against MNEs. Roberts noted “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” Scholars<sup>401</sup> argue that the wording “Touch and concern” leave the possibility open for ATS claims involving US plaintiffs or defendants abroad.

Roberts claims ‘corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices’.<sup>402</sup> The last may suggest US corporations could be held liable under ATS for their actions against foreigners abroad. According to Hathaway, ‘it may have been precisely this possibility that prompted Justices Alito and Thomas to write separately to emphasize their broader view of the bar on extraterritorial application of the ATS’.<sup>403</sup>

The concurring judgment, by Justice Breyer’s opinion, apply the extent of the liability to ‘foreign squared’ cases. Breyer based his argument on the ‘principles and practices of foreign relations law’, and intent that jurisdiction may be applied ‘where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest ... include[ing] a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind’.<sup>404</sup> The

---

<sup>400</sup> Oona Hathaway, *Kiobel Commentary: The door remains open to “foreign squared” cases*, SCOTUSblog (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases>> accessed 26 June 2013.

<sup>401</sup> *ibid.*

<sup>402</sup> *Kiobel v Royal Dutch Petroleum* (n 4).

<sup>403</sup> Hathaway (n 400).

<sup>404</sup> *ibid.*

Supreme Court's decision was very clear in permitting 'foreign squared' cases and even strengthen the focus of ATS litigation on US corporations.

However, some indistinct issues arise, first where the sole direct connection to the United States is a US plaintiff, and second, according to Justice Kennedy's opinion as the Court 'is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute'.<sup>405</sup> Kennedy left the nature of these open questions unspecified except where he noted, that permitted cases are such that are not covered by the Torture Victim Protection Act that involve 'allegations of serious violations of international law principles protecting persons'. He further explained 'the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation'.<sup>406</sup>

It seems that the Kiobel case only stresses the acute need for single international corporate court as it did not solve the complex issues of international law in regard to appropriate judicial panel. Most likely that Plaintiffs shall turn to U.S court, this time, through common law tort actions alleging violations of state law, which are free to set tort law without federal government interference.

As the Supreme Court in Kiobel did not apply its decision on jurisdictional issues like causes of action, it is important to consider the existing complicities in the current system that undoubtedly shall subsist if major change shall not accrue in the form of international commercial tribunal. This acute problem of extraterritoriality is dealt with in the US Restatement (Third) of Foreign Relations. According to these rules, a court seeking to apply a given US law extraterritorially, must consider the extent of various elements such as the domestic effect of the conduct, the connections between the United States and the persons engaging in the conduct in question, the character of the conduct and the extent to which it is regulated elsewhere, consistency with international custom, the extent of another

---

<sup>405</sup> *ibid.*

<sup>406</sup> *ibid.*

state's interests, and whether extraterritorial application would create conflict with the laws of a foreign jurisdiction.<sup>407</sup>

In *Timberlane Lumber Co v Bank of Am Nat'l Trust and Savings Ass'n*, the Southern District Court of New York, and later the Supreme Court, contemplated upon the question of extraterritoriality. The Supreme Court concluded that the only question open is the interpretation of US law, because 'as a court of the US we cannot look beyond our own law'. Thus, the Supreme Court used American antitrust law to determine in the case, involving an American corporation and a Honduras governmental arm.<sup>408</sup>

Unfortunately, the *Kiobel* case does not provide remedy in cases such as the case of a class action brought against a corporation named *Unocal*. Here, the court ruled that the law of the place of the alleged wrong, Myanmar in this case, should govern the piercing of the corporate veil procedure. However, after hearing the parties, the court decided that Myanmar, had for some time, no functioning court system and therefore no law that could apply in this case. The court then turned to the law of the parent corporation, in this case Bermuda. This time, the defence announced that it lacked an expert on Bermudian law and no ready prospect of obtaining one in a timely manner. As a result, the court made a third, and this time final, decision that the applicable law could be taken to approximate the law of the forum state, in this case, California, US.<sup>409</sup>

In *Af-Cap*, the district court in Texas dismissed the plaintiff's request for a garnishment based on the Texan law, which does not allow the garnishment of nonmonetary obligations.<sup>410</sup>

In a case brought by a US company against the Peruvian government concerning a debt, the Southern District Court in New York, and later the Supreme

---

<sup>407</sup> *Restatement (Third) of Foreign Relations Law of the US* [1986]; Martinez (n13) 429, 473; PB Dye and others, 'International Litigation' (2006) 40 *International Law* 299; Minh Van Ngo, 'Corporate Practitioner's Perspective on Recent Supreme Court Cases' (2010) 5 *Charleston Law Review* 43, 54.

<sup>408</sup> [1977] 549 F2d 597 (US Ninth Cir) <<http://openjurist.org/549/f2d/597/timberlane-lumber-co-sa-rl-v-bank-of-america-nt-and-sa-e-sa-s-rl-smith>> accessed 10 October 2011.

<sup>409</sup> *John Doe* (n 3); Branson (n 387) 21.

<sup>410</sup> *Af-Cap Inc v Republic of Congo Cms* 462 F3d 417 Nov. 2004 <<http://openjurist.org/462/f3d/417/af-cap-inc-v-republic-of-congo-cms>>

Court, leaned upon the New York contract and tort law. In this case, the issue was whether the company's purchase of Peruvian sovereign debt was with the intent and for the purpose of bringing an action or proceeding thereon, thereby rendering the purchase a violation of law. Bratton suggests that it is likely that a New York district court was chosen by the company as a convenient forum, due to its experience and prior rulings in the issue of sovereign debt.<sup>411</sup>

Many times, the US courts find a solution for the extraterritoriality problem by simply determining that they are not adequate to rule in cases in which it is clear that a foreign law interpretation is required. In a 1995 case, for example, several Nicaraguan citizens brought suit in Texas against US-based MNEs, including Shell Chemical, for alleged use of toxic material in Nicaragua after it was banned in the US. The court decided to dismiss the suit based on *forum non convenience* after it determined that the Nicaraguan courts offered an adequate and more convenient alternative forum.<sup>412</sup>

### *Conclusion - How the ICSCD Would Remedy the Problems*

As indicated above, it is quite clear that, although the US court system is considered by MNEs and states a rather efficient tool in the global legal arena (in comparison to other legal systems, such as the ICSID), it is evident that it is still perforated by inherent faults. Furthermore, the most significant change in international judicial authority is the recent decision on Kiobel case as the US court system shall be used where the ATS applies only to conduct within the United States or on the high seas. Initially, this system was established to solve local and federal disputes, not international complex issues. The ICSCD offers a solution to

---

<sup>411</sup> *Elliott Associates Lp v Banco De La Nacion the Republic of Peru* [1998] 194 F3d 363 (US Second Cir) <<http://openjurist.org/194/f3d/363/elliott-associates-lp-v-banco-de-la-nacion-the-republic-of-peru>> accessed 10 October 2011; William Bratton, 'Pari Passu and a Distressed Sovereign's Rational Choices' (2004) 53 EMORY Law Journal 823, 825; Marcus Miller and Dania Thomas, 'Sovereign Debt Restructuring: Judge Griesa, the vultures and creditor rights' (2007) 30 10 *The World Economy* 1491-1509 (2007) 757.

<sup>412</sup> *Dow Chemical Co* [2005] 422 F3d 827 (US Ninth Cir) <<http://openjurist.org/422/f3d/827/dow-chemical-co>> accessed 10 October 2011; Dye PB and others (n 407) 281-82.



these acute problematic issues by providing a comprehensive international system that is legally binding.

First, as opposed to any domestic court, the ICSCD shall have a large panel of expert judges from multiple nationalities. Therefore, the likelihood of a biased tribunal will be minimised. In the *ad hoc* mechanism of the ICSCD, for instance, at least one member in the panel shall represent every contracting party.

Second, as a comprehensive system specialising in international commercial and investment law, the ICSCD will eventually rely solely on its courts' prior decisions, and thus will offer coherence of judgments. Consequently, it will also be free of questions of comity and interpretation of foreign law, or application of conflicting international and domestic laws.

Third, while states and MNEs are free to second guess US courts' decisions in other forms of arbitration, or vice versa, in the ICSCD, the ability to 'forum shop' will be minimal because it offers a unified system. The parties of a dispute will be granted a chance to second guess an ICSCD tribunal decision, but only in the form of an appeal within the system.

Fourth, in the ICSCD Establishing Treaty, the categories of what consists an MNE or a corporation shall be well defined, and thus MNEs will be liable in courts by definition. In addition, as an international organisation, the ICSCD courts will not have to deal with questions of jurisdiction concerning the precise nationality of a MNE; all MNEs will be liable to its jurisdiction by definition.

With respect to enforceability, the ICSCD shall offer an obliging enforcement mechanism, both against states and against MNEs. Thus, it will be free of questions of whether a company is based in the United States or if a sovereign is immune from execution of an award. Chapter Five will offer a further discussion on these issues.

## CHAPTER FOUR: INSTITUTIONAL SYSTEMS FOR INTERNATIONAL DISPUTE SETTLEMENT – THE INADEQUACY IN THE CURRENT LEGAL SYSTEM

### 4.1. The WTO and its subsidiaries entities- the DRB and the AB

#### Introduction

This chapter explores the role that the WTO and its subsidiaries play in relation to MNEs conduction. It first presents the relation between the WTO and MNEs and the legal effects of the WTO system on MNEs as a dominant force that sets in motion international legal dialogues. A discussion of the limitations and gaps in the current WTO system will follow. Finally, the chapter will illustrate the issues with four case studies. These cases demonstrate the conflicting forces inherent in the WTO's forums.

The WTO deals with the rules of trade between nations at a global or near-global level, with the WTO agreements at its centre,<sup>413</sup> negotiated and signed by the majority of the world's trading nations. However, only member governments can be 'plaintiffs' or 'defendants' in a WTO case. No citizen or corporation has access to the dispute settlement body, and no decision within the system directly implicates citizens' or corporations' rights. Nevertheless, business or citizens' interests, or commercial concerns with the regulations of another government, are frequently the ones with the most influence behind the scenes and have the ability to affect the decision of a government to notify a dispute.<sup>414</sup>

Although states retain the formal gate-keeping authority, they often have incentives to open the gates, letting actors in civil society set much of the agenda.<sup>415</sup> Thus, in reality, governments feel the pressure to work together with businesses or other lobby groups to guarantee that their own economies are taking advantage of every opportunity. As a result, this sort of pressure flows over into the WTO every day.<sup>416</sup>

---

<sup>413</sup> See WTO, 'What is The WTO?' (World Trade Organization 2011) 1

[http://www.wto.org/english/docs\\_e/legal\\_e/03-fa.pdf](http://www.wto.org/english/docs_e/legal_e/03-fa.pdf) > accessed 10 April 2011.

<sup>414</sup> Peter Gallagher, *Guide to Dispute Settlement* (World Trade Organization, Kluwer Law International 2002) 4, 13.

<sup>415</sup> Robert O Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54(3) *International Organization* 457, 486.

<sup>416</sup> Peter Gallagher (n 414) 3.

On one side, multinational corporations face two major problems when raising complaints to the WTO via governments. The time factor is one of the problems, as changing regulations by the DSB takes long time. Another problem is that limited value firms can benefit from the resolution. Even if a corporation 'wins', this outcome does not promise a better positioning in a commercial sense due to the main 'remedy' restoration of conformity with the agreements, which could very well be no better than the initial problem. In addition, a ruling in favour of the corporation can also have positive and beneficial ramifications for the firms' competitors.<sup>417</sup>

The second approach implies that allowing private corporations to bring action against state members would substantially improve the capability of the adjudicatory system to maintain fealty to WTO standards. The approach is based on the notion that MNEs would be far less prone to self-censorship. Moreover, where the issue is significant enough for the corporation, economic needs might prompt such a firm to sue the host country, thereby ensuring compliance with WTO norms. It claims that participation by well-financed industries would serve to increase observance of WTO norms and expand the opportunities for the generation of principled rulings.<sup>418</sup>

So, despite MNEs being excluded from participation in the WTO system, they have managed to pave their way in. Indirectly, MNEs have succeeded in becoming an undeniable force in the WTO processes, and now serve as operators or stimulators that motivate governments to act for the benefit of the firms. Corporations and lobby groups, for example, spent nearly \$13 billion on influencing US congress and federal officials during 1998 to 2004. Moreover, in 2003, senior officials from Pfizer negotiated directly with the director-general of the WTO to block proposals from developing countries.<sup>419</sup> Such events might be a major

---

<sup>417</sup> *ibid* 57-8.

<sup>418</sup> Robert D Lawrence, 'Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution' (2003) *American Business Law Journal* 16-17 <<http://www.allbusiness.com/legal/3484626-1.html>> accessed 13 April 2011.

<sup>419</sup> Dominic Eagleton, 'Under the Influence' (ActionAid International, Trade Justice Campaign January 2006) 3 <[http://www.actionaid.org.uk/.../174\\_6\\_under\\_the\\_influence\\_final](http://www.actionaid.org.uk/.../174_6_under_the_influence_final)> accessed 30 July 2012.

obstacle in the proposed goal of this work to establish single international economic tribunal that will act upon a unified international law. Some governments may prefer the current regime, if it serves their interests, and many are even willing to make enormous efforts to 'keep' the MNEs on their ground.

### **The importance and utility of the DSB and the AB**

The dispute settlement system is based on clearly defined rules, with timetables for completing a case. Yet, the purpose of the system is not to pass judgment and the preferred outcome is to settle disputes via consultation.<sup>420</sup>

Additionally, The Appellate Body displays a much-needed degree of precedent setting in terms of developing specialised jurisprudence in an area of international law that is still covered in mist.<sup>421</sup> The collegial decision-making process of the Appellate Body, both in terms of its institutional design and its practice, may well be one of the most efficient and least costly judicial processes operating today.<sup>422</sup> Since even the best agreement is unworthy if its obligations cannot be enforced, it was determined that, as the DSB adopts a report of the panel, the conclusions and recommendations contained in that report become binding upon the parties to the dispute.<sup>423</sup>

As a rule, remedies for violation of WTO obligations remain available only to the members whose international trade interests have been affected, in actual or potential terms. In other words, only the states suffering from the consequences of

---

<sup>420</sup> Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harv Int'l LJ 3 <<http://www.worldtradelaw.net/articles/trachtmandomain.pdf> > accessed 16 April 2011; WTO, 'A Unique Contribution' (World Trade Organization 2011) 1 <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm)> accessed 10 April 2011.

<sup>421</sup> Isikeli Maitaitoga, 'The World Trade Organization Dispute Settlement Mechanism: A Developing Country Perspective' (The High Court of Fiji) 3 <[http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm#17](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17)> accessed 27 August 2013.

<sup>422</sup> Alberto Alvarez-Jimenez, 'The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?' (2009) 91 Journal of International Economic Law 289, 292.

<sup>423</sup> WTO, 'Introduction to the WTO Dispute Settlement System' (World Trade Organization 2011) 1 <[http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c1s1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm)> accessed 23 April 2011; WTO, 'Legal Effects of Panel and Appellate Body Reports and DSB Recommendations and Rulings' (World Trade Organization 2011) 1 <[http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c7s1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm)> accessed 23 April 2011.

the breach can react and implement the remedies permitted in international law.<sup>424</sup> However, under the WTO system, the spectrum has widened and expanded so that the legal standing has been defined as 'the right to bring an action in a dispute',<sup>425</sup> implying that the claimant must have a legal right that a court will protect.

From the above review, it can be seen that the WTO system introduced some improvements to the international legal arena. The WTO reduced the scope for overt politicisation of the process and the DSU mechanism emerged as one of the unique features of the WTO system. Moreover, the AB has played an important role when taking a rather proactive stance with respect to panel reports, and the appropriate interpretation of WTO disciplines.<sup>426</sup>

### **The limitations of the WTO system**

Although, there has been a marked shift from politics towards legality, the WTO system is far from ideal<sup>427</sup> and the impact of its innovation on international relations and trade is still mixed. Despite all its amendments, the DSU retains many of the flaws that have characterised the GATT dispute resolution.<sup>428</sup> As the instrument of negotiations, it can be beneficial in reducing trade tensions and misconduct, yet, the process is still prone to abuse.<sup>429</sup> For example, in spite of the emphasis placed upon expediting the resolution of disputes, delays in the process remain common. Significant delays are introduced into the process, at both the panel establishment and report approval stages.<sup>430</sup>

New limitations and difficulties have also begun to surface as a result of the modifications that were made. For instance, given that consensus is required to prevent the establishment of a panel's adoption of reports, any attempt at

---

<sup>424</sup> Tarcisio Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of Their Violation' (2006) 17(4) *The European Journal of International Law* 723-24.

<sup>425</sup> Appellate Body, 'EC-Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/R para 132.

<sup>426</sup> Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford University Press 2009) 126

<sup>427</sup> Maitoga (n 421) 11.

<sup>428</sup> Lawrence (n 418) 13.

<sup>429</sup> *ibid* 9-10.

<sup>430</sup> *ibid* 14.

consensus is hindered by members who are interested in continuing the process.<sup>431</sup>

Moreover, because of changes in adoption procedures, the increased reliance on legal rules has afforded some parties the opportunity to exploit the process to achieve substantial delay. This problem of clarifying the sequence between panel determination of compliance and the appropriate level of suspension of concessions came into realisation in the EU-Bananas dispute settled more than six years after initiation of procedures under DSB auspices.<sup>432</sup>

One of the main accusations against the DSB concerns its inability to deter state members from acting in a manner that is contrary to the principles of the WTO agreements. The denunciation is that the measures outlined in the DSU are not designed to act as a remedy against economic incentives that encourage violation. In other words, no potential violator has economic incentive to settle a dispute.<sup>433</sup>

Furthermore, issues of implementation also arise from the domestic political structure of certain countries. For example, American federal law would not be affected by the WTO decisions until congress or the executive branch changed the law or administrated measures concerning the issue. Only the federal government may bring suit against a state or declare its law invalid, when it is inconsistent with the WTO agreement.<sup>434</sup> This limitation came to realisation in 1996, as the state of Massachusetts passed a government purchasing law barring companies doing business with Myanmar from bidding for major public contracts. In response, in 1997, the EU and Japan initiated dispute-settlement consultation with the United States, arguing that it violated provisions of the AGP and the TRIMS. Though a complaint was submitted, the WTO was released from ruling, because two US

---

<sup>431</sup> *ibid* 14.

<sup>432</sup> *ibid* 13; Jeanne J Grimmert, 'Dispute Settlement in the World Trade Organization: An Overview' (Congressional Research Service 2006) 5; Valerie Hughes, 'The WTO Dispute Settlement System- from Initiating Proceedings to Ensuring Implementation: What Needs Improvement?' in Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press 2006) 229.

<sup>433</sup> Lawrence (n 418) 30.

<sup>434</sup> Grimmert (n 423) 5.

courts argued that the law interfered with the federal government's exclusive authority to conduct foreign policy.<sup>435</sup>

Limitations may also originate from a deviant path of certain member when it strays from the DSU framework. As in the EC-Bananas case, autonomous measures of a unilateral character are gradually establishing themselves as essential links within the trade market. The difficulty in enforcing WTO provisions creates an inclination of state members to adopt unilateral measures in anticipation of a WTO dispute, rather than the course of actual litigation.<sup>436</sup> To conclude, unilateral action is the very antithesis of the WTO's multilateral dispute settlement system;<sup>437</sup> representing a step backwards in the evolution of the international trading system.<sup>438</sup> In effect, WTO law is far from providing a clear legal regime. Dealing with new and complex issues while negotiating among a significant number of states results in textual ambiguity.<sup>439</sup> To achieve an agreement, all parties may stumble on constructive vagueness and ambiguity. Consequently, this obscurity leads to different understandings of the meanings and realm of the words used by the provisions of the covered agreements.<sup>440</sup>

An acute restriction of the legitimacy of the WTO system is realised through the scepticism of NGOs and others. These actors question if the WTO small tribunals, which lack direct democratic legitimacy, have the legal right to determine profound issues, such as the relationship between trade and labour issues, or trade and environmental values.<sup>441</sup> This constraint links to another limitation that the WTO demonstrates. Currently, WTO rules have not hindered or blocked any

---

<sup>435</sup> WTO, *EU & Japan v US: Myanmar Sanctions* [1997] WT DS88; Global Exchange, 'The WTO Erodes Human Rights Protections' (Global Exchange 1999) 2-3 <http://www.globalexchange.org/print/11864> accessed 29 July 2012.

<sup>436</sup> Antonis Antoniadis, 'The European Union and WTO Dispute Settlement: in Search of a Normative Framework for Autonomous Measures (forthcoming)' (2005) EUSA 9th Biennial International Conference 1, 3.

<sup>437</sup> Friedel Weiss, 'Manifestly Illegal Import Restrictions and Non-Compliance with WTO Dispute Settlement Rulings: Lessons from the Banana Dispute' in Ernst U Petersmann and Mark A Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford University Press 2003) 121, 130.

<sup>438</sup> Jimenez (n 422) 300-1.

<sup>439</sup> *ibid* 300.

<sup>440</sup> *ibid* 300-1.

<sup>441</sup> Trachtman (n 420) 2.

multilateral environmental agreement. No provision contained in a MEA, or any trade restriction undertaken in compliance with any MEA, has ever been disputed at the WTO.<sup>442</sup> The Tuna/Dolphin cases<sup>443</sup> and the Automobile Fuel-Efficiency case<sup>444</sup> demonstrate that, at trade organisation tribunals, free trade almost always takes precedence over environmental issues.

The WTO structure also constitutes a limitation due to its inability to cope with complicated matters. The WTO fails to deal successfully with complex issues and linkages that require not only interfacing goods, services, and intellectual property, but also international organisations and regulatory fields of international law. The WTO faces the unresolved problem of graduation pertaining to shaping rules, rights, and obligations in a manner responsive to levels of social and economic development.<sup>445</sup>

An additional restriction pertains to the situation that, even though other members of the WTO may share similar concerns and measures, they cannot draw inferences from the outcome of cases with regard to their own disputes. This problem undermines the general aim of WTO dispute settlement of providing security and predictability to the multilateral trading system.<sup>446</sup>

Distinguishing law from facts comprises another limitation. According to Article 17.6 of the DSU, panels have the responsibility of fact-finding and applying WTO law to those facts, while the AP reviews legal issues only.<sup>447</sup> A problem is created since a single issue would typically involve both legal and factual questions, whereby an issue that is 'factual' in one context could be 'legal' in another.<sup>448</sup>

---

<sup>442</sup> Eric Neumayer, 'The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak' (2004) 4(3) *Global Environmental Politics* 1, 4.

<sup>443</sup> GATT, Mexico v US: Tuna/Dolphin 1 [1991] DS21; GATT, European Community v US: Tuna/Dolphin 2 [1994] DS29.

<sup>444</sup> GATT, EU v US: Automobile Fuel-Efficiency [1994] DS31.

<sup>445</sup> Thomas Cottier, 'The State of International Economic Law' (2009) 12(1) *Journal of International Economic Law* 3, 4.

<sup>446</sup> Tania Voon and Alan Yanovich, 'The Facts Aside: The Limitations of WTO Appeals to Issues of Law' (2006) 40(2) *Journal of World Trade* 239, 244.

<sup>447</sup> *ibid* 257.

<sup>448</sup> *ibid* 245.



The WTO negotiation system may also carry a disadvantage, as a high number of settlements can be seen as a shortcoming. Thus, if there is a high degree of distrust in the expected outcome of the DSU process, countries may use the threat of the DSU and the associated uncertainty of what the outcome may be as an instrument to induce countries to settle.<sup>449</sup>

However, the most prominent concern stems from the enforcement limitations. Fundamental constraints of the WTO system stem from the situation that implementation and compliance in international disputes are complex and problematic. Currently there is no single international authorised tribunal specialising in MNEs- states disputes that can set, *inter alia*, enforcement means. Thus, governments' willingness to negotiate and abide by international trade agreements depends in part on the efficiency of enforcement provisions.<sup>450</sup>

The enforcement constraint also exists in other branches of the organisation. For example, panel enforcement mechanisms accomplish their objective via means contrary to the basic economic efficiency principles the WTO seeks to enforce. The implementation of concession withdrawal will thus remain a necessity that represents a fundamental challenge to the DBS and the WTO as a whole.<sup>451</sup> Even in the tool of retaliation, one can observe a basic problem. A limitation emerges because retaliation involves raising barriers to trade, which is detrimental not only to the interests of the country that does so, but also to world welfare.<sup>452</sup>

Similar to the codes of conduct, a deliberation exists regarding the question of whether to move the DSB further in the direction of a judicial model, with specific, binding rules and enforcement mechanism, or whether it is preferable to shift it in the direction of the GATT period when dispute resolution is more diplomatic in nature. For now, it seems that the more 'constitutional legalist' approach prevails. In accordance with this approach, 'rules are rules' and should

---

<sup>449</sup> Hoekman and Kostecki (n 426).

<sup>450</sup> *ibid* 126.

<sup>451</sup> Lawrence (n 418) 32.

<sup>452</sup> Hoekman and Kostecki (n 426) 116.

therefore be enforced.<sup>453</sup> This notion may well benefit the proposal of this work regarding the establishment of new international economic tribunal that shall adopt some of the WTO rules and principles as legally binding rules.

### **The struggle forces in the WTO's forums - Case studies**

The following section presents two case studies that portray the complex triangular relations between developing countries, developed countries, and MNEs. These cases demonstrate the struggle forces that take place in the World Trade Organisation's forums.

*European Communities Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States:*

The EC import regime for bananas has long been a main concern, due to EC preferences for bananas produced by African, Caribbean, and Pacific countries. As a result, these countries traditionally had a significant share of the EC market, to the detriment of Central and South American countries.<sup>454</sup>

In 1996, four Latin American producers joined by the United States, which participated on behalf of US multinational fruit firms that were major players in the global distribution of bananas, alleged that the new EC banana regime discriminated against their producers and banana marketing companies. They contested that the new EC regime for importation, sale, and distribution of bananas was inconsistent with GATT Article I, II, III, X, XI and XIII, as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the Agreement on Trade-Related Investment Measures, and the General Agreement on Trade in Services.<sup>455</sup>

The established panel published its findings in May 1997, concluding that the EC's banana import regimes and the licensing procedures for the importation of bananas in this regime were inconsistent with the EC obligations under GATT 1994 and the GATS. Moreover, the panel declared that Lomé waiver granted to the EC

---

<sup>453</sup> *ibid* 121.

<sup>454</sup> *ibid* 101.

<sup>455</sup> Maitaitoga (n 421) 102.

waived only inconsistency with GATT Article XIII regarding the allocation of quotas, but not inconsistencies arising from the licensing system.

In June 1997, the EC appealed and, in response, the AB mostly upheld the panel's findings. However, it reversed the panel's findings that the inconsistency with GATT Article XIII was waived by the Lomé waiver, and that certain aspects of the licensing regime violated GATT Article X and the Import Licensing Agreement. The appellate and the modified panel report were adopted by the DSB in September 1997. In November 1997, the complainants requested that the 'reasonable period of time' for implementation of the recommendations and rulings by the DSB be determined by binding arbitration, pursuant to Article 21.3(c) of the DSU.<sup>456</sup>

As a result of the panel reports, amendment to the EC bananas regulation, was announced in purported compliance with the recommendations. However, the complainants did not agree that the amended regulation implemented the DSB recommendations. Instead, they indicated that they might take recourse to Article 21.5 of the DSU, requesting the referral to the original panel regarding the consistency with WTO rules 'of measures taken to comply with the recommendations'. While Ecuador pursued the reconvening of the original panel under Article 21.5 of the DSU, the United States invoked its domestic procedures to implement its threat of retaliation against the EC exports to the United States, as stipulated under Article 22.6 of the DSU.

In response to the accusation, on December 15, 1998, the EC requested the establishment of a panel to find that its implementation measures 'must be presumed to conform to WTO rules unless their conformity has been duly challenged' under the DSU.

As a result, the DSB agreed to two separate requests from Ecuador and the EC to refer, under Article 21.5, to the original panel in the dispute over the EC's implementation of DSB recommendations concerning its banana importation regime. While Ecuador requested the panel to verify whether the DSB recommendations have been effectively implemented, the EC asked the panel to

---

<sup>456</sup> Maitoga (n 421) 6.

look into the regulations it had adopted to implement the DSB recommendations regarding its banana importation regime.<sup>457</sup>

On January 1999, the US, Guatemala, Honduras, Mexico and Panama, asked for consultation with the EC under Article 4 of the DSU to find a solution regarding the EC's amended banana importing regime. The DSB meeting was postponed repeatedly. For the first time in the history of the WTO, there was objection to the adoption of the agenda for the DSB meeting. Two small banana-growing countries objected to the inclusion in the agenda of the US request for authorisation to retaliate against the EC.

This unprecedented move led to angry outbursts from the United States and to intense negotiations that resulted in a compromise whereby the countries involved needed to find a mutually agreed solution to the problem.<sup>458</sup> The struggle between the countries did not end in 1999 and continued to occupy the DSB.<sup>459</sup>

The procedural wrangling regarding implementation of the DSB recommendations in the bananas case is a product of the ambiguity of the DSU, which served as a pawn and was exploited by the two major trading powers.<sup>460</sup> The conclusions arising from this case further highlight the inequality and discrimination that still exist in the WTO system. Although the United States is not a major exporter of bananas, it serves as an instrument to defend the rights of its MNEs engaged in the production of bananas in Latin America and their export to the EC.

The WTO ruling in the EC-Bananas case indicated that a member's potential interest in trade in goods or services, as well as in a determination of rights and obligations under the WTO agreement, is sufficient to establish a right to pursue a WTO dispute settlement proceedings.<sup>461</sup>

The bananas dispute also highlighted the disrespectful attitude that the two major trading powers demonstrated toward the WTO. On several occasions, the United States and the EC have outstretched the interpretative borders of the DSU

---

<sup>457</sup> *ibid* 7.

<sup>458</sup> *ibid*.

<sup>459</sup> Hoekman and Kostecki (n 426 103-4.

<sup>460</sup> Maitav (n 421) 8.

<sup>461</sup> Gazzini (n 424) 735.

provisions, and took a deviant path away from the DSU framework,<sup>462</sup> as evident in their unilateral actions. For example, when the panels were still deliberating about appropriate steps, the United States adopted measures against the targeting products and imposed them with retroactive effect.<sup>463</sup> For its part, the EC decided to adopt unilateral measures in anticipation of WTO dispute, rather than in the course of actual litigation.<sup>464</sup> For an organisation such as the WTO, which is rooted in multilateralism, unilateralism is a trampling of its principles.

Above all, the EC-Bananas case revealed the weakness of the enforcement instrument mechanism. Apparently, the ultimate threat is unlikely to induce the EC to change its policies; therefore, developing countries cannot coerce a developed country to make amends.<sup>465</sup>

### **Patents, compulsory license, and access to medicines**

The basic human right to health services, such as access to medicines, has emerged as a major public health issue, particularly due to the influence of patents on the prices of drugs. Thus, the establishment of the trade-related Intellectual Property Rights Agreement in the WTO in 1995 has made patenting of medicines even more common. That agreement made it compulsory for WTO members to integrate medicines in their regime for product and process patents. Consequently, the monopoly granted by patents enabled the maintenance of excessive prices of medicines for HIV-AIDS.<sup>466</sup>

The WTO tried to solve the problem that arose due to using the Doha Declaration on the TRIPS Agreement and Public Health. The declaration reaffirmed and clarified the flexibilities available under the TRIPS Agreement, such as issuing a compulsory license. It affirmed that the agreement should be interpreted in a manner supportive of WTO members' right to protect public health

---

<sup>462</sup> Antoniadis (n 436) 3.

<sup>463</sup> *ibid* 25.

<sup>464</sup> *ibid* 3.

<sup>465</sup> Hoekman and Kostecki (n 426) 104.

<sup>466</sup> Martin Khor, 'Patents, Compulsory License and Access to Medicines: Some Recent Experiences' (draft, Third World Network 2007) 1.

and to promote access to medicines for all.<sup>467</sup> The WTO sought to ensure that the TRIPS Agreement would not be in conflict with public interest, including public health. Additionally, the organisation aspired to encourage patent protection, while relaxing the law to facilitate research and development.<sup>468</sup>

Undoubtedly, the WTO is interested in supporting patent protection as an incentive for innovative research and development. However, it is also aware that intellectual property rights must be considered in the context of human rights.<sup>469</sup> Therefore, the WTO provided nations with several national measures that are TRIPS-consistent and could pave the way towards providing affordable medicines.

Nevertheless, the advisable measures uncovered and created new problems. For instance, Article 31(f) of the TRIPS Agreement states that a country making use of compulsory licensing must manufacture the product locally for the domestic market; thus, the country must have sufficient local manufacturing capacity. This restriction caused difficulties for poor developing countries with small domestic markets that could not attract sufficient investment in the pharmaceutical sector and lacked adequate local manufacturing resources.<sup>470</sup>

## Conclusions

Though it is tempting to infer otherwise, the WTO dispute settlement system has achieved a great deal; it has served the WTO members well, and has proven to be successful.<sup>471</sup> However, one cannot ignore the limitations and gaps that overshadow the organisation's relative success, as it has to overcome the problems of discrimination, inequality, and procrastination.

## 4.3 The International Centre for Settlement of Investment Disputes (ICSID)

### Introduction

---

<sup>467</sup> *ibid.*

<sup>468</sup> Ben Sihanya, 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya' (WTO) 2 <<http://www.wto.org>> accessed 15 May 2011.

<sup>469</sup> Jacques Perriens, 'UNAIDS Report on Compulsory Licensing and Access to HIV Drugs' (Conference on Community and Home Care for People with HIV Infection, Paris, 1999) 2 <<http://lists.essential.org/pharm-policy>> accessed 16 May 2011.

<sup>470</sup> Sihanya (n 468) 2, 3.

<sup>471</sup> Hughes (n 423) 193.

ICSID is an autonomous intergovernmental institution designed to promote the settlement of disputes between states and private foreign investors, namely between states and nationals of other states.<sup>472</sup> The concept that stands behind the ICSID convention is motivating investment and economic development by improving the standard of protection for foreign investments and by upgrading the overall investment climate.<sup>473</sup> However, despite its stated goals, its conduct raises various issues of concern the next section will discuss.

### **The legal effects of the ICSID convention**

The absence of an agreed set of specialised international methods for investment dispute settlements had caused numerous difficulties and complications for foreign investors. The current system forces the host state and the foreign investor to settle their dispute at the domestic courts of the host state. From the investor's perspective, the courts of the host state are rarely impartial in this type of situation. Furthermore, domestic courts are obligated to apply domestic law, even if it fails to protect the investor's rights under international law. Most importantly, regular courts often lack the technical expertise required to resolve complex international investment disputes.<sup>474</sup>

As previous chapters have indicated, the change in the investment world can be pinned to the wide consensus that private investment is an eminent factor in economic development. This consent has led most developing countries to revise their previously reserved attitudes toward FDI and to adopt an open and welcoming approach toward foreign investments as embodied in the ICSID convention.<sup>475</sup>

---

<sup>472</sup> Christoph Schreuer, 'International Centre for Settlement of Investment Disputes (ICSID)' (University of Vienna 2009) 1 <[http://www.univie.ac.at/intlaw/wordpress/pdf/100\\_icsid\\_epil.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf)> accessed 13 June 2011; ICSID, 'About ICSID' (ICSID 2011) <[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home)> accessed 13 June 2011.

<sup>473</sup> Christoph Schreuer, 'The Dynamic Evolution of the ICSID System' (University of Vienna 2006) 3 <[http://www.univie.ac.at/intlaw/wordpress/pdf/85\\_cspubl\\_86.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/85_cspubl_86.pdf)> accessed 14 June 2011.

<sup>474</sup> *ibid* 2.

<sup>475</sup> *ibid* 1.

The ICSID convention was, therefore, an important step forward, as it was initially designed to close a significant procedural gap by offering considerable advantages in comparison to previous institutions. It aimed to protect, to the same extent and with the same vigour, the investor and the host state, while defending the general interests of developed and developing countries equally.<sup>476</sup> Because the ICSID proceedings are self-contained and denationalised, providing independence of intervention of any outside body such as national law including the law of the tribunal's seat, they improve the investors' probability of success. However, domestic courts, in particular, are excluded from intervening and have no power to stay, to compel, or to influence ICSID proceedings thereby reducing the chances of bias and preventing any form of scrutiny or disregard by them.<sup>477</sup>

Article 45<sup>478</sup> of the ICSID convention, deals with non-cooperation portrayed by one of the parties and manifests one of the system's merits, which contribute to a well formed progression of the proceeding, and indirectly boost the investors' confidence in the system. However, the convention's primary purpose is to provide impartial facilities for international investment disputes.<sup>479</sup> From the legal perspective, although the ICSID convention does not hold any substantive rules and it solely suggests a procedure for the settlement of investment disputes, it does contain a rule on applicable law, which directs tribunals in finding the rules to be applied to particular disputes.

According to this law, tribunals are to follow any choice of law agreed by the parties. In case of absence of an agreed choice of law, the tribunal is to apply the law of the host state and international law.<sup>480</sup> Hence, it can be deduced that applicable law grants the foreign investor as well as the host country freedom of choice, and an opportunity to adjust the law to their needs. This 'freedom of choice'

---

<sup>476</sup> Christoph Schreuer, 'Courses on Dispute Settlement' (United Nation Conference on Trade and Development, New York, 2003) 11.

<sup>477</sup> International Centre for Settlement of Investment Disputes Convention (hereafter ICSID Convention <<http://icsid.worldbank.org>>accessed 11 August 2011 art 44; Christoph Schreuer, 'Courses on Dispute Settlement' (n 476) 17; Christoph Schreuer, 'The Dynamic Evolution' (n 473) 6, 8.

<sup>478</sup> ICSID Convention *ibid* art 45.

<sup>479</sup> ICSID, 'About ICSID'.

<sup>480</sup> ICSID Convention art 42; Christoph Schreuer, 'Courses on Dispute Settlement' (n 476) 7-8.



may be an advantage or disadvantage for either party, depending on the circumstance. However, if a single economic international tribunal is established, which specialises in such disputes and serves as the only choice of court, unified and integrated international law system may be formed.

### **Bilateral investment treaties**

ICSID convention and BITs are closely interrelated where both originated in a state's offer of consent to international arbitration. As such, both contain a mechanism that preserves certain rights and obligations under the original treaty, even after it is denounced. Moreover, when ICSID convention or a BIT is denounced, it does not fundamentally alter the relationship between the two. A terminated BIT contains the offer of consent to arbitration by virtue of its survival clause as the same manner as a treaty in force, irrespective of whether it triggers ICSID jurisdiction via article 25 or 72.<sup>481</sup>

The following segments, are not attached to the ICSID system, but are at the base of the majority of the claims submitted to the ICSID arbitration. The aim of the following examples is thus to help accentuate the merits of the BITs and explain their growing popularity.

In *American Manufacturing & Trading, Inc v Democratic Republic of Congo*,<sup>482</sup> a US company built facilities to manufacture automobiles, dry cell batteries, and import and resell consumer goods in the Democratic Republic of Congo. During the civil war, the plant was occupied and destroyed by military forces and the company did not have a contractual relationship with the Zaire government.

In another case of *Azurix Corp v Argentine Republic*,<sup>483</sup> a US investor became a majority shareholder in an Argentinean company and invested millions of dollars in a concession agreement to operate water and sewage services.

---

<sup>481</sup> Trade Law Clinic (E780) 2010 UN conference on Trade and Development, International Trade agreements section.

<sup>482</sup> [1997] ARB/93/1 (ICSID).

<sup>483</sup> [2006] ARB/01/12 (ICSID).

Shortly after the contract was signed, a bitter and highly political dispute arose regarding tariffs.

The third example regarding *Exxon and Venezuela, Mobile Corporation and Others v Bolivarian Republic of Venezuela*<sup>484</sup> deals with a US company that acquired rights to develop a very valuable oil field in Venezuela. Shortly afterwards, a new government came to power and planned to force the company to renegotiate the original agreement under the threat of nationalisation. Since the United States and Venezuela had not agreed to a BIT, the investor restructured its investments in Venezuela and transferred the assets to a subsidiary in the Netherlands.

At first glance, these examples portray a risky situation, as without a protection most BITs afford to foreign nationals investing in a foreign state, they would have remained lost causes. Due to the BITs, the foreign investors were compensated and were able to recover a very substantial portion of their investment, and most importantly, they felt secured and protected while conducting business with developing countries.

Almost all BITs demand host states to accord 'fair and equitable treatment' to investors from another state. The obligation is to maintain a stable and predictable investment environment consistent with reasonable investor expectations.<sup>485</sup> The problem is the vague and general nature of this principle, which constitutes a loophole for treaty claims. The cases on fair and equitable treatment belong to two broad categories. The first category pertains to the treatment of investors by the courts of the host state. For example, in *Azinian v Mexico*,<sup>486</sup> the tribunal accepted that, in principle, the host state could be liable for the decisions of its courts especially if the courts refused to entertain the suit, subjected the suit to undue delays, administered justice in an inadequate way, or if there was a clear and malicious misapplication of the law.<sup>487</sup>

---

<sup>484</sup> [2010] ARB/07/27 (ICSID).

<sup>485</sup> Houthoff Buruma, 'Investment Arbitration: The Role of Bilateral Investment Treaties' (2011) 2 In-House Counsel Practical Guide 12, 17.

<sup>486</sup> *Azinian, Davitian, & Baca v Mexico* [1999] ARB (AF)/97/2 NAFTA (ICSID)

<sup>487</sup> Buruma (n 485) 17.

The second category deals with the review of administrative decisions, such as granting or withholding of investment licenses. In *Biwater v Tanzania*,<sup>488</sup> an arbitration proceeding brought under the BIT between the UK and Tanzania, the tribunal found that a series of public announcements denigrating the investor's poor performance and announcing that a new public entity would be taking over the service were in violation of the fair and equitable treatment standard.

In *Duke Energy et al. v Ecuador*,<sup>489</sup> the tribunal contended that Ecuador had failed to accord fair and equitable treatment to the investor by not implementing the specific payment guarantee expressly promised in one of the investment contracts.

The third feature that insures protection under the BITs is 'full protection and security'. The primary reason for this character is the need to protect the investor from physical violence. The principle is breached if the host country fails to take reasonably expected protective measures to prevent physical destruction of the investor's property.<sup>490</sup> For instance, in *AAPL v Sri Lanka*,<sup>491</sup> Sri Lankan security forces had destroyed the investor's shrimp farm and killed more than 20 of its employees in an attempt to curb Tamil Insurgents. The tribunal subsequently ruled that the Sri Lankan government had violated its obligations of full protection and indemnity.

Moreover, in the case of *Siemens v Argentina*,<sup>492</sup> arbitration based on the Germany-Argentina BIT, the tribunal found that the protection feature extends beyond physical protection to include protection against infringements of the investor's rights by operation of laws and regulations of the host state.

The right not to be treated in an arbitrary or discriminatory way marks the fourth characteristic. Host countries act unreasonably or discriminatorily if rules of law are *de facto* violated, or if an investor has no access to due process. For example, in *SD Myers Inc v Canada*,<sup>493</sup> a NAFTA claim, the company complained

---

<sup>488</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [2008] ARB/05/22 (ICSID).

<sup>489</sup> *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* [2008] ARB/04/19 (ICSID).

<sup>490</sup> *Buruma* (n 485) 18-19.

<sup>491</sup> *Asian Agricultural Products Ltd v Sri Lanka* [1990] ARB/87/3 (ICSID), Final Award.

<sup>492</sup> [2004] ARB/02/8 (ICSID), Decision on Jurisdiction.

<sup>493</sup> [2000] NAFTA (UNCITRAL), First Partial Award.

that it had been treated discriminatorily and unfairly, as Canada announced an export ban on the trans-boundary movement of hazardous waste. Based on the facts, the tribunal decided that the export ban was arbitrary and discriminatory against non-nationals.

The fifth character, 'national treatment', maintains that the host country must treat foreign investments no less favourably than the investments of its own nationals and companies. In *Maffezini v Spain*,<sup>494</sup> which was based on the Argentina-Spain BIT, the Argentinean investor had filed a claim in the arbitration proceedings against Spain, although he had not previously submitted the dispute to the Spanish courts, as required by the BIT. The Argentinean investor claimed, however, that by invoking the 'national treatment' clause, he could bypass the condition in the Argentinean-Spain BIT and require a benefit available under the Spain-Chile BIT.

One of the most important protection clauses in a BIT is 'no expropriation without compensation'. Expropriation relates to direct and deliberate formal acts of taking ownership, as well as any indirect act that substantially deprives an investor of the use, value, and enjoyment of its investment.<sup>495</sup> The difficulty, however, lies in distinguishing between improper expropriation and legitimate regulatory measures.<sup>496</sup>

For instance, in *CME Czech Republic BV v Czech Republic*,<sup>497</sup> which was based on the BIT between the Netherlands and the Czech Republic, an investor in a joint venture in the Czech Republic contended that the joint venture had collapsed after the official Czech broadcasting authority had forced the joint venture to give up its exclusive licensing rights and had changed other key terms of the joint venture agreement. The tribunal held that the acts of the Czech authority had interfered with the economic and legal basis of the investment and, therefore, amounted to improper expropriation.<sup>498</sup>

---

<sup>494</sup> [2000] ARB/97/7 (ICSID), Award on Jurisdiction.

<sup>495</sup> *Buruma* (n 485) 21.

<sup>496</sup> *ibid.*

<sup>497</sup> [2001] (UNCITRAL), Partial Award.

<sup>498</sup> *Buruma* (n 485) 23.

Furthermore, in the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*,<sup>499</sup> Vivendi filed a dispute under the France-Argentina BIT, which erupted due to an investment in water and sewage services provision in the Tucuman province of Argentina. Vivendi accused the Argentineans of violating significant BITs provisions, such as the fair and equitable treatment, and expropriation without compensation. While the tribunal had declared its jurisdiction to hear the BIT's claim, it dismissed the claims on the ground that the claimants ought to first pursue their case in the administrative courts of Tucuman.

The last and final clause is an 'umbrella clause', which obliges host states to comply with the obligations concerning the investments of individuals and companies from other countries. The umbrella clause causes elevates any contractual argument to the level of international law, and, thus, subjects it to international arbitration under the BIT. For instance, in *SGS v Philippines*,<sup>500</sup> which is based on the Switzerland-Philippines BIT, SGS claimed breach of custom related pre-shipment inspection services. In response to the Philippines' plea that the argument was contractual, SGS invoked the 'umbrella clause'. The tribunal held that the 'umbrella clause' did not have the effect of overriding the exclusive jurisdiction clause in the contract between SGS and the Philippines.

To be protected by a BIT, an investor must be an 'investor' within the meaning of the BIT.<sup>501</sup> Individuals, for example, must have the nationality of one of the contracting countries to be recognised as investors. In *Soufraki v UAE*,<sup>502</sup> which was under the BIT between Italy and the United Arab Emirates, the claimant produced several Italian certificates of nationality. In spite of that, the tribunal found that the claimant had lost its nationality as a consequence of having become a Canadian national. With a Canadian nationality, the claimant was unable to rely on the BIT between Italy and the UAE. Furthermore, Canada is not a party to ICSID.

---

<sup>499</sup> [2002] 41 ILM 1135 5.

<sup>500</sup> [2004] ARB/02/6 (ICSID), Decision on Jurisdiction.

<sup>501</sup> *Buruma* (n 485) 25.

<sup>502</sup> [2004] ARB/02/7 (ICSID), Decision on Jurisdiction.

The criteria for companies are different from that of individuals, as their nationality is based on the nation of incorporation of the company, the nation where the company is controlled, and the nation where the company is managed. The *Tokios Tokelès v Ukraine* case,<sup>503</sup> which will be described later in this chapter, provides an example of nationality identification.

In summary, contrary to other agreements, BITs are meant to protect foreign investment and investors, and do not offer protection to both sides. The quotation that expresses the BITs' role in a most profound way appears in the tribunal ruling in the case of *Saluka v Czech Republic*.<sup>504</sup> Here, the tribunal held that 'the protection of foreign investments is not the sole aim of the treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations'.<sup>505</sup>

### **System of enforcement**

The aim of the ICSID awards is to be 'binding and final';<sup>506</sup> and shall be recognised all states parties to the convention. Their obligations ought to be enforced as final domestic judgments in all contracting states.<sup>507</sup> Therefore, recognition and enforcement should be sought in any state that is a party to the ICSID convention and not only in the host state or in the investor's state of nationality.<sup>508</sup> The procedure for the enforcement of ICSID awards is governed by the law on the execution of judgment in each country. According to Article 54(2)(3),<sup>509</sup> the contracting states are to designate a competent court or authority for this specific purpose.<sup>510</sup>

According to Shaw, the award debtor is under obligation to comply with an award. Compliance with ICSID awards is facilitated via several measures: (1) The

---

<sup>503</sup> [2004] ARB/02/18 (ICSID), Decision on Jurisdiction.

<sup>504</sup> *Saluka Investments BV v The Czech Republic* [2006] (UNCITRAL), Partial Award.

<sup>505</sup> *Buruma* (n 485) 16.

<sup>506</sup> ICSID Convention (n 484) art 53; Christoph Schreuer, 'The Dynamic Evolution' (n 473) 9.

<sup>507</sup> *ibid* art 54(1).

<sup>508</sup> Christoph Schreuer, 'The Dynamic Evolution' (n 473) 9.

<sup>509</sup> ICSID Convention (n 484) art 54(2)(3).

<sup>510</sup> Christoph Schreuer, 'The Dynamic Evolution' (n 473) 9.

strong institutional link of ICSID to the World Bank. States find it unwise to jeopardise their good standing with the Bank due to noncompliance with an ICSID award. (2) Noncompliance with an award by the host state is subject to retaliation. The investor is entitled to diplomatic protection by its home state.<sup>511</sup>

The mere availability of an effective system tends to affect the behaviour of parties to potential disputes. Its restraining influence on investors and on host states will induce both to try to avoid actions that might involve them in arbitration that they are likely to lose.<sup>512</sup>

Many cases brought before the ICSID system have been amicably settled or discontinued, and the awards it has given have generally been recognised and enforced without difficulty<sup>513</sup>. However, a broad range of potential grounds for refusing to enforce a final judgment exists, including common investor-state issues, such as allegations of lack of impartiality or independence on the part of an arbitrator, false testimony during the arbitral hearings, corruption, misrepresentation in the underlying transaction, or changed circumstances.<sup>514</sup>

In addition, ICSID's lack of coherence weakens the rule of law in investor-state arbitration because affected parties have less incentive to adhere to the tribunals' decisions.<sup>515</sup> Even though Article 53(1)<sup>516</sup> and 54(1)<sup>517</sup> establish an autonomous and simplified system for recognition and enforcement of ICSID awards, the ICSID convention does not provide a similar self-governing system for executing the final award against particular assets of the losing party and, in practice, it even permits final judgments to be challenged in a number of circumstances.<sup>518</sup>

---

<sup>511</sup> Malcolm N Shaw, 'International Court of Justice: A Practical Perspective' (1997) 46 *International and Comparative Law Quarterly* 1042; Christoph Schreuer, 'The Dynamic Evolution' (n 473) 9.

<sup>512</sup> *Ibid* 19.

<sup>513</sup> Philip Ebow Bondzi-Simpson, *Legal Relationships between Transnational Corporations and Host States* (Quorum Books 1990) 191-92.

<sup>514</sup> Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23(1) *Journal of International Arbitration* 1, 13.

<sup>515</sup> Kim (n 77) 242, 258.

<sup>516</sup> ICSID Convention art 53(1).

<sup>517</sup> *ibid* art 54(1).

<sup>518</sup> Baldwin (n 514) 5, 9.

The ICSID convention and international law regarding treaties suggest a platform for a court to refuse to enforce an ICSID award. As the number of ICSID disputes ascends, courts will likely become more involved in establishing the parameters for enforcement of ICSID awards. Furthermore, international law regarding treaty obligations provides several avenues for challenging award enforcement.<sup>519</sup> The binding force of the awards granted is limited to the parties involved, as it does not extend to other cases before tribunals and does not create binding precedents.<sup>520</sup>

### **The gaps in the current ICSID system**

The lacunas of ICSID system undermine the convention's efficiency and jeopardise its professionalism. ICSID tribunals have failed to develop a coherent jurisprudential approach or consistent standard of review, and their arbitrations have generated a contradictory jurisprudence that lacks theoretical coherence and remains tied to the private law origins of international arbitration.

Approaching the NPM clause in the US-Argentina BIT, the three tribunals in *CMS*,<sup>521</sup> *Enron*,<sup>522</sup> and *Sempra*<sup>523</sup> imported the customary law requirements of necessity into their analysis and required Argentina to demonstrate that the actions it took were the only means available to the government in response to the crisis. However, the necessity defence is not a standard of review, but rather a narrow carve-out of generally customary law rules of state responsibility. Therefore, it does not lay the groundwork for a standard of review that could be generalised to public law disputes writ large.

The above analysis seems to indicate that the reliance on the customary international law is of necessity for defence, and its narrow construction essentially precludes the public law elements of the dispute from playing any meaningful role in the case resolution. Eventually, the three tribunals vitiated the necessity defence

---

<sup>519</sup> *ibid* 23.

<sup>520</sup> Christoph Schreuer, 'The Dynamic Evolution' (n 473) 9.

<sup>521</sup> *CMS, Gas Transmission Co. v Argentina Republic* [2007] ARB/01/8 (ICSID).

<sup>522</sup> *Enron Corp Ponderosa Assets, LP v Argentina Republic* [2007] ARB/01/3 (ICSID).

<sup>523</sup> *Sempra Energy International v Argentine Republic* [2007] ARB/02/16 (ICSID).



as a matter of law and reverted back to what is essentially a private law, without recognition of the public law that lay at the heart of the cases.<sup>524</sup>

The aforementioned gap, however, reveals yet another lacuna in the form of diverse rulings. The lack of coherent jurisprudential approach generates inconsistencies in the tribunals' rulings. For instance, in *LG&E v Argentina Republic*<sup>525</sup> and *Continental Casualty v Argentina Republic*,<sup>526</sup> the tribunals took a very different approach to the NPM clauses. They also gave considerable deference to Argentina's determination that its actions were necessary to protect essential security interests and maintain public order. These tribunals recognised the public law nature of the disputes, as national and global policy concerns were at stake. As it can be seen, the divergent rulings and decisions in the presented cases indicate presence of a legitimacy gap.

Because the ICSID jurisprudential framework remains thin, and the applicable standards of review are far from being sufficiently elaborated and clarified, this produces a sense of doubt in the system's legitimacy.<sup>527</sup> The tribunals' multiple approaches lack uniformity and result in ambiguity and conflict over the applicable standard of review in similar public law settings. They invoke contradiction and confusion, further highlighting the need for the emergence of a clear standard of review.<sup>528</sup>

Moreover, the legitimacy of the ICSID arbitration has been questioned even from within the ICSID system. For instance, in the *CMS*<sup>529</sup> case, the tribunal gave an erroneous interpretation of Article XI<sup>530</sup> that could have decisive impact on the operative part of the award. This daring declaration casts a shadow of uncertainty over the quality of ICSID jurisprudence in particular, and the legitimacy of investor-

---

<sup>524</sup> William W Burke-White and Andreas Von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration' (2010) 35 *The Yale Journal of International Law* 297-98.

<sup>525</sup> [2006] ARB/02/1.

<sup>526</sup> [2008] ARB/03/9.

<sup>527</sup> Burke-White and Von Staden (n 524) 299.

<sup>528</sup> *ibid* 323-24.

<sup>529</sup> *CMS, Gas Transmission Co. v Argentina Republic* [2007] ARB/01/8 (ICSID).

<sup>530</sup> ICSID Convention art XI.

state arbitration in general.<sup>531</sup> The conclusion that arises from this paragraph is that no ICSID tribunal has engaged in a serious and considered treatment of the appropriate standard of review that could be applied in cases pertaining to public law issues.<sup>532</sup>

Another grave legitimacy gap concerns the annulment committee's role. Expansions in the scope of review at the annulment committee level have weakened the historic advantage of the ICSID arbitration system and have limited the ongoing evolution of the ICSID system to a judicialised institution capable of generating coherent rules governing international investment disputes.<sup>533</sup>

In addition, ICSID arbitral tribunals have been undergoing judicialisation in that they have acquired domestic court-like features that enable them to affect state and individual behaviour, rather than solely resolving disputes.<sup>534</sup> Ongoing confusion pertaining to the role of the annulment mechanism and inconsistent decisions of annulment committees has further jeopardised the legitimacy of the ICSID arbitration system as a judicialised body capable of shaping prospective state and individual behaviours. Hence, the annulment system in its current form cannot serve as a check on conflicting awards produced at the tribunal level.<sup>535</sup>

States have tried to limit the access of investors to international arbitration, symbolising another significant gap at the core of the system. States have attempted to counteract international arbitration and weaken its authority by revivifying domestic remedies. For instance, host states have tried to insert forum selection clauses in investment contracts, because, under these clauses, disputes arising in the context of the contract are to be taken to national courts or tribunals.<sup>536</sup> This turn to domestic remedies undermines the nature of ICSID, which tried to obstruct domestic interference.

In addition, host states have attempted to restrict the meaning of the substantive standards granted to investors. For example, host states have tried to

---

<sup>531</sup> Burke-White and Von Staden (n 524) 300.

<sup>532</sup> *ibid* 328.

<sup>533</sup> Kim, (n 77) 244.

<sup>534</sup> *ibid* 245.

<sup>535</sup> *ibid* 246.

<sup>536</sup> Christoph Schreuer, 'The Dynamic Evolution' (n 473) 12.

limit the standard of fair and equitable treatment. The somewhat open-ended and flexible standard invoked in almost every case has led to attempts to limit its meaning.<sup>537</sup>

Another fundamental gap concerns the essence of the ICSID convention. While investment constitutes the core of ICSID, it did not earn an unequivocal definition. The ICSID system does not define investment wilfully and has left it to the states to provide the definition of the types of investment entitled to international protection in separate legal instruments.<sup>538</sup> The flexibility of states to define foreign investments can cause ambiguity, confusion, and allow for exploitation of the system for personal needs.

Lacunas can even be found in the convention articles, as Article 54(1)<sup>539</sup> generates a possible gap by stating that the obligation to enforce an award only covers pecuniary obligations. Although it would be incorrect to deduce from this provision that an ICSID tribunal may not order non-pecuniary relief, it does point out that ICSID convention had doubts concerning the feasibility of an enforcement of non-pecuniary obligations.<sup>540</sup>

'Emergency Law', 'necessity', or 'economic crisis' claims that are inflicted by host countries may expose shortcomings in the protection afforded to investors under numerous BITs and FTAs. This gap came to realisation in 1996 in the case of *Sempra Energy Int'l v Argentina*,<sup>541</sup> when Argentina tried to adjust contracts, licenses, and concessions with the investor under the label of a major economic and currency crisis.<sup>542</sup> The Vienna convention even widened the scope of the shortcoming when it recognised that a contracting state might properly suspend its

---

<sup>537</sup> *ibid* 15.

<sup>538</sup> Omar E Garcia-Bolvar, 'Protected Investments and Protected Investors: The Outer Limits of ICSIDs of Reach' (2010) 2(1) Trade, Law and Development 149.

<sup>539</sup> ICSID Convention art 54(1).

<sup>540</sup> Christoph Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20(4) Arbitration International 325.

<sup>541</sup> *Sempra Energy International v Argentine Republic* [2007] ARB/02/16 (ICSID).

<sup>542</sup> Skadden, 'New ICSID Annulment Decisions Exposes Possible Gap in United States Investment Treaty Protection' (Skadden July 19, 2010)

<[http://www.skadden.com/content/Publications/Publications2159\\_0.pdf](http://www.skadden.com/content/Publications/Publications2159_0.pdf)> accessed 20 June 2011.

treaty obligations in certain extraordinary circumstances, such as political and economic events outside the judicial system.<sup>543</sup>

Currently, legitimacy gaps, ambiguities, and absent definitions undermine the advantages of the ICSID and overshadow its contribution to resolutions in investment disputes. To improve the system and promote its efficiency, its principles should be integrated in a new unified international legal system under the authority of the proposed economic international tribunal.

### **Conclusions**

The ICSID has a purpose that exceeds the mere resolution of disputes between investors and states.<sup>544</sup> It strives to increase its influence on the investment world and widen its membership scope. However, ICSID expansion is a mixed blessing, as the increase in the number of ICSID cases has led to an incline in the number of challenges.

Despite its limitations, the centre will likely continue to play a key role in contributing to the conditions necessary for the promotion of capital flows into developing countries.<sup>545</sup> The following chapter theoretically challenge the possibility of ICSID future participation in a united economic tribunal.

---

<sup>543</sup> Baldwin (n 514) 20.

<sup>544</sup> *ibid* 152.

<sup>545</sup> Roberto Dañino, 'Making the most of International Investment Agreements: A Common Agenda' (Symposium Co-Organized by ICSID, OECD and UNCTAD, Paris, December 2005) 1.

## CHAPTER FIVE: PERSPECTIVE, CONCLUSIONS AND RECOMMENDATIONS

### 5.1 The New International Court of State and Corporate Disputes (ICSCD), and its Integration in the Current Dispute Settlement systems

#### Abbreviations

**CAIM** Contract Approval and Interpretation Mechanism

**AHTS** *Ad Hoc* Tribunal System

#### Introduction

##### *Framework of ICSCD*

The ICSCD Tribunal, similar to the ICJ and the ICC, shall function as a judicial organ, and will specialise in commercial disputes arising between MNEs and states. The initial goal of the ICSCD is to segregate fatherly the political and the legal aspects in international commercial legal issues.

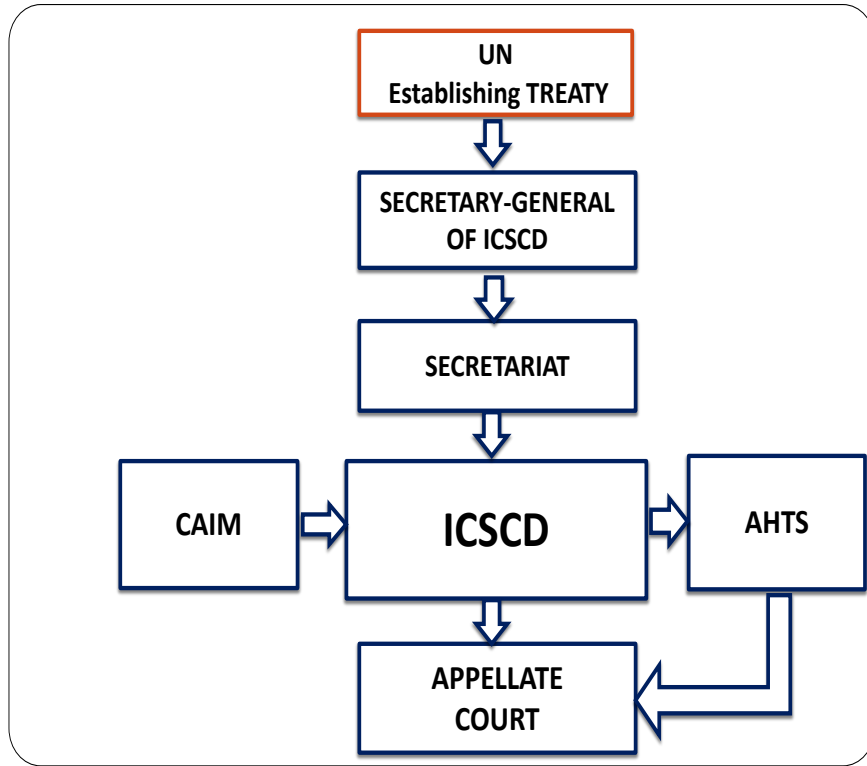
A vote in the United Nations general assembly shall establish the legality and powers of the ICSCD, which would create a treaty binding all the nations affiliated with the UN to uphold this treaty. This treaty will specify the framework of the court, its jurisdiction, power of enforcement, language employed, and qualifications of the courts administration and judges.

The ICSCD's jurisdiction shall cover all disputes between a contracting or defendant state (by MNE), including constituent subdivision or agency of the state, and a registered or defendant MNE(by state), arising directly out of an investment or commercial related agreement or contract. Alternatively, if all parties have consented in writing to submit such a dispute to the ICSCD, preferably in the form of a specific and explicit court-of-choice clause in the contract, the Panel of Judges shall refer the case to a suitable tribunal<sup>546</sup>, and in this case, to the ICSCD.

---

<sup>546</sup> Malcolm D Rowat, 'Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA' (1992) 33 Harvard International Law Journal 109; Michael F Hoellering, 'UNCITRAL Model Law on International Commercial Arbitration' (1986) 20 International Lawyer 327, 109.

**Figure 2** illustrates the *ICSCD* system and the integration with its four main organs:



**Figure 2.** *The ICSCD system*

#### *The ICSCD structure and general principles*

To secure a judicial independence, the ICSCD will be comprised of four main organs: (1) the **ICSCD Secretary** and the **general Panel of Judges**, which will constitute the administrative body and the highest judicial function of the entire ICSCD; (2) an **Ad Hoc Tribunal System (AHTS)** appointed by the Secretary; (3) a **Contract Approval and Interpretation Mechanism (CAIM)**, which will harmonise state-MNE contract law and thus implicitly provide a coherent regulative body for contractual disputes; and (4) an **Appellate Court**, which shall be the final hearing on all appeals from the AHTS, CAIM, ICSCD and external international and domestic tribunals hearing.

The incorporation of the AHTS in the ICSCD shall consist of a selection of various domestic and international courts and tribunals, which would be called in certain cases by the Panel of Judges to rule in disputes. However, as opposed to

current commercial *ad hoc* tribunals, the suggested chambers shall include only members who are focused on, and knowledgeable in, the matters arising from the disputes brought before them.

As a self-contained and autonomous body, the ICSCD sitting as an appellate court would hold the ultimate judicial power, manifested in two respects. First, the ICSCD shall be empowered to hear the parties' concerns pertaining to the competence of the tribunal, the AHTS, or the ICSCD as a whole. The second manifestation of the ICSCD's power shall be its jurisdiction to rule on appeals concerning AHTS tribunals' awards. Thus, the sole judicial body to hear an appeal on an AHTS tribunal's award shall be the ICSCD, which this chapter will thoroughly discuss.

The Secretary is the sole organ in the ICSCD with connections to the UN political and diplomatic organs. The higher positions in the office, Secretary General and Deputy Secretary General, shall be elected by the Contracting States in mutual agreement through the facilities of the UN. The Secretary General shall be the legal representative and the principal officer of the ICSCD in its dealings with the UN and other international bodies.

The Secretariat shall be the only body responsible for the appointment of panel judges. Initially, the Secretariat will appoint the entire Panel, according to the need in specific fields of arbitration that are foreseen by the members of the Secretariat. After the Panel of Judges is determined, it shall be brought to the Contracting States for affirmation.

In addition to the independence from political influence, the ICSCD shall be autonomous from any other international judicial body, and its decisions shall be considered independent, binding, and exclusive. However, the present state of affairs offers an abundance of functioning judicial bodies that perform, to a greater or lesser degree, parts of the intended purpose of the ICSCD. The suggestion made here intends to integrate the current judicial bodies in the ICSCD system rather than eliminate them altogether or compete with them. It is the goal of the ICSCD to unify and consolidate international commercial litigation, not to contribute to its on-going harmful proliferation.

*Establishing treaty as an 'International Codex' for all the current legal texts: Applicable law, precedence and jurisdiction*

The ICSCD shall use as applicable law any international legal material that is deemed relevant to commercial litigation and in line with the Establishing treaty. Thus, the Establishing Treaty shall refer specifically and explicitly to international trade treaties, such as GATT, TRIMS, TRIPS, and GATS; regional agreements such as NAFTA, MERCOSUR and ASEAN; BITs; and other international agreements and charters. The Establishing Treaty shall also refer to any relevant domestic litigation cases worldwide to create the most advanced and up-to-date international commercial arbitration.<sup>547</sup>

Customary international law is another source of legal material that will be used by ICSCD courts. This shall be done, following ICSID experience, in references to case law from the ICJ and arbitral tribunals, as well as treaties, in particular the Vienna Convention on the Law of Treaties, and references to documents adopted by the International Law Commission. A subsequent question will concern the applicable customary law as it was at the time of conclusion of the treaty or at the time of the dispute. Here again, ICSCD courts shall follow the ICSID experience and prefer customary international law at the time of the dispute, as demonstrated in the *Tecnicas* case, where the tribunal applied customary international law 'not as frozen in time, but in its evolution'.<sup>548</sup>

In this manner, the Treaty offers a novelty, for instead of referring generally to 'international law' as the applicable law, as in the case of most trade and investment agreements, it provides a defined framework of references. Most importantly, these references are to be ordered, debated, and positioned in a coherent way. This systematic reference system for international agreements shall also address the contradictions and potential discrepancies between various

---

<sup>547</sup> Fauchald (n 71) 301,318.

<sup>548</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States* [2004] ARB(AF)/00/2 (ICSID).  
<[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602\\_En&casId=C186](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&casId=C186)> accessed 27 April 2012; Fauchald (n 71) 311-12.



agreements. It will decide which principles, codes, and provisions the Treaty will espouse and which ones shall be abandoned.

Thus, the Establishing Treaty shall function as an 'international codex', a legal text that will eventually be regarded as the largest contextual framework for courts' interpretation of contracts and agreements. This unified international law codex shall be a legal codex by which a court, plaintiff, and respondent can be guided. In this manner, the ICSCD expands the very limited definition of 'context' in the Vienna Convention on the Law of Treaties, which restricts this term either to any agreement relating to the treaty or to any instrument created by one or more parties in connection with the conclusion of the treaty.<sup>549</sup>

In many situations, case law from one court is not applicable in another. The lack of a unified international commercial law codex also raises conflict between international law set by treaties and local national laws, often to the detriment of the local people. An example of such scenario can be seen in the ICSID limitations, where a concern for both investors and host countries was raised. The investors have become concerned regarding the complex nature, duration, and costs of the procedure, as well as the growing incidence of requests for annulment, which caused them to question the finality and cost of ICSID proceedings. Host countries, on the other hand, become weary of the possibility of being sued. The legal codex shall be established in a joint effort of registered states, scholars, and law professionals knowledgeable in litigation and the practical aspect of international law implementation.

The process of determining legal definitions of commonly used and debated terms such as 'International Personality'<sup>550</sup>, 'Security'<sup>551</sup>, and Expropriation'<sup>552</sup> shall be done by analysing past MNEs- state dispute cases where those terms

---

<sup>549</sup> Fauchald (n 71) 319.

<sup>550</sup> Text to n 76 in ch 2.1.

<sup>551</sup> Text to n 153; See GATTs' weak reservation in *U.S v Thailand*, text to 155 in ch 2.2.

<sup>552</sup> The definition of expropriation under NAFTA: some provisions allow explicit expropriation and also allow indirect expropriation. See *Metalclad Corp v the United Mexican States*; CEMEX Asia Holding case. Text to n 199; and Trakman opinion Text to n 207.

were open for interpretation due to vague language.<sup>553</sup> This task is possible as each law scholar is well aware of the 'illness' of the discipline to expertly negotiate interpretations of certain legal terms. When the ICSCD is formed, various relevant and clear codes must be integrated in the new 'international codex' and gain a legal binding status in order to rule by them.

In the new system, the ICSCD will be obliged to refer to all the legal material at its disposal, in accordance with a fairly-ordered method. It will address the specific contract signed between the state and the MNE, observe all the relevant BITs and regional treaties, and finally account for any relevant international treaties relating to the Establishing Treaty. In turn, this treaty will be the sole document to assist the judges in mediating contradictions between all the other legal documents.

The effectiveness of the sealing of the Establishing Treaty bears special significance, for it would have an enormous impact on the success of the ICSCD system. A major problem with subsequent agreements to a signed treaty is that they may reduce the transparency of the treaties. On one hand, investors cannot trust that the treaty constitutes the final regulatory framework, and on the other, it helps to undermine domestic constitutional and democratic procedures.<sup>554</sup>

When the Establishing Treaty is signed, there will be only an extremely narrow option of adding any interpretive agreement to it, which will require an absolute accord of all ICSCD Contracting States. In addition, these states will be expected not to sign any BIT or regional agreement that contradicts the principles outlined in the Establishing Treaty. These severe restrictions correspond with the principle of the Panel of Judges' judicial autonomy, and demonstrate to what extent the ICSCD trusts them with interpretive power of the Establishing Treaty.

To be more specific on the issue of interpretation, the rationale of integrating the ICSCD system into the ICSCD follows the former's convention, stating that any dispute concerning the interpretation or application of the convention that is not settled by negotiation shall be referred to the ICJ. Thus, under the auspices of the

---

<sup>553</sup> See the discussion on vague language text to n 183; see also the 'Banana dispute', text to n 163; the TRIMS short illustrative list; and State Counter list, text to n 165.

<sup>554</sup> *ibid* 332.

ICSCD, the interpretation of the ICSID convention shall be regarded an exclusive prerogative of the ICSCD's Panel of Judges. Hence, the ICSID Convention shall still be considered as valid, but will be also considered as secondary to the ICSCD Establishing Treaty.

### *The Secretariat*

#### *Structure*

The Secretary-General of the UN will initially appoint the Secretary-General of the ICSCD and the ICSCD Secretariat will appoint all subsequent Secretary-Generals. As the principal administrative organ of the ICSCD, the secretariat shall be responsible for the day-to-day running of the system, as well as the appointment of judges, the registration of claims, and their initial screening.<sup>555</sup> The judges shall all be elected under the following principles of qualification:

- a. A minimum of 10 years of international corporate law experience.
- b. A minimum of 10 years as a judge.
- c. References.
- d. Not active in any political movement or party.

The Secretariat shall consist of the Secretary-General, seven Deputies Secretary-General, and staff. The higher positions, Secretary-General and Deputies Secretary-General, shall be elected by the Contracting States in mutual agreement through the facilities of the ICSCD. Borrowing from the well-informed ICC and ICJ tribunals' structure rules, there shall be no more than one Deputy Secretary-General of the same nationality. The staff, which is not considered a

---

<sup>555</sup> It will combine the powers of the Presidency and the Pre-Trial Division of the ICC. See *Rome Statute of the International Criminal Court* (hereafter Rome Statute), art 38 <<http://www.icc-cpi.int/NR/rdonlyres.pdf>> accessed 11 august 2011. On the Secretariat of the ICSID, see Gabriel Egli, 'Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions' (2007) 34 *Pepperdine Law Review* 1045, 1060.

body of members of the Secretariat, shall be nominated directly by the Secretary-General.<sup>556</sup>

The Secretary-General shall be the legal representative and the principal officer of the ICSCD. Borrowing from the ICSID system, the Secretary-General and the Deputies Secretary-General will be elected for a term in office of six years and shall be eligible for reelection. They shall all be elected under the following principles of qualification:

- a. A minimum of 15 years experience in international Corporate or commercial law.
- b. Minimal Master's degree in a relevant field.
- c. Administrative or judicial experience of a minimum 10 years.
- d. No criminal background.
- e. References from previous professional activities.
- f. Neither the Secretary-General nor any Deputy Secretary-General may hold any political or other position, will be only on the payroll of the ICSCD,<sup>557</sup> and in time shall preferably be former AHTS tribunal judges.

The seven deputy-Secretary-Generals (DSG) will be required to have the same qualifications as the Secretary-Generals (SG).

The centralisation of the ICSCD in the hands of the Secretariat is due to the lessons learned from the ICTY experience. The wide autonomy given to the chambers of the well-established ICTY to fulfill the crucial need for judicial in the best way possible resulted in a problem of accountability in two different stages.

First, it has been extremely difficult, and has taken an extraordinary long period to combine the organs of the system to work in a way that would guarantee efficiency, since each one is very careful about giving away its institutional independence and rejecting its necessary accountability to the Secretariat. Second, this problem resulted in the parent organ of the ICTY, as the Security

---

<sup>556</sup> ICSID Convention art 9; *Rome Statute* art 36; Statute of the International Court of Justice (hereafter ICJ Statute), art 26 <<http://www.icj-cij.org/documents/index> > accessed 11 August 2011 art 3; Egli (n 555) 1060.

<sup>557</sup> ICSID Convention arts 10 and 11; Egli (n 555) 1060.

Council of the UN, finding it extremely difficult to hold the chambers accountable before it.

Thus, as Ralph Zacklin accurately observes, 'the decentralisation of power and accountability, coupled with the need to respect judicial and prosecutorial independence, have been chronic problems, for which no solution has been found'. In case of the trade-law arena, as demonstrated throughout the present research, this problem finds a reasonable solution in the form of a de-politicized judicial organ, accountable before a half-politicized Secretariat, which buffers the influence of the shaky waters of the UN diplomatic arena.<sup>558</sup>

### *Registrar Office*

The Secretary-General shall appoint a Registrar Office that will be responsible for registering claims brought before the ICSCD. As such, the office will be responsible for entering all significant data concerning the institution, conduct, and disposition of each proceeding, including the membership of the chosen Tribunal. All communications from any party or arbitrator to the ICSCD shall be addressed to the Registrar.<sup>559</sup>

### *Appointment*

#### *Appointment of the Panel*

The Secretariat shall be the only body responsible for the appointment of judges. Initially, the Secretariat will appoint the entire Panel of judges. This will be done according to the need in specific fields of arbitration that are foreseen by the members of the Secretariat, such as portfolio investment, trade in communication services, or mergers.<sup>560</sup>

---

<sup>558</sup> Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 Journal of International Criminal Justice 541, 544-45.

<sup>559</sup> *The London Court of International Arbitration Rules* (hereafter LCIA Rules), art 3 [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx) accessed 11 august 2011. On the proceedings of the Office, text to sections 4.1 and 4.2.

<sup>560</sup> Similar to the LCIA, wherein appointments to the panel are made by the Court alone, with the recommendation of the Contracting Parties, or the ICC, wherein the court elects the candidates but the Contracting Parties have the right to put for vote one nominee for each. LCIA Rules *The London Court of International Arbitration Rules* (hereafter LCIA Rules) art 6 [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx) accessed 11 august 2011 art 5; *Rome Statute* art 36; *ICJ Statute* art 9. It is opposed to the

The Secretariat shall also be the sole body to possess the power to appoint new members to the Panel. This will be done in two cases: (1) when a member retires or dies; (2) when the secretariat decides there is a need to expand the number of members in a certain field due to an increase of cases brought under it.<sup>561</sup> All decisions made by the Secretariat shall be determined by a majority vote of its members. The Secretary-General shall possess no special voting powers.<sup>562</sup>

### *Appointment of a Tribunal's Members*

The Secretariat shall appoint the tribunal as soon as possible after receipt by the Registrar Office of the response or after the expiry of 30 days. The Secretariat shall appoint, by a majority vote, the members of the tribunal according to the categories defined by the Registrar Office. For instance, if the dispute involves a charge of expropriation of assets allegedly breaching a contract of investment in the industry of beverages, the Secretariat shall try to appoint the members who have the most experience in issues of investment and expropriation, and if possible in the beverages industry.<sup>563</sup>

### *Number of Tribunal Members*

In accordance with an international law principle, as can be seen in the aforementioned courts models<sup>564</sup>, the tribunals will operate with three members, including the chairperson. However, the Secretariat shall preserve the right to nominate more members to a tribunal if it anticipates that the specific needs of a dispute require a larger number of judges. The 'needs' are defined here according to the complexity of the matter in dispute and the professional value of certain members to solve it. The tribunal shall also include a Secretary for Administration Purposes.<sup>565</sup>

---

ICSID method, wherein each Contracting Party is entitled to appoint up to four members to the panel, see George R Delaume, 'ICSID Arbitration Proceedings: Practical Aspects' (1985) 5 Pace Law 563, 572.

<sup>561</sup> Rome Statute art 36; Delaume (n 560) 572.

<sup>562</sup> ICJ Statute art 55; Delaume (n 560) 572.

<sup>563</sup> LCIA Rules art 5; Rome Statute art 36; ICJ Statute art 55.

<sup>564</sup> See Figure 1 on p 13 of this thesis.

<sup>565</sup> Andreas Zimmermann, 'Ad Hoc Chambers of the International Court of Justice' (1989) 8 Dickinson Journal of International Law 15; Henry G Schermers and Niels M Blokker,

The small number of three members per tribunal follows the long lasting tradition of ICSID arbitrations in that it assists the proceedings' efficiency. Thus, although the ICSID is struggling with more and more cases brought before it each year, it seems that the system manages to maintain a somewhat consistent and reasonable duration of proceedings.<sup>566</sup>

In the 2010 case brought by an MNE against the government of Rwanda, for instance, the proceedings lasted less than a year, including the registration, a request for provisional measures, the opponent response, the constitution of the tribunal, and the settlement. Another case, against the government of Grenada concerning an oil exploration contract allegedly breached, was pending in an ICSID tribunal for only five months from the assembly of the tribunal to the rendering of the award. Similarly, in a case brought before the ICSID regarding a dispute between a MNE and the Kingdom of Jordan on the issue of a light railroad construction contract by the company, the proceedings lasted for less than two years.<sup>567</sup>

Thus, the Panel of Judges has the absolute power in determining a tribunals' jurisdiction. As Hoellering argues, such self-determination provides for the severability of the arbitration agreement from the contract, granting jurisdiction to the arbitrators under the agreement to determine the validity of the contract itself. In the absence of a specific choice-of-court clause, the ICSCD will follow the ICSID example and grant, as Rowat points out, jurisdictional power to its tribunals in any case of provisions in certain investment treaties or national codes applicable to the disputed agreement.<sup>568</sup>

Thus, under the auspices of the ICSCD, ICSID's tribunals shall maintain their right of abstinence from hearing a case if they consider it to be manifestly

---

International Institutional Law: Unity within Diversity (3rd edn, Martinus Nijhoff 1995) 451-52; Egli (n 555) 1062.

<sup>566</sup> 'ICSID Caseload – Statistics' (ICSID, 2011) <<http://icsid.worldbank.org>> accessed 11 August 2011.

<sup>567</sup> *Olyana Holdings LLC v Republic of Rwanda* [2010] ARB/10/10 (ICSID); *RSM Production Corporation and others v Grenada* [2005] ARB/10/6 (ICSID); *International Company for Railway Systems (ICRS) v Hashemite Kingdom of Jordan* [2009] ARB/09/13 (ICSID); ICSID Convention art 16; Schermers and Blokker (n 565) 452-53.

<sup>568</sup> Rowat (n 546); Hoellering (n 546) 335.

outside their own jurisdiction. However, in such a case, their decision shall be examined by the Secretary and Panel of Judges. The latter would have three options in their possession, (1) to overthrow the abstinence ruling and return the dispute to the same court; (2) to refer the case to another tribunal from the ICSCD's arsenal of domestic courts and other international *ad hoc* tribunals; and (3) if the Panel of judges decides that the case is not suited for ICSCD courts, the parties to the dispute shall refrain from bringing it before non-ICSCD tribunals.<sup>569</sup>

This jurisdictional power of the ICSCD's tribunals shall include a wide range of cases, referring to any dispute with some commercial relevance. This includes not only investment, construction of contracts, licensing, and concession agreements, but also purely manufacturing activities, any trade transaction for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, leasing, construction of works, consulting, engineering financing; banking, insurance, exploitation agreements or concessions, joint ventures and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.<sup>570</sup>

In addition, as in the case of the ICJ, the ICSCD's Panel of Judges shall have the power to declare invalid decisions of the UN organs both in advisory proceedings and in contentious cases in which a UN organ resolution forms part of the applicable law. As Dapo Akande argues, a UN international tribunal should not renounce its duty and responsibility to decide, in accordance with international law, cases brought before it by overly deferring to legal determinations made by other organs, even when that involves determining the legal limits of the powers of that organ.<sup>571</sup>

Following Fauchald's terminology, the ICSCD *Ad Hoc* Tribunals shall be more 'legislator-oriented' than 'dispute-oriented' courts. That is, they shall act in a way that relies heavily on precedents<sup>572</sup>.

---

<sup>569</sup> Delaume (n 560) 790.

<sup>570</sup> Hoellering (n 546) 330.

<sup>571</sup> Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *The International and Comparative Law Quarterly* 309, 342.

<sup>572</sup> Text to n 753 in ch 5.4.



One of the most acute questions arising when considering the interpretation of applicable law is the issue of the balance between what Schreuer refers to as the principles of effectiveness and restrictiveness. The former designates the favouring of an interpretation that would most effectively fulfil the objectives of a provision or a treaty, whereas the latter favours an interpretation that best protects the sovereignty of the state. As the history of the ICSID shows, tribunals largely intend to prefer the former instead of the latter, leaving sovereigns with little incentives to initiate suits against MNEs. Even when tribunals take a restrictive approach, they do so in a very limited manner, taking into an account only exceptions to main rules.<sup>573</sup>

## 5.2. Ad Hoc Tribunals of Companies Crimes

### Abbreviations

**AHTS** – The *Ad Hoc* Tribunal System

### Introduction

#### *The AHTS as an Organ of the ICSCD*

This chapter proposes a structure for a novel *ad hoc* Tribunal System (AHTS) for the settlement of disputes in the area of international trade. The proposed system is designed to serve as an organ of the ICSCD. As such, the AHTS would be created by the ICSCD Establishing Treaty, signed by the Contracting Parties under the auspice of the UN.

The incorporation of the AHTS in the ICSCD shall follow the ICJ's precedent. This form of incorporation has four major advantages, the most striking one being the direct benefits of being a part of a comprehensive framework. Thus, the AHTS shall derive its independence of political influence, jurisdiction powers, enforceability, and exclusiveness directly from the ICSCD.<sup>574</sup>

---

<sup>573</sup> Christoph Schreuer, 'The Dynamic Evolution' (n 473) 1; Fauchald (n 71) 318.

<sup>574</sup> Eduardo Jimenez Arechaga, 'Amendments to the Rules of Procedure of the International Court of Justice' (1973) 67 *American Journal of International Law* 1; Sandra L Hodgkinson,

In a maritime border dispute between the United States and Canada in the early 1980s, named the *Gulf of Maine Case*, both sides agreed on the formation of an ICJ *ad hoc* chamber instead of referring to the ICJ Court itself. As Schwebel argues, that was a result of the attractive combination of the ability to influence court procedure and the identity of the chamber's members as well as the convenience of an established institution.<sup>575</sup>

In cases where arbitral tribunals are connected to the system more loosely, the enforceability of an award might be jeopardised. In the ICJ, for instance, awards rendered by *ad hoc* arbitral tribunals that do not constitute strictly as chambers are not treated as ICJ final awards. This has been demonstrated several times, as in the *Beagle Channel* dispute between Chile and Argentina. In this case, the Security Council of the UN did not reinforce the award and the process required a further involvement of non-legal elements, such as the Pope, to terminate the dispute.<sup>576</sup>

The second advantage lies in the observation that chambers are usually constituted for purposes of dealing with specific issues. Thus, their members tend to be more focused and knowledgeable in the matters arising from the disputes brought before them. For these reasons, among others, the ICJ Court has decided in 1993 to establish a chamber specifically for referring to it disputes in environmental issues.<sup>577</sup>

An additional advantage concerns the issue of rulings. As Zimmermann points out, the strong attachment of the chambers to a comprehensive system allows for the *ad hoc* rulings to follow prior extensive practices of other tribunals. Thus, the rulings of chambers are more predictable than those of

---

'Are Ad Hoc Tribunals an Efficient Tool for Prosecuting International Terrorism Cases?' (2010) 24 Emory International Law Review 515-17.

<sup>575</sup> Stephen M Schwebel, 'Ad hoc chambers of the International Court of Justice' (1987) 81 American Journal of International Law 831, 843.

<sup>576</sup> Zimmermann (n 565) 6, 7.

<sup>577</sup> *Statute of the International Court of Justice* (hereafter ICJ Statute), art 26 <<http://www.icj-cij.org/documents/index>> accessed 11 august 2011; Schwebel (n 575) 843; Schermers and Blokker (n 565) 451.

arbitral tribunals and they strengthen the confidence of the Contracting Parties and MNEs in the system.<sup>578</sup>

On the same note, *ad hoc* chambers' jurisdiction is usually restricted to the particular questions of certain categories of disputes. However, their reliance on precedence and their role in an autonomous comprehensive system, such as the ICJ or the proposed ICSCD, allow their members to take into consideration broader issues usually lacking in international law, such as environment, consumer and labour rights and national security.<sup>579</sup>

In addition, *ad hoc* chambers are less expensive for the parties involved than arbitration tribunals, because the expenses of the proceedings are borne by a fixed budget to which the litigants contribute as members. The frugality of the system might be crucial for developing states, which are sometimes overloaded with lawsuits brought by MNEs against them.<sup>580</sup>

That is true especially in the current system of fees and awarding of costs, which is wildly inconsistent. As Gotanda rightfully suggests, in this unpredictable reality, the legitimacy of the dispute resolution is severely undermined. It also jeopardises the parties' ability to settle disputes, and thus neutralises the efficiency of the entire process of arbitration. At the international level, these problems are acutely dangerous, for the costs and fees in transnational disputes can reach millions of dollars.<sup>581</sup>

The formation of chambers shall guarantee the AHTS tribunals as much judicial independence as possible. As opposed to ICSID *ad hoc* tribunals, for

---

<sup>578</sup> Zimmermann (n 565) 6-8.

<sup>579</sup> ICSID Convention; Schermers and Blokker (n 565) 461; Carmen G Gonzales, 'An Environmental Justice Critique Of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms' (2011) 32 University of Pennsylvania Journal of International Law 723; Rahim Moloo and Justin Jacinto, 'Environmental and Health Regulation: Assessing Liability under Investment Treaties' (2011) 29 Berkeley Journal of International Law 1.

<sup>580</sup> Schermers and Blokker (n 565) 276, 451; Zimmermann (n 565) 8; Andrew A Jacovides, 'International Tribunals: Do They Really Work for Small States' (2001) 34 New York University Journal of International Law and Politics 253, 260-61.

<sup>581</sup> John Y Gotanda, 'Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations' (2009) 44 Villanova University School of Law School of Law Working Paper Series 1.

instance, the AHTS tribunals will not be composed under the consent of the disputing parties.<sup>582</sup>

Thus, the entire structure of the AHTS is designed to promote independence. It will be composed of a Secretariat, and of a judicial organ, comprising a Panel and individual *ad hoc* tribunals. The following sections discuss the latter, as they address the issue of proceedings. Finally, the last section concludes by revisiting the relationship between the AHTS and the ICSCD, in the form of an appellate body.

### *The Tribunals components - General*

As indicated above, the arbitral body of the AHTS shall consist of a panel of judges and specific *ad hoc* tribunals drawn out of the members of the panel. As the AHTS is a part of the self-contained ICSCD rules, the place of arbitration in each case does not have the significance that it has in the case of *ad hoc* arbitration subject to domestic law.<sup>583</sup>

The chairperson of a specific tribunal shall be chosen directly by the Secretariat, and will preferably be nominated according to seniority among the other members of the tribunal. The chairperson will be considered the representative of the tribunal facing the parties to the dispute and in any event of questions or procedural matters brought by the Secretariat or the ICSCD. The chairman shall possess no special voting or other powers not provided to the other members of the tribunal.

### *Panel Members' Qualifications*

The principle in searching for potential members for the AHTS Panel shall be the candidate's legal background in the general fields of trade-law and international trade-law. Additionally, it is required, if possible, that the panel

---

<sup>582</sup> Sedlak (n 77) 147, 148; Abadir M Ibrahim, 'International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms' (2011) 7 *Eyes on the ICC* 157, 164.

<sup>583</sup> Delaume (n 560) 574; Stuart Ford, 'International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers' (2010) 43 *John Marshall Law Review* 715, 717-19.

members will be as diverse in their specific fields of expertise as possible to minimise potential objections of the parties to a dispute to the Secretariat's decision on which Panel members shall sit at a certain tribunal.<sup>584</sup> To both address complex international trade issues and strengthen the confidence of states and MNEs in the court, it is also desirable that the appointment will be limited to persons holding the highest judicial positions, or at least are suitable to hold these positions, in their countries.<sup>585</sup>

However, considering the novelty of the ICSCD and the AHTS, as well as the complexity of international trade-law, a panel judge position shall be open also to lower-ranked judges, lawyers, and even civil servants, if the Secretariat finds them suitable for their experience and expertise in the relevant fields.<sup>586</sup>

In any event, once a person is appointed as an AHTS Panel Judge, he or she is forbidden from holding any other judicial, political, or private-sector position, and will be on the payroll of the AHTS only. If any potential conflict of interest arises, the member of the tribunal must inform the Secretariat immediately.<sup>587</sup>

As to the crucial question of the nationality of judges, the AHTS offers a moderate approach. Thus, in composing the Panel, the Secretariat is advised to take into consideration this issue and appoint the members in a way that would result in the greatest national diversity. While there is no definite percentage of membership from each Contracting Party, there is a requirement that at least one member shall represent every Contracting Party.<sup>588</sup>

The issue of national diversity cannot be avoided. Its importance is manifested not only in promoting confidence in the system, but also for the development of international economic law. As Akhavan notes, national diversity helps to develop even core principles, such as what is considered just and fair and,

---

<sup>584</sup> ICSID Convention art 14.

<sup>585</sup> *Rome Statute* art 36.

<sup>586</sup> Schermers and Blokker (n 565) 455-56; Eric A Posner 'The Decline of the International Court of Justice' (2004) 233 John M Olin and Economics Working Paper 3 <<http://papers.ssrn.com>> accessed 11 August 2011.

<sup>587</sup> *ICJ Statute* art 16; Delaume (n 560) 573.

<sup>588</sup> *LCIA Rules* art 6; ICSID Convention art 13.

as Schermers and Blokker suggest, it also allows for an interplay between national and international law.<sup>589</sup>

However, in appointing specific tribunals, no national considerations shall be taken into account by the Secretariat. After a person is nominated as a member of the panel, he or she shall be considered as a member of the panel only and be chosen to a certain tribunal only on professional grounds.

For minimising the possibility of appointments being made in accord with national identity, there shall be no preference to members with legal experience in a certain state. However, this should not mean that nationals of a certain state are prohibited from sitting as judges in disputes involving their government.<sup>590</sup>

In that respect, the AHTS shall be an improvement of the existing structure of the ICSID. Thus, while borrowing the low number of members per tribunal, the AHTS will be free of ICSID-style politicisation of its tribunals, such as in the case of the dispute between Southern Pacific Properties corporation and the government of Egypt. In this case, the government went as far as refusing to acknowledge the ICSID jurisprudence until the Secretary General and the Hong Kong Corporation would agree to nominate a certain Egyptian national as a member of the tribunal. The ICSID and the Hong Kong Corporation eventually agreed to the demand, thus demonstrating the susceptibility to political influence of a system that allows for the parties' intervention in the composition of the tribunal.<sup>591</sup>

The respective neutralisation of the question of nationality has a desirable side effect of setting aside the possibility of following the questionable procedure of nominating *ad hoc* judges. The ICJ has used this procedure frequently, for

---

<sup>589</sup> ICSID Convention art 14; Schermers and Blokker (n 565) 454; Payam Akhavan, 'The Contribution of the Ad Hoc Tribunals to International Humanitarian Law' (1997) 13 American University International Law Review 1509, 1521-23; Leigh Swigart 'National Judge: Some Reflections on Diversity in International Courts and Tribunals' (2010) 42 McGeorge Law Review 223, 233.

<sup>590</sup> Schermers and Blokker (n 565) 456-58.

<sup>591</sup> *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* [1992] ARB/84/3 (ICSID), Award of the Tribunal, May 20 1992.

example in cases such as the *Gulf of Maine*, has raised questions of the qualifications of judges.<sup>592</sup>

### *Duration of Terms*

The term in office of an AHTS Panel member shall be nine years, following the ICC's and ICJ's lengthy terms, with an option of renewal. The Secretariat shall authorize the renewal in consultation with the recommendation of all panel members, following the approval of the Contracting Parties. However, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.<sup>593</sup>

In case of death or resignation of a member of a panel, the Secretariat shall nominate a new member to serve for the remainder of that member's term. At the end of the term, the new member replacement's performance will be examined by the Secretariat and voted upon, similar to any other member.<sup>594</sup>

The lengthy period of a Panel member's term, unfamiliar in the ICSID for instance, in which judges serve for periods of six years, is the result of positioning the AHTS in a comprehensive framework such as the ICSCD. This is important for two reasons:<sup>595</sup> First, it joins the limited consideration of nationality of judges in promoting judicial independence. Thus, the longer the term is, the less the member is dependent upon the Secretariat and the Contracting Parties. The second reason is the long duration in office assists in creating an autonomous and long-lasting legal tradition relied upon precedence. Thus, the longer a judge serves in the same position there is more likelihood that the system will develop a coherent line of ruling. As Gabriel Egli points-out, the reliance on precedents is crucial for maintaining consistency in rulings.<sup>596</sup>

In the international criminal and humanitarian arena, the significance of reliance upon precedents is strikingly illuminating. As Akhavan shows, the ICTR

---

<sup>592</sup>The *Gulf of Maine*, Judgment of 12 October 1984; Zimmermann (n 565) 19-20; Schermers and Blokker (n 565) 454.

<sup>593</sup> ICSID Convention arts 15 and 16; ICJ Statute art 13; Rome Statue art 46.

<sup>594</sup> ICSID Convention art 15; Zimmermann (n 565) 21.

<sup>595</sup> ICSID Convention *ibid*.

<sup>596</sup> Egli (n 555) 1079.

has created crucial precedents for the development of, *inter alia*, the definition of a war crime. In this respect, the AHTS efforts to constitute a reliable judicial tradition will be no more than an institutionalization of this kind of 'deeply-rooted tradition' of precedence', as Zimmerman coins.<sup>597</sup>

### *Proceedings*

#### *Initiating Arbitration*

Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to the Registrar Office. It is important to emphasise that the ICSCD will allow, and encourage, both claims filed by MNEs against states and claims presented by states against MNEs.<sup>598</sup> Moreover, by providing the Secretariat the full jurisdiction in deciding the membership of the tribunals, there is no room for either Contracting Parties or MNEs to make any demands in issues of procedures and judges at this stage.

#### *The Screening Stage*

After receiving the claim of the plaintiff, the Registrar Office shall decide, under the approval of the Secretary General, if the dispute is *manifestly* within or outside the jurisdiction of the AHTS. This shall be done based on the information contained in the request alone and relying solely upon the broad principles and definitions of the Establishing Treaty.

If the claim is found to be relevant, the Registrar Office shall notify the parties of the registration. The Office shall also, at this stage, decide on the merits of the claim and categorise it for the Secretary General to assemble the most suitable tribunal.<sup>599</sup>

### *Competence*

---

<sup>597</sup>. Zimmermann (n 565) 17-18; Akhavan (n 589) 1512-14; Eric Talbot Jensen, 'Incentivizing and Protecting Informants Prior to Mass Atrocities Such as Genocide: An Alternative to Post Hoc Courts and Tribunals' (2006) 29 *Houston Journal of International Law* 113, 124-26.

<sup>598</sup> ICSID Convention art 28.

<sup>599</sup> ICSID Convention art 28.



Following the case registration, the proceedings shall follow regular judicial procedures, including written and oral proceedings, the establishment of factual background, and the hearing of claims and objections. This is the stage in which the parties to the dispute may question the competence of the tribunal regarding the case brought before it.

Delaume clarifies that the term 'competence' relates to both the Jurisdiction of the court and to the question of whether the tribunal is empowered to consider issues dealing with its competence. These issues may include questions concerning the constitution of the tribunal or if it is alleged the dispute falls within the competence of another tribunal. In the limits of the ICSCD, the question of competence is further qualified to consider only the professional competence and suitability of the judges, not their nationality.<sup>600</sup> The question of competence shall be considered by the tribunal *itself*. Thus, the tribunal will be authorised to determine if the question of competence will be considered as a preliminary question or be joined to the merits of the dispute.<sup>601</sup>

Here the ICSID's long judicial tradition offers numerous illuminating precedents on which to rely. One such example is the first case submitted to the ICSID: the *Holiday Inns* dispute between a Swiss company and a US corporation, and the Government of Morocco, concerning a construction of hotels in the country. In a response to a challenging claim made by the Moroccan government, the tribunal has restricted its jurisdiction to the foreign companies involved, leaving out of the proceedings their Moroccan subsidiaries that were initially a part of the plaintiff.<sup>602</sup>

### Awards

---

<sup>600</sup> ICSID Convention art 57; Delaume (n 560) 577; Ross P Buckley, 'Now We Have Come to the ICSID Party: Are Its Awards Final and Enforceable' (1992) 14 Sydney Law Review 358, 359-60; Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 Law and Practice of International Courts and Tribunals 371, 378-80.

<sup>601</sup> ICSID convention arts 32 and 41; Schermers and Blokker (n 565) 463-64.

<sup>602</sup> *Holiday Inns SA and others v Morocco* [1972] ARB/72/1 (ICSID); Delaume (n 560) 570; William Rand, Robert N Hornick, and Paul Friedland, 'ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction' (1986) 19 New York University Journal of International Law and Politics 33, 38-39.

As in the ICSID, the ICC, and the ICJ systems, the AHTS tribunal shall rule in a certain case by a majority of the votes of all its members, all of which sign the final decision, given in writing in the form of an award. The award shall state explicitly the reasons upon which it is based and address every issue submitted to the Tribunal by the parties.<sup>603</sup>

The AHTS judgment shall be considered unanimous and without the publication of dissenting opinions of minority judges. Historical proceedings of systems that allow such practices clearly show how dangerous they are to the persuasive force of the judgment, as well as to the efficiency of the proceedings and the effort to create a substantive precedence tradition.<sup>604</sup>

In the *Klöckner v Cameroon* controversial award rendered by an ICSID tribunal on the issue of a construction and operation of a fertiliser factory, the detailed and harsh dissenting opinion of one of the three judges was repeatedly used by the German-based MNE in the annulment proceedings as grounds for proving the tribunal's problematic conduct. In such a delicate environment as the international trade-law arena, it is important to present as much of a strong and coherent professional front to prevent any politicisation of the rulings.<sup>605</sup>

### **The ICSCD as the AHTS' Appellate Body**

Franck suggests that the creation of an appellate court may serve as a successful solution for the problem of the inconsistent decisions of arbitral tribunals. The suggestion that Franck offers in the area of investment is that should be broadened to include the entire arena of trade-law. This is precisely the principle connecting the AHTS to the ICSCD.<sup>606</sup>

---

<sup>603</sup> ICSID convention art 48; *ICJ statute* art 55; *Rome Statute* art 40.

<sup>604</sup> *ICJ Statute* art 57 Schermers and Blokker (n 565) 463-64; Egli (n 555).

<sup>605</sup> *Klöckner Industrie-Anlagen Gmb and others v United Republic of Cameroon and Société Camerounaise des Engrais* (1981) ARB/81/2 (ICSID); Tai-Heng Cheng and Robert Trisotto, 'Reasons and Reasoning in Investment Treaty Arbitration' (2009) 32 *Suffolk Transnational Law Review* 409, 414-16.

<sup>606</sup> Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1606-10, 1617-25

The unity of the *ad hoc* system under the auspices of a single appellate body is also a solution for what Sedlak coins the potential of an 'endless appeals process', wherein every ruling of a tribunal may be questioned in another tribunal or committee without a sealing of an appellate body.<sup>607</sup>

That reality was well demonstrated by the *Klöckner* and *Amco* cases, in which the parties, dissatisfied with each award of the annulment, initiated a second stage of annulment. In another case, *MINE v Guinea*, the parties settled their dispute soon after the award was annulled. In contrast, in the *Gulf of Maine*, the incorporation of the *ad hoc* tribunal as a part of the ICJ has resulted in settling this 'exceptionally knotty and difficult'<sup>608</sup> dispute with no further proceedings.<sup>609</sup>

As a self-contained and autonomous body, the ICSCD sitting as an appellate court would hold the ultimate judicial power manifested in two respects. First, the ICSCD shall be empowered to hear the parties' objections concerning the competence of the tribunal, the AHTS, or the ICSCD as a whole.<sup>610</sup>

The second manifestation of the ICSCD's power shall be its jurisdiction to rule on appeals concerning AHTS tribunals' awards. Thus, the ICSCD will be the sole judicial body to hear an appeal on an AHTS tribunal's award. A party may request an annulment of an award on the grounds of, for example, an appearance of new facts; the claim that the tribunal was not properly constituted or exceeded its powers; that there was corruption on the part of a member of the tribunal; that

---

<sup>607</sup> Sedlak (n 77) 164; Kim (n 77) 242.

<sup>608</sup> Schwebel (n 575) 846.

<sup>609</sup> *Misima Mines Pty Ltd v Independent State of Papua New Guinea* [1996] ARB/96/2 (ICSID); *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (1981) ARB/81/2 (ICSID); *Amco Asia Corporation and others v Republic of Indonesia* [1984] ARB/81/1 (ICSID); Sylvia Schatz, 'Effect of the Annulment Decisions in AMCO v Indonesia and Klöckner v Cameroon on the Future of the International Centre for the Settlement of Investment Disputes' (1988) 3 American University Journal of International Law and Policy 481, 513; Rowat (n 546); Hoellering (n 546) 116-17; Sedlak (n 77) 162-64; George K Foster, 'Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 Columbia Journal of Transnational Law 201, 213.

<sup>610</sup> *ICJ Statute* art 61; Delaume (n 560) 569.

there has been a departure from a rule of procedure; or that the reasons on which the award is based have not been stated.<sup>611</sup>

An additional outcome of the incorporation of the AHTS in the ICSID is the judicial power given to the former. Thus, an AHTS tribunal's ruling shall be considered final and binding upon the parties. Thus, there will be no questioning on the merits of the award in national courts or any other legal system. This point is crucial when one examines the current reality in international trade and investment treaties, which wildly allow for a possibility of recourse to local courts before bringing a claim to an international arbitration institution.

This method had been used frequently by governments, which prefer the convenience of their domestic sympathetic courts. as was demonstrated in the case of the MNE Gas Natural against the government of Argentina. In this case, Argentina tried to invoke a clause in a relevant treaty that offers the aperture of delaying the international arbitral process in no less than 18 months under the provision of exhausting the proceedings in domestic courts. Although in this case the government was not successful in its attempt to interfere with the judicial process, it still demonstrates how easily proceedings can be dragged to an unreasonably long period, and thus transform the entire process of arbitration to an inefficient tool.<sup>612</sup>

Moreover, in the AHTS, there shall be no parallel proceedings. The history of the ICSID shows how crucial such a comprehensive system is specifically in the area of investment. A dispute between SARL Benvenuti and Bonfant corporations and the government of Congo is just one case in which the great disorder in the international legal arena was brought to an absurd state. In this case, there were two parallel proceedings, one in the ICSID and the other in a Congolese court.

---

<sup>611</sup> ICSID Convention art 52; Thomas W Walsh, 'Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality' (2006) 24 Berkeley Journal of International Law 444, 455-59.

<sup>612</sup> *Gas Natural SDG SA v Argentine Republic* [2003] ARB/03/10 (ICSID); C Ignacio Suarez Anzorena and others, 'International Commercial Dispute Resolution' (2006) 40 International Legal Developments in Review 2005 Disputes 251, 259.

Neither court waived its option of jurisdiction, even under a plea of the government.<sup>613</sup>

### 5.3. Control of the legality of States – Corporate contracts

#### Abbreviations

**CAIM** Contract Approval and Interpretation Mechanism

#### Introduction

The following chapter presents a Proposal for a Contract Approval and Interpretation Mechanism (CAIM) as an Organ of the ICSCD. As such, the CAIM's main purpose is to harmonise state-MNE contract law and, consequently, provide a coherent regulative body for contractual disputes.

DiMatteo suggests that unification of contract principles grants many benefits, including the reduced likelihood of disputes precipitated by misunderstandings of the meaning of contractual terms, as well as reduction in transaction costs associated with the negotiation of transnational contracts.<sup>614</sup>

Regulation of contracts is particularly crucial when concerning state-MNE relationships. In many cases, these involve issues such as costumers and workers' rights, as well as much broader issues, such as the future of national natural resources, economic stability, health issues, public safety, and national security.

This sensitivity is sharply demonstrated in cases of Third World nations contracting with powerful MNEs, but it is also manifested, less bluntly, in more powerful nations' contracts with MNEs. As the contracting is a convenient first step for MNEs or large companies to become more dominant in a nation's economy, with the danger of a complete takeover of the economy or natural resources, the role of a regulative mechanism such as CAIM is crucial.

Considering the lack of state-MNE contractual regulation mechanisms, CAIM shall be based upon private international contractual principles and driven

---

<sup>613</sup> *SARL Benvenuti and Bonfant v People's Republic of the Congo* [1976] ARB/77/2 (ICSID); Delaume (n 560) 587.

<sup>614</sup> Larry A DiMatteo, 'Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law' (2002) 43 *International Law Journal* 569, 570.

from the *International Institute for the Unification of Private Law Principles*, which Rosett claims provides well drafted, thoughtful, and specific provisions on vexing problems.

These may be the *Principles of European Contract Law*, which constitutes, as Hesselink and de Vries point out, a major leap forward in European private contract law; and the *United Nations Convention on Contracts for the International Sale of Goods* that 'provides uniform substantive rules of law governing the formation of contracts for the international sale of goods and seller's and buyer's rights and obligations'.<sup>615</sup>

Following these agreements, as well as normative principles of contractual law, the key principles governing CAIM shall be good faith and fair conduct. As Viscasillas emphasises in his discussion of the UNIDROIT Principles, good faith and fair dealing shall be applied in CAIM throughout the life of the contract: during the preliminary negotiations, before the offer, during the formation stages, the exchange of offer and acceptance that leads to the contract's conclusion, and lastly, during the performance phase.<sup>616</sup>

McCaw stated that the right of an individual or a business entity to enter into a contract relating to his or her business is a fundamental liberty. However, as Lando argued, no freedom is absolute; it is primarily subject to the requirement of good faith and fair dealing, and the mandatory rules established by these Principles.<sup>617</sup>

---

<sup>615</sup> International Institute for the Unification of Private Law Principles (hereinafter UNIDROIT Principles) [2004] <<http://unidroit.org/dynasite.cfm>> accessed 10 September 2011; Principles of European Contract Law (hereinafter PECL) [1999]; United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) [1980] <<http://cisgw3.law.pace.edu/cisg/text/treaty.html>> accessed 10 September 2011; Maureen T Murphy, 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1989) 12 Fordham International Law Journal 727; Arthur Rosett, 'UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven' (1997) Uniform Law Review 441, 449; Martin Willem Hesselink and George JP de Vries, *Principles of European Contract Law* (Kluwer 2001) 11.

<sup>616</sup> Ma del Pilar Perales Viscasillas, 'UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions' (1996) 13 Arizona Journal of International and Comparative Law 383, 433.

<sup>617</sup> Kirsten L McCaw, 'Freedom of Contract versus the Antidiscrimination Principle: A Critical Look at the Tension between Contractual Freedom and Antidiscrimination Provisions'

CAIM shall encompass contractual matters between a state and an MNE, which are characterised by certain elements or conditions, such as: (1) the contract is evidently international and the company contracting with the state is not based in that state; (2) the company is a large entity as MNE, with a certain (large) amount of employees and minimum annual income, in comparison to a small foreign company; and (3) the amount of money it transferred according to the contract amounts to 'reasonable' international transactions.

This system has two main purposes: (1) it shall approve contracts between the Contracting Parties in the Pre-contractual and the contractual stage, and (2) it shall act as an arbitrator in disputes arising from such contracts. As a part of ICSCD, CAIM shall constitute a chamber in the comprehensive system, similar to the *Ad Hoc* Tribunal System (AHTS) as discussed thoroughly in the previous chapter of this thesis. As such, it will include an administrative office under the auspices of the ICSCD, which will be responsible for referring contracts and disputes to the appropriate tribunals.

The CAIM judges shall be chosen from the ICSCD Panel itself with no consideration of their nationality. They will be chosen by the CAIM Secretariat, which will, in turn, be nominated automatically by the ICSCD, according to an annual duty roster among the ICSCD Panel of Judges.

The approval body, in contrast, is a simple organ of two judges for each case in which contracts between states and MNEs are brought for approval after the negotiations and the signing stages. This approval shall be regarded as mandatory, for its purpose is to prevent, or at least minimise, the option of various interpretations or a claim of one side, 'to open' the contract for revision. An additional and most important purpose of this body is to prevent cases of depriving, illegal, and immoral contracts. Hence, disputes arising from contracts that were not been approved by the CAIM shall be more legally vulnerable in case of arbitration or a lawsuit. In the approval stage, the judges will be confined to find only gross issues, as noted above, which conflict the general principles of good faith and fair

---

(1996) 7 Seton Hall Constitutional Law Journal 195; Ole Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 American Journal of Comparative Law 379, 387.

dealing, as well as the other general principles with regards, apparently, to the 'freedom of contracts' principle.

### **General Principles for Determining the Validity of a Contract**

This section outlines the contours of state-MNE contracts, which will serve as general guidelines for CAIM judges at the approval stage. Following a widespread tendency in domestic laws to regard procedural and substantive unfairness in contracts as interrelated matters, the said principles are taken here into account under two categories: the procedural stage of negotiations and the substance of the contract.<sup>618</sup>

#### *The Negotiations Stage*

The pre-contractual stage of negotiations is governed by the principle of good faith and fair dealing. This principle is evident in what the UNIDROIT Principles refer to as 'gross disparity', where exploitation by one party of the weaker bargaining position of the other is manifested in the latter's dependence, economic distress, or urgent need. A party that has negotiated or broken off negotiations contrary to this principle shall be liable in the ICSCD Court for the losses caused to the other party.<sup>619</sup>

Sensitiveness of CAIM judges towards 'gross disparity' is especially important when the issue brought before the court is a contract signed between a powerful MNE and a politically and economically weak Third World state. Kalamiya emphasised exactly this point when he discussed the 1975 outrageously exploitive contract between the Zaire despot, at the time Mobutu Sese Seko, and OTRAG, a German-based MNE involved in military equipment trade.

According to the contract, Zaire was to lease to OTRAG a grand lot of land for no less than 25 years, under extremely unfair terms, which are detailed in the next section of this thesis. As Kalamiya argued, the main reasons for such an exploitive agreement at the time were the civil uprising and the economic shaky

---

<sup>618</sup> UNIDROIT Principles art 3.4, 3.7-3.9, and 3.11; Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 169.

<sup>619</sup> DiMatteo (n 614) 576; Bonell (n 618) 169-70.



grounds in the country, accompanied by the personal benefits given to the despot.<sup>620</sup>

The danger of such consequences of an imbalanced relationship between a state and a MNE, which can easily be extended to stronger nations that are facing economic distress, is the reason for the CAIM to follow the PECL example and require that a significant imbalance *alone* is sufficient for CAIM judges to avoid from approving a contract. That is, without determining, such as other contract principles do, that unfair terms are invalid only if they are substantially unfair *and* if one party has taken advantage of any shortcomings of the other side.<sup>621</sup> CAIM may take the rigid road of UNIDROIT Principles or PECL, which extend the definition of 'gross disparity' to 'improvidence, ignorance, inexperience or lack of bargaining skill'.

The Zaire example sheds light on yet another issue. When negotiating with the government representatives, OTRAG presented itself as a purely commercial and private company, constructing and commercially exploiting carrier missiles designed for the transport of useful loads in space. Thus, it denied any involvement of a third party.

However, after the contract was signed, concrete evidence about how the West German governments and the US were deeply involved in every aspect of the contract emerged, indicating that OTRAG was merely acting as a front or a nominal party. Moreover, the enterprise was discovered as not a financial one, but rather a strategic military move by West Germany to import cheap missiles.<sup>622</sup>

For this reason, another principle of CAIM judges when determining the validity of a contract shall be the political or undisclosed economic motives behind its declared objectives, as well as the nature and history of the company signed on the contract.

---

<sup>620</sup> Kallu Kalamiya, 'Rape of Sovereignty: OTRAG in Zaire' (1979) 14 Review of African Political Economy 16, 20.

<sup>621</sup> PECL art 4:110; Lars Meyer, 'Soft Law for Solid Contracts - A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization' (2006) 34 Denver Journal of International Law and Policy 119, 138.

<sup>622</sup> Kalamiya (n 620) 29-31.

On other angle, CAIM is equally concerned about government harassment of companies in the negotiations stage or, more commonly, in the renewal of a contract. Schreuer argues that the case of *Tecmed v Mexico* is an example of hostile treatment, harassment, and coercion by a government against a company. In this case, the Mexican government had replaced unilaterally an unlimited license for the operation of a landfill by the Spanish company with a license of limited duration. The ICSID tribunal found that the denial of the permit's renewal was designed to force the investor to relocate to another place, bearing the costs and the risks of a new business.<sup>623</sup>

In CAIM, contracts may also be brought unilaterally before the pre-contractual panel in cases where one party argues that a refusal to renew a contract was done in bad faith. The panel will then have to determine if there are no reasonable grounds for terminating the contract.

#### *The Substance of the Contract*

In the Zaire case, the MNE has been granted under the contract the right of full and exclusive usage of the land without any restrictions, except for a vague clause of national security. This almost unlimited definition included alterations of every kind to the topography and subsoil of the land.

Moreover, ORTAG forced the government to define the leased territory a customs free zone; to permit the MNE to evacuate any resident of the leased territory; to grant an option of a free and unhindered access to the zone for any employee or guest of the corporation, without complying with any administrative authorisation; to grant diplomatic immunities for all employees, as MNE members are exempted from undergoing any judicial prosecution; and to grant complete exemption from income and other forms of taxation.<sup>624</sup>

This case is an extreme example of the unevenness that characterises many contracts between MNEs and states in more subtle venues. As such, it

---

<sup>623</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States* [2004] ARB(AF)/00/2 (ICSID); Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *Journal of World Investment and Trade* 357, 380-81.

<sup>624</sup> Kalamiya (n 620) 20-24.

serves as an illuminative guide for CAIM judges searching for instances of 'gross disparity' or excessive advantage granted to one side by the terms of a contract.

Hence, as in the negotiations stage, 'gross disparity' points to severe cases of obvious imbalance of obligations between the parties to a contract. Other example may be a credit given by a MNE to a state, under preferable conditions than those given by the World Bank, for instance, but under a stipulation that a breach of the contract may lead to a remedy in the form of an unlimited usage of a national natural resource. Additionally, a grand-scale investment by a MNE, may be conditioned by a one-sided option for a breach of contract, and of unlimited timeline.

The latter was precisely the case in the Zaire example. According to the contract, OTRAG was to enjoy the right of exclusive usage of the territory until the end of the year 2000, without any option of revocation by the state. Subsequently, the contract was supposed to be automatically renewed every ten years. On the other hand, OTRAG was not similarly bound and could terminate the contract when and if it deems it convenient.<sup>625</sup>

### *CAIM as a tribunal for Contractual Disputes*

#### *Exclusivity*

Inspired by the novel *Convention on Choice of Court Agreements*, the proposed CAIM shall require all contracts signed between ICSCD Contracting Parties and MNEs from other Contracting Parties to include a clause determining that the ICSCD is the *exclusive* judicial system to decide upon disputes arising from a certain contract. Consequently, the exclusive clause excludes any court or judicial organ that is not a part or in connection to the ICSCD from hearing a dispute concerning the certain contract.<sup>626</sup>

The exclusivity of the court clause is crucial, as, according to Shany, multiple jurisdictional clauses leave the door widely open for 'forum shopping' in

---

<sup>625</sup> *ibid* 24.

<sup>626</sup> *Convention on Choice of Court Agreements* (2005) arts 3 and 6  
<<http://www.hcch.net/upload/conventions/txt37en.pdf>> accessed 10 September 2011.

search for the most sympathetic court.<sup>627</sup> In the 1997 *Vivendi* case, for example, a French MNE that entered into a contract with a local Argentinean province government to operate the province's water and sewage systems brought a dispute with the government before the ICSID. This contract relied upon the 1991 Argentina-France BIT, which provides foreign investors with the choice of bringing international investment disputes before either national courts or international arbitration. However, the contract between the corporation and the government stated clearly that disputes arising from the contract should be exclusively heard in local administrative tribunals.<sup>628</sup>

The corporation's argument was quite direct, alleging that the government was acting with the aim to destroy the concession contract between the parties and thus breached the BIT. Hence, the ICSID panel was obliged to decide whether a case could be brought before the ICSID based on the events governed by a contract containing an exclusive jurisdictional clause.

The important point for the discussion here is that the tribunal rejected its own jurisdiction in the case, arguing that the alleged violation of the treaty was too closely connected with the alleged contract claim, and thus the case should be brought before a local tribunal. However, an *ad hoc* ICSID committee accepted the corporation's request for the annulment of this decision, arguing that the nature of the violation of the treaty and that of the breach of the contract were different.<sup>629</sup>

In its least desired form, the multiplicity of available forums could lead not only to 'forum shopping' but also to actual multiple proceedings of the same dispute or related disputes involving the same parties before different judicial bodies. The *SGS v Pakistan* expands the understanding of the importance of the specific CAIM choice of court clause by demonstrating how current exclusivity

---

<sup>627</sup> Yuval Shany, 'Contract Claims vs Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims' (2005) 99 *The American Journal of International Law* 835, 838.

<sup>628</sup> *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* [1997] ARB/03/19 (ICSID), 2000 award.

<sup>629</sup> Shany (n 627) 838-39.

clauses in the international arena may still be interpreted to lead to multiplicity of proceedings, and thus betray their initial purpose.<sup>630</sup>

In this case, the Swiss-based MNE brought judicial proceedings against the Pakistani government before Swiss courts, alleging that the latter unilaterally terminated the contract and withheld payments. Before the Swiss court dismissed the case due to Pakistan's sovereign immunity, both Pakistan and the MNE initiated other venues of arbitration. The former pursued the case in Pakistan, according to the contractual clause stipulating that disputes shall exclusively be arbitrated in Pakistan, under the Pakistani Arbitration Act, and the latter before ICSID, according to the Swiss-Pakistani BIT referring to the ICSID.<sup>631</sup>

The ICSID tribunal asserted its own jurisdiction on the matter, accepting the MNE's argument that there exist separate legal foundations of the contract and treaty claims, and thus that proceedings conducted on the basis of the contractual clause could not deprive ICSID of jurisdiction over treaty claims. However, the court held that the BIT clause was intended only to cover disputes over application of BIT standards, while contract claims were to be governed by the contractual clause. As a result, the tribunal asserted exclusive jurisdiction over the treaty claims and upheld the Pakistani arbitrator's exclusive jurisdiction over the contract claims.<sup>632</sup>

As Talpis and Krnjecic pointed out, such claim splits results from permissive and non-mandatory language, which paved the road for uncertainties concerning the place of judgment. To prevent such cases, CAIM offers a distinct solution. Any international or local court other than that of the ICSCD shall be expected to suspend or dismiss proceedings concerning contracts as such, even if the ICSCD Court has decided not to hear the case.<sup>633</sup>

---

<sup>630</sup> *ibid.*

<sup>631</sup> *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* [2001] ARB/01/13 (ICSID).

<sup>632</sup> Shany (n 627) 839-40.

<sup>633</sup> *Convention* art 3 and 6; Jeffrey Talpis and Nick Krnjecic, 'Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to a Mouse' (2006) 13 *Southwestern Journal of Law and Trade in the Americas* 1, 13; William J Woodward, 'Saving the Hague Choice of Court Convention' (2008) 29 *University of Pennsylvania Journal of International Law* 657, 664.

In some cases, parallel claims concerning the conflicting applicability of a treaty or a contract in the issue of jurisdiction prompt even more complex questions concerning the relationship between a certain contract and international law. In *Svenska v Lithuania*, for instance, much confusion emerged from a clause in a contract that contained an express choice of Lithuanian law, while the place of arbitration was to be Denmark.<sup>634</sup>

In *Salini v Jordan*, a dispute over post-transaction debts, the Italian Corporation argued not only for a distinction between treaty and contractual claims, but also a determination that the Italian-Jordanian BIT's choice of court clause. The latter, provided the investor with a choice between national and ICSID proceedings, also encompassed contract claims. The ICSID tribunal eventually held itself incompetent to address the contract claims, while retaining competence with respect to the treaty claims.<sup>635</sup>

In another case involving SGS, this time against the government of the Philippines, the corporation brought a claim against the government over the balance of payments before an ICSID tribunal on the basis of the Philippines-Swiss BIT referring to the ICSID, even though, the contract contained a choice of court clause referring disputes to the exclusive jurisdiction of the local Philippine courts.

<sup>636</sup>

Similar to the *Vivendi* and *SGS v Pakistan* cases, the government objected to the tribunal's jurisdiction on the grounds, *inter alia*, that the corporation's claim was purely contractual, and thus should be heard in a local court. However, in this case, the corporation, on its part, contended, *inter alia*, that the BIT choice of court clause should be broadly interpreted to authorise the ICSID tribunal to discuss contract, as well as treaty, claims. The tribunal accepted this argumentation and

---

<sup>634</sup> *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] 1 Lloyd's Rep 181; Ardavan Arzandeh and Jonathan Hill, 'Ascertaining the Proper Law of an Arbitration Clause Under English Law' (2009) 5 Journal of Private International Law 425, 435.

<sup>635</sup> *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan* [2003] ARB/02/13 (ICSID); Shany (n 627) 142.

<sup>636</sup> *SGS Société Générale de Surveillance SA v Republic of the Philippines* [2002] ARB/02/6 (ICSID); Shany, *ibid*.

held that excluding contract claims from the jurisdiction of ICSID would lead to unnecessary claim-splitting and jurisdictional uncertainties.<sup>637</sup>

In *Joy Mining*, a dispute between the government of Egypt and a British corporation, the ICSID tribunal confronted a BIT claim in the face of an incompatible contractual clause on exclusive jurisdiction referring contractual disputes to UNCITRAL arbitration in Cairo. Eventually, the tribunal rejected the claim on other grounds, primarily *the non-investment nature* of the original transaction, which excluded the dispute from the purview of both the BIT and ICSID jurisdiction.

However, the tribunal declared in *obiter dicta*, that the dispute at hand, which involved the post-transaction release of bank guarantees, was purely contractual and did not fall under the scope of the BIT. The tribunal held that the contractual choice of court clause would have overridden the BIT clause in any event.<sup>638</sup>

Similarly, in *Lanco v Argentina*, the Argentinean government argued before an ICSID tribunal that the contract precludes ICSID arbitration, but the tribunal decided that the US-Argentina BIT, which allows ICSID arbitration, supersedes the clause in the contract.<sup>639</sup> Here is where the greatest strength of CAIM lies, for it treats the contractual dispute settlement as a part of a comprehensive international legal system, as the ICSCD, and thus constructing contractual disputes initially under the provisions of the ICSCD Treaty.

In addition, to prevent situations in which a party to the contract seeks to undermine the jurisdiction of the court on the premise of an invalid term in the contract, the CAIM follows the doctrine of court choice clause. Hence, constituting a part of the contract court choice shall be treated as an agreement independent of the other terms of the contract for all intents and purposes. In other words, the validity of the clause is not susceptible to subversion solely because the contract is

---

<sup>637</sup> Shany *ibid*.

<sup>638</sup> *Joy Mining Machinery Limited v Arab Republic of Egypt* [2003] ARB/03/11 (ICSID); Shany (n 627) 842-43.

<sup>639</sup> *Lanco International Inc v Argentine Republic* [1997] ARB/97/6 (ICSID); Mathew Wendlandt, 'SGS v Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes' (2008) 43 Texas International Law Journal 523, 534.

not valid. To secure the clause's autonomy, as well as to make it usable for subsequent reference, it must be documented in writing and render information accessible.<sup>640</sup>

### *Interpretation of a Contract*

Following John Y Gotanda's interpretation of the CISG, the CAIM tribunals shall first decide whether the dispute brought before them can be decided according to the literal text or the plain and natural reading of the contract.<sup>641</sup> This shall be done in a contextual method of trying to follow the subjective intentions of both parties at the time of the signing. As Lando adds, it is generally held that a contract is to be interpreted according to the common intention of the parties, even if this differs from the literal meaning of the words. If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.<sup>642</sup>

However, when the dispute cannot be determined simply by the wording of the contract, the CAIM tribunal, as any other tribunal of the ICSCD, shall refer directly and exclusively to the ICSCD Establishing Treaty. By doing so, contract claims, such as a breach, will be interpreted in broader terms.

This is a crucial matter, for in the current lack of a clear language considering the connection between contract law and treaty law, tribunals are faced with confusing challenges when contract disputes are brought before them.

For instance, the ICSID tribunal in the *Mondev* case faced a difficult challenge when it was asked to determine whether the protection of Article 1105 of

---

<sup>640</sup> *Convention* art 3 and 5; Ronald A Brand, 'Consent, Validity, and Choice of Forum Agreements in International Contracts' (2009) 3 Legal Studies Research Paper 544 <<http://papers.ssrn.com/sol3/papers.cfm?abstract=> accessed 10 September 2011.

<sup>641</sup> John Y Gotanda, 'Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation' (2005) 37 *Georgetown Journal of International Law* 95, 121.

<sup>642</sup> Robert E Scott, 'The Death of Contract Law' (2004) 54 *University of Toronto Law Journal* 369, 376; Lando (n 617) 393.



NAFTA on fair and equitable treatment extended to contract claims. Eventually the tribunal agreed that it may be extended in such a way.<sup>643</sup>

In the case of *Azinian v Mexico*, the ICSID tribunal was faced with a similar challenge on the matter of damages sought by a US corporation resulting from the annulment of the concession by the Mexican government. That is, although both sides had compelling arguments against each other. Foreexample, the government argued that the Concession Contract came to an end on two independently justified grounds: invalidity and rescission. Both are on contractual grounds, and therefore all of the evidence brought before the tribunal were of simple breach of contract.

However, NAFTA, which was the applicable document in the case, does not allow investors to seek international arbitration for mere contractual breaches. As a consequence, the corporation could not prevail merely by persuading the Arbitral Tribunal that the government breached the contract. Thus, it had neither contended nor proved that the Mexican legal standards for the annulment of concessions violated Mexico's treaty obligations, nor that the Mexican law governing such annulments is expropriatory.<sup>644</sup>

Similarly, In *Glamis Gold v United States*, the tribunal accepted the US' position that mere contract breach, without something further such as denial of justice or discrimination, does not hold sufficient to establish a breach of the fair and equitable treatment obligation.<sup>645</sup>

In CAIM, this complex situation will not exist, for if the panel decides that the mere wording of the contract between a corporation and state is not sufficient to rule in a dispute, it would refer directly to the ICSCD Establishing Treaty for answers in, for instance, the definition of expropriation. Thereby the tribunal shall

---

<sup>643</sup> *Mondev International Ltd v United States of America* [1999] ARB(AF)/99/2 (ICSID); *North American Free Trade Agreement* (hereinafter *NAFTA*) [1994] <<http://www.nafta-sec-alena.org/>> accessed 10 September 2011; Christoph Schreuer, 'Fair and Equitable Treatment' (n 623) 357, 380.

<sup>644</sup> *Robert Azinian and others v United Mexican States* [1997] ARB(AF)/97/2 (ICSID), 1999 award.

<sup>645</sup> *Glamis Gold Ltd v United States of America* [2003] (UNCITRAL); Foster (n 609).

take into account any evidence for a breach as relevant for the issue of expropriation.

*Modification and Termination of a Contract*

Once a contract is signed by the parties and approved by CAIM, it can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in the CAIM Principles. The effect of termination is that all obligations that still exist on both sides are discharged, but any right based on prior breach or performance may survive. This, of course, does not imply a rescission of the entire contract; arbitration clauses, jurisdiction agreements, and other terms that are to operate even after termination are not affected.<sup>646</sup>

As Lando pointed out, it is a general rule in many jurisdictions that a contract can be terminated only for a fundamental reason. Following Mercédeh Azeredo da Silveira's account of CISG, CAIM will permit parties to ask the ICSCD Court for determination or suspension of performance in cases wherein it becomes apparent that a breach will be committed by the other side, and according to the magnitude of the future breach.<sup>647</sup>

Two other fundamental reasons are *force majeure* and hardship. As to *force majeure*, the principal condition of the test is that the impediment hindering performance must be beyond the control of the non-performing party and that the non-performing party has not explicitly or implicitly assumed the risk of its performance.<sup>648</sup>

Following the CISG and PECL, the main limitation method in CAIM is the foreseeability test. For instance, foreseeable risks shall include failure of a central bank to grant authorisation to pay in foreign currency when foreign exchange control regulations were in place at the time of contracting; armed hostilities

---

<sup>646</sup> Peter Schlechtriem, 'Termination and Adjustment of Contracts' (1999) 1 European Journal of Law Reform 305, 312; Christina L Kuntz, 'The 2000 Draft of UCC Article 2: Part Six on Breach, Repudiation, and Excuse' (2001) 54 SMU Law Review 899, 911; Lando (n 617)388.

<sup>647</sup> Mercédeh Azeredo da Silveira, 'Anticipatory Breach Under the United Nations Convention on Contracts for the International Sale of Goods' (2005) 2 Nordic Journal of Commercial Law 1, 4; Lando (n 617) 400.

<sup>648</sup> Christoph Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for non-Performance in International Arbitration* (Wolters Kluwer 2009), 76.

between countries with a history of antagonism; and political or environmental instability in a certain country at the time of conclusion.<sup>649</sup>

As Ferrari stated, this fundamental test of the ability to foresee the detrimental consequences of a *force majeure*, extends to a reasonable entity of the same kind and in the same circumstances that is either able to foresee the consequences or not. Thus, a party cannot simply claim ignorance because it did not mention a certain disaster in the negotiations stage; it has to show that the said disaster was unforeseeable in its character.<sup>650</sup>

Lando noted in addition to the *force majeure principle* there should be a principle covering circumstances in which no *force majeure* has occurred but still one party finds it difficult to realise its obligations under the contract for reasons beyond its control, such as economic depression or civil unrest. The UNIDROIT Principles address this question and state that a regulation of a hardship situation is to be performed under circumstances in which the balance between the two contract parties becomes out of proportion due to drastic changes in the market.<sup>651</sup>

In a dispute case between a US oil corporation and the government of a newly independent state formerly belonging to the Soviet Union, the American company was to invest substantial funds and construct a power station. In return, the company would be granted a long-term contract for the supply of electricity to customers in that state at fixed prices that would be likely to generate a return on the investment. However, the state's energy supply system, was subsequently fundamentally changed by law, resulting in impossibility for the power station of the American company to supply energy at profitable prices. The *ad hoc* Arbitral

---

<sup>649</sup> Amin Dawwas, 'Alteration of the Contractual Equilibrium Under the UNIDROIT Principles' (2010) 2 Pace University School of Law International Law Review 1, 11; Yan Li, 'Remedies for Breach of Contract in the International Sale of Goods: A Comparative Study between the CISG, Chinese Law and English Law with reference to Chinese Cases' (2010) Thesis for the degree of Doctor of Philosophy 1, 104 <<http://eprints.soton.ac.uk>> accessed 9 September 2011.

<sup>650</sup> Franco Ferrari, 'Fundamental Breach of Contract under the UN Sales Convention - 25 Years Article 25 CISG' (2006) 25 Journal of Law and Commerce 489, 499.

<sup>651</sup> UNIDROIT Principles art 6; Lando (n 617) 399.

Tribunal concluded that Article 1.4, 6.2.2 - 6.2.3 and 7.1.7 of the UNIDROIT Principles concerning *force majeure* and hardship are applicable in the case.<sup>652</sup>

In another, unpublished, case, an ICC arbitral tribunal had before it a dispute between Dutch and Turkish companies and was confronted with the allegation of the Turkish respondent that exchange rate fluctuations in his country had discharged it from its payment obligation under the hardship provision in the Dutch Civil Code, which was applicable to the sales contract in dispute. The panel was thus faced with the task of reconciling the principle of sanctity of contracts with the demand of excuse from performance according to the principles of *force majeure* and hardship.<sup>653</sup>

In addition to unforeseeable *force majeure* and hardships, CAIM shall allow some modifications in a contract according to unforeseeable changes for the better. As Brown pointed out, in the case of contracts concerning exploration and use of natural resources, such as minerals and petroleum, the problem of annulment or revocation of a contract is acute. In such cases, governments and MNEs usually sign a contract without knowing precisely how resource-rich the land is. Many times, after the mining or the pumping commences, both sides discover that the land is actually richer in minerals than was initially expected, and the contract suddenly becomes uneven *ex post facto*.<sup>654</sup>

### **Conclusion**

As it can be seen from the above proposal for a Contract Approval and Interpretation Mechanism (CAIM) as an Organ of the ICSCD, harmonisation of state-MNE contract law may be achieved, as well as a coherent regulative body for contractual disputes.

As the contracting is a convenient first-step for MNEs or large companies to become even more dominant in a nation's economy, with the danger of a complete

---

<sup>652</sup> Arbitral Award (place unknown), available at <<http://www.unilex.info/case.cfmt>> accessed 9 September 2011.

<sup>653</sup> Klaus Peter Berger, 'International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts' (1998) 46 *American Journal of Comparative Law* 129,140.

<sup>654</sup> Roland Brown, 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources' (1984) 33 *The International and Comparative Law Quarterly* 218, 221.

takeover of the state economy or natural resources, the role of a regulative mechanism such as CAIM seems to be crucial.

#### **5.4 The Integration of ICSCD in the Current Dispute Settlement Systems.**

##### **The Procedural Integration of Current Systems: ICSID, UNCITRAL, Domestic Courts, and the Issue of Enforcement of Awards**

The following section demonstrates how the existing domestic court systems and international arbitration solutions, such as the ICSID and the UNCITRAL, can take a part in the novel international economical court. Furthermore, it discusses the function of the Establishing Treaty of the ICSCD and the ways in which it may secure a coherent use of applicable law, case-law precedence, and jurisdiction by using existing international agreements and codes.

The ICSCD presents a system that essentially offers a complex integration between currently used international and domestic means of litigation involving commercial disputes. The purpose is to harmonise the current system where a domestic as well as the UNCITRAL tribunal, for instance, shall perform essentially the same procedures in a certain dispute. States and MNEs Signatories to the ICSCD, or defendants shall be bound to make use of the ICSCD process, by contract, by the Establishing Treaty or by any other international agreement. The tribunal's decision cannot be unilaterally revoked, thus ensuring the MNE that the disagreement will not be heard in a biased environment as unilaterally determined by the state.<sup>655</sup>

The issue of integrating the two systems is essentially a question of the relationship between arbitration and litigation. In the current system, this relationship takes a rather awkward form. As Michael F Hoellering points out, the UNCITRAL system, for example, allows limited recourse to court during the arbitral proceedings and simultaneously permits the arbitration to go forward. It is also possible that a court may be designated to perform the tasks of appointing an

---

<sup>655</sup> Sedlak (n 77) 147, 154.

arbitrator failing party agreement, deciding challenges of arbitrators, removing an arbitrator, deciding a challenge to arbitral jurisdiction, or setting aside an award.<sup>656</sup>

In the case of *MINE v Guinea*, for example, the MNE chose, according to the Guinean government, to break a contractual promise to file a formal arbitration request to the ICSID. Instead, it filed a petition in the US District Court for the District of Columbia to compel arbitration under the AAA. Guinea did not agree to appear before the AAA, which eventually rendered an *ex parte* award against Guinea in excess of 25 million dollars. The MNE then returned to the district court, filing a motion to confirm the award and enter judgment, thereon under the FAA. The district court sided with the MNE. As Georges R Delaume points out, a main flaw of the court's decision in this case was its assumption that ICSID arbitration necessarily takes place in the US, while it should have acknowledged the exclusive character of ICSID arbitration under the Convention.<sup>657</sup>

In the case of the OECD and the UNCTAD codes, there exist three probable methods by which a domestic court could be called upon to test the binding nature, or legal enforceability, of an international code or ruling. This situation can arise, first, by a direct enforcement action commenced by the OECD or UN, or an agency or organ of either entity; second, by a suit initiated by private parties claiming rights under a code; or, third, by an action made by the sovereign to enforce a code.<sup>658</sup>

However, in reality, the OECD cannot enforce any code it adopts in any sovereign state unless the code had been adopted in accordance with the local constitutional procedures. Thus, in practice, the OECD codes are voluntary, rather than self-executing binding acts in domestic courts. In *Diggs v Schultz*, for example, a local US court ruled that no tenable claim for an action for declaratory and injunctive relief in respect of the withdrawal by the US government from an embargo ordered by the UN on trade with Rhodesia existed, because the US

---

<sup>656</sup> Hoellering (n 546) 330-31.

<sup>657</sup> *MINE v Republic of Guinea* [1988] ARB/84/4 (ICSID); Delaume (n 560) 784,787-88.

<sup>658</sup> Richard Schwartz, 'Are the OECD and UNCTAD Codes Legally Binding' (1977) 11 International Lawyer 529, 534.

Congress had the power to enact a statute that detached its government from the boycott that had been implemented by Executive Orders.<sup>659</sup>

Therefore, under the principle of *unification*, the ICSCD will require all the existing courts and tribunals that will come under its auspices to oblige to the same judicial proceedings in cases referred to them by the Panel of Judges. In unifying the two systems, another goal of the ICSCD is to inherit the best of each and leave behind their problematic aspects.

According to the domestic legal arena, it has long been argued that investors' confidence is usually weakened when using domestic litigation, for it is commonly accepted that domestic courts are biased against alien investors, especially when those courts must evaluate and pronounce upon acts of their own governments. Moreover, as Brower and Steven argue, these courts often lack the legal expertise and experience to free themselves from the confines of their own domestic regimes when addressing international law. As Andreas F Lowenfeld points out, in most cases, domestic laws are not developed yet, especially when the dispute arises out of contracts between MNEs and developing countries.<sup>660</sup>

Thus, the one of the tasks of the novel ICSCD system is to make sure that the domestic courts it uses globally are comprised of expert judges and follow recognisable and agreed-upon procedures. This can be achieved by providing, as Sean D Murphy suggests, 'safe-harbours', where there is a general standard to which MNEs are exposed under national law, and then a more specific rule that determines whether it has met the standard. In this case, the ICSCD's Secretary shall be responsible of unifying all of the domestic general standards.<sup>661</sup>

Furthermore, the Secretary shall have the ultimate authority to determine whether a specific court is suitable for international commercial litigation. To do so, formal ICSCD officials will physically visit courts willing to serve as ICSCD *Ad Hoc*

---

<sup>659</sup> *Charles Coles Diggs v George P Shultz, US Secretary of Treasury* [1972] 470 F2d 461 (US District of Columbia Circuit); Schwartz (N 658) 534.

<sup>660</sup> Charles N Brower and Lee A Steven, 'Who Then Should Judge: Developing the International Rule of Law under NAFTA Chapter 11' (2001) 1 *Chicago Journal of International Law* 193, 196; Andreas F Lowenfeld, *International Economic Law* (Oxford University Press 2002).

<sup>661</sup> Sean D Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 *Columbia Journal of Transnational Law* 389, 427.

Chambers and examine their adaptability according to the judges' curriculum vitae, as well as the court's efficiency and caseload. In some cases, the Secretary may decide that only a number of the present judges are fit for the task. In any event, this procedure must be conducted under careful cooperation with the local government and state officials.

The major benefit of using domestic courts is their ability to enforce awards, as opposed to most international arbitration tribunals. Because domestic courts are the most reliable institutions with respect to their ability to enforce arbitral awards, one of the main goals of the ICSCD is to establish an efficient method for relying on them for this purpose. In this sense, the ICSCD is no more than a mechanism that can enable the ICSID Convention to meet its declared goals. Theoretically, as Charity L Goodman importantly points out, awards granted by ICSID tribunals are final and binding on both parties. In reality, as has been shown throughout this work, MNEs quite frequently forum-shop even after an award has been determined, and as Delaume points out, in most cases, domestic courts grant an ICSID award with its needed recognition and enforcement of awards.<sup>662</sup>

Under a unified system, such as the proposed ICSCD system, ICSID tribunals will automatically be integrated into a hierarchic system in which any challenge of their awards other than a formal appeal to the Panel of Judges will be impossible. This is especially important in the case of annulments, which provide a convenient path for MNEs to escape meeting their monetary obligations. Here, the ICSCD Tribunal shall bring into force the provisions of the ICSID Convention Article 52(1), which establishes the limited grounds under which a party to an arbitration that has produced an award may request annulment.<sup>663</sup>

In turn, under the ICSCD auspices, annulment shall be available only in exceptional cases, which should not be confused with an appeals procedure. In this manner, the ICSCD follows the example of the ICSID. Its record is scarcely

---

<sup>662</sup> Delaume (n 560) 785; Charity L Goodman, 'Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' (2007) 28 *University of Pennsylvania Journal of International Economic Law* 449, 465.

<sup>663</sup> Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 4 *Duke Law Journal* 739, 763.



blackened by annulments. Only in extreme cases, such as that of *Vivendi v Argentina*<sup>664</sup>, the tribunal annulled a prior decision due to serious departures from a fundamental rule of procedure, a manifest excess of powers, and a fundamental failure to state reasons. Thus, as Ole Kristian Fauchald suggests, the annulment procedure must be regarded only as an avenue for eliminating decisions based on clear violations of relevant rules.<sup>665</sup>

The ICSCD Contracting Parties, whether parties to the certain disputed case or not, shall be required by the Establishing Treaty to recognise and enforce any ICSCD arbitral award. The recognition of an award is particularly important, for it constitutes the formal confirmation by the state that the award is authentic and has full legal effect. The immediate implication here, as Sedlak points out, is that a claim on which the award has been decided cannot be the subject of another proceeding before a domestic court or arbitral tribunal. More importantly, recognition of an award, in most cases, serves as a first step towards the enforcement of the award.<sup>666</sup>

In addition, Soley suggests that one of the main impediments facing the current relationship between international and domestic legal systems is the inherent gap between enforcement and execution. While a domestic court must recognise and enforce ICSID awards against states regardless of defences, such as sovereign immunity and public policy, the ICSID Convention does not address the actual seizing and selling of the debtor's property. This matter is left to the domestic procedures and sovereign immunity laws existing in the country of the court hearing the suit. Thus, judgments rendered in accordance with the ICSID Convention are subject to different treatment in the courts of each state.<sup>667</sup>

For this reason, the ICSCD Tribunal shall require domestic courts and international tribunals under its auspices to adhere to the exactly the same procedures when hearing cases referred to them by the Panel of Judges.

---

<sup>664</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S. A. v Argentine Republic* ICSID Case No. ARB/97/3.

<sup>665</sup> *Vivendi Universal v Argentina Republic* [2002] ARB/97/3 (ICSID); Fauchald (n 71) 305-6.

<sup>666</sup> Sedlak (n 77) 155.

<sup>667</sup> David A Soley, 'ICSID Implementation: An Effective Alternative to International Conflict' (1985) 19 *International Lawyer* 211, 225.

Enforcement and execution will be considered in the novel system as two inseparable aspects of the same procedure. Thus, an award given by, for instance, an ICSID *Ad Hoc* Tribunal, shall be executed by this tribunal to the same extent and manner as in German or Polish domestic courts.

Thus, the ICSCD, if it aims to be an authoritative body and lead a substantive change in the international legal arena, shall oblige its Contracting Parties to harmonise, to a certain degree, their domestic legal systems with well-established international norms and treaties, such as NAFTA, The Vienna Convention and the WTO. In this sense, the ICSCD requires some alterations of domestic laws, such as the standards of acquisition and the scope and use of property rights, which must be enforced by every Contracting Party. It also requires all Contracting Parties or others to implement a system that would provide effective administrative, quasi-judicial, and judicial remedies and adopt the principle of objectivity, fairness, transparency, and justice in enforcing their laws as well as the rules of ICSCD courts.<sup>668</sup>

Turning to international arbitration, Peterson (2005) argues that one of the problematic aspects of arbitration, in comparison to judicial proceedings, is its confidentiality, which paves the path for MNEs to settle their disputes privately and far from the public eye. As Levine (2011) points out, international commercial arbitration usually contains certain privacy and confidentiality rights for MNEs. For instance, the UNCITRAL rules ensure the parties' rights to privacy by guaranteeing in-camera proceedings without access by third parties unless the disputing parties consent otherwise. The rules also restrict the publication of any awards without the parties' consent. In addition, the UNCITRAL rules prohibit third-party access to relevant documents by agreement.<sup>669</sup>

---

<sup>668</sup> Wang Guiguo, 'Impact of Globalization on State Sovereignty' (2004) 3 Chinese Journal of International Law 473, 476.

<sup>669</sup> Luck Eric Peterson, 'All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties' in Lyuba Zarsky (ed.), *International Investment for Sustainable Development: Balancing Rights and Rewards* (Earthscan 2005) 221; Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 19 *Berkeley Journal of International Law* 200, 204.

The ICSID Convention protects confidentiality in Article 48(5) and in the complimentary ICSID's Rules of Procedure for Arbitration Proceedings. According to Tahyar, it is not surprising that many cases heard in ICSID tribunals are only partially public or not publicised at all. Here, the UNCITRAL and ICSID systems shall be forced to alter dramatically to join the ICSCD and to adhere to public resolution. ICSID tribunals' awards, such as the one in the *Amco Asia Corp* case, which refused to enjoin the MNE from disseminating information to the press regarding their dispute, may serve as an adequate premise for the proposed integration.<sup>670</sup>

The issue of transparency is uniquely important because of the growing role ICSID tribunals are playing in commercial issues concerning the public. As Susan L Karamanian points out, the ICSID system reaches beyond mere dispute resolution, for while the said tribunals are accustomed to interpreting international investment law and other aspects of international law, their proceedings usually remain secretive and protected from public scrutiny.<sup>671</sup>

Kinyua argues that a presence of a third party can help the tribunal to deal with issues of bribery or corruption. This problem arose in the case of *World Duty Free v Republic of Kenya*, in which both sides acknowledged the claimant's payment of a cash bribe to the previous government. However, as Levine points out, there are likely to be circumstances where the parties to a dispute would prefer not to disclose that their agreement was founded on corruption. This is exactly where an informed third party is crucial in bringing relevant allegations of corruption before the tribunal.<sup>672</sup>

---

<sup>670</sup> *Amco Asia Corporation and others v Republic of Indonesia* [1988] ARB/81/1 (ICSID); Benjamin H Tahyar, 'Confidentiality in ICSID Arbitration after *AMCO Asia Corp v Indonesia*: Watchword or White Elephant' (1986) 10 Fordham International Law Journal 93-95.

<sup>671</sup> Susan L Karamanian, 'Overstating the 'Americanization' of International Arbitration: Lessons from ICSID' (2004) 19 Ohio State Journal of Dispute Resolution 5, 9.

<sup>672</sup> [2006] Arb/00/7 (ICSID)

<[http://www.marsgroupkenya.org/corruption/index.php?option=com\\_content&task=view&id=813&Itemid=31](http://www.marsgroupkenya.org/corruption/index.php?option=com_content&task=view&id=813&Itemid=31)> accessed 27 April 2012; Kenneth Kinyua, 'Assessing the Benefits of Accepting Amicus Curiae Briefs in Investor-State Arbitrations: A Developing Country's Perspective' (2009) 4 Stellenbosch University Faculty of Law Working Paper Series <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310753](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310753)> accessed 27 April 2012; Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of

The case of *BGT v Tanzania* illustrates how crucial the issue of third party's presence and transparency in the current system is. In this dispute between a British MNE and the government of Tanzania, the latter unilaterally disclosed certain legal material, an action that led immediately to a formal request by the MNE for provisional measures on confidentiality. The MNE demanded a structured and gradual discussion on every document disclosure and a ban on any material disclosure to third parties in line with the ICSID's Rules of Procedure for Arbitration Proceedings, which authorise the tribunal to recommend provisional measures.

The Tanzanian government was quite clear in its argument that ICSID should act very carefully when addressing the issue of transparency, and should follow its own tradition of publication of certain awards in its website, in scholars' responses, and in open discussions of the ICSID Arbitration Rules.<sup>673</sup>

Despite these faults, ICSID's tribunals, as well as its entire system, are in a sense the ground upon which the ICSCD is to be founded. While the ICSID is concerned solely with investment disputes, the ICSCD intends to deal with a much broader commercial framework. The integration of the former into the latter is a matter of 'natural' necessity, not only because the ICSID is the current largest and most popular form of arbitration. It is also a result of what Won-Mog Choi calls a DE politicisation of investment disputes between MNEs and states. Furthermore, as Andrew P Tuck suggests, although the ICSID Convention dictates how to operate the ICSID, many aspects of the system are flexible and thus subject to potential alterations.<sup>674</sup>

In addition, as Rowat argues, the ICSID's record of dispute arbitration is rather impressive. This success can be seen in the overwhelming usage of choice-of-court clauses in BITs, national investment laws and codes, and individual agreements referring to the ICSID. As such, this system serves as a venue for settlement, as well as a prevention of disputes, providing both investors and states

---

an Increase in Third-Party Participation' (2011) 19 *Berkeley Journal of International Law* 218.

<sup>673</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [2006] ARB/05/22 (ICSID).

<sup>674</sup> Choi (n 197) 725, 736; Andrew P Tuck, 'Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules' (2007) 13 *Law and Business Review of the Americas* 885, 921.

with an impartial, low-cost repository of dispute resolution expertise. For this reason, the goal of the ICSCD is to use, as much as possible, the existing mechanisms provided by the ICSID.<sup>675</sup>

In the issue of judicial proceedings, the ICSCD system will use the existing ICSID form as a foundation, with several alterations where necessary. Following the ICSID tribunals' procedures, ICSCD *Ad Hoc* Court will hold, after the judges are selected, an initial meeting to establish procedures, including acknowledgement of the proceeding's official language, confirmation of the proceeding's location, the schedule for written submissions on pending issues, and the date for oral hearings on pending issues. However, the ICSCD shall abandon the problematic procedure of two separate hearings for the said procedure and for challenges of the jurisdiction or the panel's competence. All matters of jurisdiction will be under the sole authority of the Panel of Judges and shall be dealt as a preliminary stage, similar to the procedure in the ICJ, as Eduardo Jimenez de Arechaga indicated.<sup>676</sup>

#### **5.4 The Need for a new international Legal System**

This chapter focuses on the current gaps and lacunas of the current international legal system as a unified system, which specialises in commercial and investment disputes arising between sovereign states and MNEs. As shown extensively throughout this work, the lack of such a court in an ever-tightening global economy has severe repercussions both for the states and, to a lesser degree, for MNEs.

As numerous attempts have been made to amend this defaulted picture, none has been either successful or comprehensive. This chapter presents an integration of the most important issues demonstrating the need for such a comprehensive system and deepens the discussion on their inherited complexities and ramifications. Most significantly, it also attempts to show, as an original

---

<sup>675</sup> Rowat (n 546); Hoellering (n 546) 103, 118.

<sup>676</sup> de Arechaga (n 574) 67 The American Journal of International Law 1, 21; Karamanian (n 671) 22-23.

contribution to this field, how the ICSCD may provide satisfying answers for these issues.

Perhaps the most striking feature of the commercial international legal arena, as has been observed by many scholars,<sup>677</sup> is its disorder and abundance of legal frameworks, documents, and judicial bodies. Thus, when being observed from the perspective of the relationship between MNEs and states, it is quite astonishing to find so many bilateral and regional treaties concerning commercial activity while at the same time having so little (at least formal) binding legal connection between them and the different court rulings they produce.

On one side, one can find the much-discussed NAFTA agreement, as well as the South-American MERCOSUR and the South-Asian ASEAN, with thousands of bilateral agreements. On the other side, there are numerous agreements, most of which contain essentially very similar language and provisions, with some differentiations. The common feature shared by all is usually rather vague legal language, precisely when addressing significant issues, such as national security or the legal liability and personality of MNEs.

This is exactly the reason why the ICSCD existence is so acutely necessary, for it will deal directly, and with no inhibitions, with such questions. The issue of MNEs' legal personality and how it can be answered under the auspices of the ICSCD is the subject of this section. The third section offers a discussion of the nuances arising out of the delicate issue of the connection between state sovereignty and commercial international legal mechanisms.

One of the core problems of the current international commercial legal system is the three-fold question of (1) the applicability of the international law, (2) the abstruse nature of international and domestic jurisdiction in MNEs-states disputes, and (3) the severe lack of a coherent (formal) precedence tradition.

The last section addresses the question of the ICSCD enforceability and argues that the essential lack of such might be the most acute problem of the current system. The ICSCD enforcement mechanism will have, as offered, actual official authorisation and shall provide the option of monetary compensation.

---

<sup>677</sup> See, for example, Martinez (n13) 429, 432.

The concluding section argues that the offered ICSCD system, as a solution to the problem of MNE-states disputes, can be regarded as a novelty as well as an extension of the current system. It also pins down the problem to the questions of a lack of coherence, expertise, and finality of awards.

### **The Integration of MNEs into the New System**

The question concerning the integration of MNEs into the commercial international legal framework is one of the challenges the current international judicial arena is facing. However, this problem needs to be dealt with, for without a clear definition of multinational corporations by the ICSCDs' Establishing Treaty, it shall be difficult to determine their liability in disputes. Thus, one of the tasks of the ICSCD is to 'expropriate' responsibly the issue from domestic law and to create a new coherent international approach to the legal status of MNEs.

As Backer points out, under the current system, MNEs have an abundance of options at their disposal when trying to avoid international or domestic regulations.<sup>678</sup> Thus, the current state of affairs allows for a variety of ways in which an MNE's management can structure the company to favour its commercial goals. While the current work does not, by any means, suggest that commercial activity should be limited as a principle, it is the purpose here to assert the need for enabling MNEs' liability when necessary.

The arena becomes more complex when considering the way in which MNEs use local companies as subsidiaries through which commercial and investment activities take place. According to Moran, an MNE's personality is as much a social issue as it is an inner-management one. As shown above,<sup>679</sup> although the ICSID does not allow formally hearing claims brought by indirect shareholders, in reality its tribunals have rarely dismissed such cases. Bottini argues that the most troubling aspect of this jurisprudence is that it leaves the most acute problems posed by indirect claims without resolution, in addition to *ad hoc*

---

<sup>678</sup> Larry Cata Backer, 'Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality' (2006) 41 Tulsa Law Review 541, 562.

<sup>679</sup> See above Chapter 2.2

rulings, contingent on the facts of each case, and not based upon legal principles.<sup>680</sup>

As mentioned above,<sup>681</sup> the problem originates with the issue of MNEs' authoritative definition, without which no identification of its entity can take place. Hence no binding legal ruling can be conducted or, more importantly, enforced. For this reason, the ICSCD agreement shall include a unified definition of an MNE, to be reached, as suggested, in the light of the proposed definition mentioned in chapter two of this research<sup>682</sup>.

According to the suggested comprehensive definition, MNE is 'a corporation that owns, controls, and manages income generating assets and investments in more than one country'. This definition is broad enough to encompass both equity and non-equity based direct investment, irrespective of the legal form or ownership.

Hence, the ICSCD courts will not have to deal with questions of jurisdiction concerning the precise nationality of a MNE, as all MNEs will be liable to its jurisdiction by definition. The ICSCD agreement shall be considered as binding for all the MNEs' sections and subsidiaries, regardless of each one's location or position.

### **MNEs under Binding List**

Furthermore, and likely of a greater significance in some cases, the ICSCD will include a novel *binding list of MNEs* that shall be considered as sufficient and inclusive. The general principle of this list will be whether an MNE's separate parts function as one economic unit, and will take into account not only the much-elusive formal control of the MNE, but also its effective control, and the location from which that control is being exercised.

The MNEs shall be pledged to this list in two different ways: The corporations themselves agreed to join the list as signatories, or the parties to the

---

<sup>680</sup> Michael Moran, 'Governing European Corporate Life' in Grahame Thompson (ed.), *Governing the European Economy* (SAGE 2001) 73; Gabriel Bottini, 'Indirect Claims under the ICSID Convention' (2008) 29 *University of Pennsylvania Journal of International Law* 563, 638.

<sup>681</sup> Text to n 76 in ch 2.1.

<sup>682</sup> Text to n 145.



treaty, simply list MNEs that fall into the Proposed MNEs definition made by the Treaty. The strength of such a list is self-evident in the prohibition of each ICSCD member from engaging in any commercial activity or signing a contract with a company either not listed or not connected in an obvious way to such a company. This provision shall provide the incentive for MNEs to join the list, as without such inclusion they will have to limit their activity to ICSCD countries at a minimum.

However, such an incentive can only be provided if the ICSCD is joined by powerful states, such as the US, China, and Germany. Only if MNEs are under an actual threat on their commercial activity with such states will they agree to limit their beneficial activities in the undeveloped countries. The involvement of powerful states is also important for ensuring the accord of undeveloped countries. The latter, might be more inclined to waiver their citizens' rights on behalf of foreign investments, and would accept the provisions of the Establishing Treaty under diplomatic pressure only. Furthermore, it is important for the Establishing Treaty to include as many states as possible, as it will be surely impossible to impose the ICSCD system upon unwilling states.

MNEs shall be liable before the international court after the establishment of the ICSCD even if they were not listed, as the state will be entitled to request the inclusion of that company. The new system may encourage MNEs as well as states to take a part in the Treaty, as a principle of operation, *before* rather than *after* disputes arise. In other words, MNEs and sovereign states will be in this way obliged to act according to legally binding and internationally rules regardless of the outcome of their commercial activity.

Furthermore, as mentioned before <sup>683</sup> in all contracts signed between MNEs and states shall be required to include a clause determining that the ICSCD is the *exclusive* judicial system to decide upon disputes arising from the contract. Consequently, the exclusive clause excludes any court or judicial organ that is not a part or in connection to the ICSCD from hearing a dispute concerning the contract.<sup>684</sup> Accordingly, MNEs shall have a direct liability to the CAIM<sup>685</sup> chambers

---

<sup>683</sup> Text to n 627.

<sup>684</sup> Convention on Choice of Court Agreements (2005) arts 3 and 6.

and to the ICSCD, and an indirect liability to these courts, which shall be forced upon them by the contraction states.

Regulation of contracts is particularly crucial when concerning state-MNE relationships. These in many cases involve issues as customers' and workers' rights, as well as much broader issues, such as the future of national natural resources, economic stability, health issues, public safety, and national security.

*The Integration of Sovereign States into the New System*

In the current international legal system, consumers, NGOs, and even states, have rather limited power in influencing the regulation of MNEs' conduct. Multi-National Enterprises are mostly not vulnerable to consumer and popular pressure, and are thus not likely to act according to codes of conduct and other forms of 'soft regulation'. As Newell argues, the observation that MNEs activity regulation 'falls between the chairs' of national and international laws and codes, 'creates a crisis of governance because new forms of state regulation and oversight are not replacing them'.<sup>686</sup>

Under the current international treaties, restrictions upon free trade provisions are usually provided in the form of security or safeguard clauses. As shown above,<sup>687</sup> these clauses depend heavily on the court's interpretation of what constitutes 'national security', public health, environment protection, and the national monetary system.<sup>688</sup>

Compa points out that the conflicts arising out of the current global economic reality complicate trade policy and development strategies, as well as challenge traditional patterns of sovereignty. This point reveals itself as even more acute when one takes into account, as Wang suggested, that national identity is becoming increasingly dependent upon new forms of economic activity, such as

---

<sup>685</sup> Text to n 615 in ch 5.3.

<sup>686</sup> Peter Newell, 'Environmental NGOs, TNCs, and the Question of Governance' in Valerie J Assetto and Dimitris Stevis (eds), *The International Political Economy of the Environment* (Lynne Rienner Publishers 2001) 85; Stephen Tully, *Corporations and International Law-Making* (Brill 2007) 207.

<sup>687</sup> See Chapter 2.2.

<sup>688</sup> Marie-Claire Cordonier (ed.), *Sustainable Development in World Investment* (Kluwer, 2011) 355.

telecommunications.<sup>689</sup> Hence, this is exactly the problem the ICSCD system is designed to solve.

The purpose of this section is to further clarify the question asked above whether MNEs themselves compromise territorial sovereignty, or whether the current international regulation of their activity is sufficient in securing the basic components of sovereignty. As shown by numerous examples given in this research, in addition to the interpretive dependence, the security clauses leave most of the issues with a potential of impinging upon state sovereignty to the courts themselves. This problem starts with the situation in which political and commercial issues are handled in unconnected systems. As Pauwelyn argues, in the international arena, commercial issues are dealt in treaties and institutions, such as the World Bank, GATT, and the WTO, while the UN institutions tackle the world's political problems.<sup>690</sup>

In this chaotic reality, national sovereignty and international commercial litigation are destined to impinge upon each other. McKeon argues that this reality leads to a principle contradiction between the mere idea of national sovereignty and the idea of international enforcement powers, as well as the jurisdiction of a global commercial court. Indeed, in the current system, national sovereignty is constantly reduced by international courts. Chalamish notes that, over the years, procedural requirements concerning jurisdictional issues have been repeatedly abated by international tribunals to attract investors.<sup>691</sup>

Most BITs contain extremely loose applicable law provisions, which lead courts, as Gibson and Drahozal argue, to rely more on international law than on domestic law. For example, in *Maffezini v Kingdom of Spain*, the ICSID tribunal

---

<sup>689</sup> Lance A Compa, 'International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies' (1993) Cornell University ILR School working paper 117, 127-128 <<https://samba.huji.ac.il>> accessed 6 March 2012; Georgette Wang, 'Foreign Investment Policies, Sovereignty and Growth' (2003) 27 Telecommunications Policy working paper 267, 273 <<https://samba.huji.ac.il/>> accessed 6 March 2012.

<sup>690</sup> Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Michigan Journal of International Law 903.

<sup>691</sup> Patricia A McKeon, 'International Criminal Court: Balancing the Principle of Sovereignty against the Demands for International Justice' (1997) 12 St John's Journal of Legal Commentary 535, 560; Efraim Chalamish, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement' (2009) 34 Brooklyn Journal of International Law 303, 344.

completely disregarded the domestic law of the respondent's state, in spite of the applicable law clauses contained in the relevant BIT and instead searched for answers in general international law. Further, in *Santa Elena v Republic of Costa Rica*, the tribunal ruled that, if there is inconsistency between domestic and international law, the latter should prevail.<sup>692</sup>

Hence, the principle underlying this work is that national security, public health, and other political issues are to be dealt *solely on the political and diplomatic levels*. The proposed ICSCD is designed to provide a remedy to the current perplexed international legal system by confining itself to the commercial level by distinguishing sharply between commercial legal issues and what is obviously political.

As the Establishing Treaty of the ICSCD is to be a product of the UN, member states will have only the initial power to define these issues as 'constitutional principles' that are thus binding in courts. That approach is, without any doubt, in accordance with what Todd Weiler coins as 'beneficial or efficient manner' of implementing sovereignty considerations.<sup>693</sup> The ICSCD shall minimise or even end the untidy, hybrid, and defaulted solution of a mix between absolute MFN provisions and exception clauses in the current treaties. In the proposed system, all member states and registered MNEs will be obliged to the exactly same detailed provisions, with a certain consideration of variations according to differences between developed and undeveloped nations. In this respect, the Establishing Treaty shall include detailed definitions of delicate and elusive issues, such as indirect expropriation.

An additional acute problem arising from the present system is that of *extraterritoriality* of rulings. The question here is simply to what extent, if any, local laws may be implemented in cases involving states or MNEs that have little connections to the court's state.<sup>694</sup> As shown above,<sup>695</sup> US courts are inconsistent

---

<sup>692</sup> *Emilio Agustín Maffezini v Kingdom of Spain* [1997] ARB/97/7 (ICSID); *Compania del Desarrollo de Santa Elena SA v The Republic of Costa Rica* (2000) ARB/96/1 (ICSID); Gibson and Drahozal (n 19) 521, 534.

<sup>693</sup> Todd Weiler, 'NAFTA Investment Arbitration and the Growth of International Economic Law' (2002) 36 Canadian Business Law Journal 405.

<sup>694</sup> See the section 'The Modern State System and the MNE', Chapter 2.1 in this thesis.

in their rulings, indicating lack of understanding of international customs and the states' internal legal systems and policies. Lutz shows that under the current problematic NAFTA regime, the Mexican legal system is violently penetrated by an unsystematic reliance upon US courts' rulings. What ICSCD offers is a consistent legal system that initially provides a set of rules and principles, as well as international law expert-judges to interpret them in the most appropriate fashion.<sup>696</sup> Furthermore, as mentioned above, the recent Supreme Court decision in the *Kiobel*<sup>697</sup> case has determined that the ATS applies only to conduct within the U.S or on the high seas, which generally means that foreign victims and plaintiff shall find themselves with the absence of legal 'legitimate' tribunal where they can submit their lawsuit against corporations.

Malcolm Shaw pins down the importance of such judges' expertise to the issue of maintaining national sovereignty by stating that the credibility of the court relies upon the avoidance of any hint of partiality or prejudice. Shaw further argues that, 'there is also a community interest in sustaining the Court as an institution composed of a wide range of talented and experienced jurists. The loss of such expertise in particular cases needs to be avoided where possible'.<sup>698</sup>

Undauntedly, the new international proposed system may intrude on national sovereignty, especially in cases where decisions under ICSCD shall be imposed on them, even if they were not initially signatories to the Establishment Treaty. Hence, even in case a state or MNE is not listed, the other party will be entitled to request the inclusion of that state/MNE for the purpose of ICSCD jurisdiction. In other words, there shall be an automatic enforceability of ICSCD jurisdiction over both parties. As a principle, decisions under ICSCD shall be considered *final*, and the member state must execute the rulings, which will be enforceable on the territory of the member state to the *same extent as a local court*

---

<sup>695</sup> See the section 'The Problematic Usage of US Courts in Solving Disputes Involving MNEs or Sovereigns' in this thesis, Chapter 3.3.

<sup>696</sup> Robert E Lutz, 'Law, Procedure and Culture in Mexico under the NAFTA: The Perspective of a NAFTA Panelist' (1996) 3 *Southwestern Journal of Law and Trade in the Americas* 391, 400.

<sup>697</sup> Text to n 22..

<sup>698</sup> Malcolm N Shaw, 'International Court of Justice (n 511) 831, 846.

*judgment*. Hence, it authorizes the use of local authorities to enforce appearance before the court and court decisions.

Furthermore, the ICSCD awards shall include the option of *monetary compensation*. More specifically, an ICSCD award will include execution and bear the consequence of collecting funds, rather than constituting a mere step in the process that leads to collection.<sup>699</sup> The ICSCD shall be regarded as a strictly commercial-law system, and thus any state-to-state diplomatic negotiations containing political considerations shall be outside its scope.<sup>700</sup>

To ensure that the ICSCD be granted real enforcement means, this research adopts the rather bold decision to provide the Tribunal for the Former Yugoslavia (ICTFY) the authority to send individuals to prisons. In the case of international commercial activity, the subjects will be corporate executives as well as state officials.<sup>701</sup>

### **Waiver of Sovereign Immunity**

The first general exception to sovereign immunity in FSIA is contained in Section 1605(a)(1). It applies for the case where the foreign state has waived its immunity. A good example of explicit waiver was presented in the case of *EM Ltd v Republic of Argentine*. In this case, where a MNE sued Argentine in the District Court for the Southern District of New York, as a first choice, the court has found that in the terms and conditions governing the contract between the sides, the state had irrevocably waived its immunity to the fullest extent permitted by the laws of the jurisdiction.<sup>702</sup>

However, Section 1605 contains also a provision for implicit waivers, which is naturally a topic of much more debate in US courts for its dependence upon

---

<sup>699</sup> Molly Steele, 'Challenges to Enforcing Arbitral Awards against Foreign States in the United States' (2008) 42 International Lawyer 87-8.

<sup>700</sup> Text to 759 in ch 5.4.

<sup>701</sup> Mary Ellen O'Connell, 'Enforcement and the Success of International Environmental Law' (1995) 3 Indiana Journal of Global Legal Studies 48, 49.

<sup>702</sup> . EM LTD., *Plaintiff-Appellant v REPUBLIC OF ARGENTINA*, Defendant-Appellee. NML Capital, Ltd., *Plaintiff-Appellant v The Republic of Argentina*, Defendant-Appellee. Banco Central De La Republica Argentina, Interested-Non-Party-Appellee. (2007) (US Second Cir).

each court's interpretation. As Paul L Lee points-out, the legislative history of the US judicial system shows that implicit waivers are to be found in cases in which a foreign state (1) had agreed to arbitration in another country; (2) had agreed that the law of a particular country would govern the dispute or (3) participated in prior litigation without raising the defense of sovereign immunity.<sup>703</sup>

In *Af-Cap Inc v Republic of Congo*, the US Court of Appeals for the Fifth Circuit addressed the above mentioned three categories of implicit waiver and dismissed them one-by-one for this certain case. First, the court concluded, there was no arbitration agreement; second, the contract stated that it is to be governed by English law, not US law; and third, in prior litigation Congo has consistently raised the immunity defense.<sup>704</sup>

Besides the existence of arbitration agreements or clauses in contracts, US courts have many times addressed the question of whether a state is a party to an international treaty that refers to arbitration in other signatory states is a sufficient foundation for determining that it implicitly waived its sovereign immunity.

In *Creighton Ltd v Government of the State of Qatar*, in which a Cayman Islands' corporation sued Qatar, the District of Columbia Circuit rejected the company's argument for implicit waiver of immunity. The contract between the parties contained an arbitration clause pointing to a French tribunal as the relevant court in cases of disputes arising from that contract. First, the company addressed the said French tribunal, but later requested an enforcement of its award in the American court. Here, the District court determined that although both France and the United States are governed by the New York Convention, and thereby waiver any immunity in each other's courts, because the Qatari government is not a signatory on the convention and the United States is not a party in the contract, this prevents the argument for implicit waiver of the government's part.<sup>705</sup>

---

<sup>703</sup> Paul L Lee, 'Central Banks and Sovereign Immunity' (2003) 41 Columbia Journal of Transnational Law 327, 339.

<sup>704</sup> *AF-CAP, INC., Plaintiff-Appellant v The Republic of Congo*, Defendant, CMS Nomeco Congo Inc.; The Nuevo Congo Co.; Nuevo Congo Ltd., Garnishees-Appellees. *Af-Cap, Inc., Plaintiff-Appellee v The Republic of Congo*, Defendant-Appellant (2006) (US Fifth Cir).

<sup>705</sup> *Creighton Limited, Appellant v Government of the State of Qatar*, Appellee (DC Cir) (1999); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

On a following case, a Cyprian corporation filed a petition in the US District Court of the District of Columbia for confirmation of an arbitral award given in Sweden against a governmental organ of Ukraine. Here, the court found that the New York Convention is a sufficient ground for the implicit waiver category because Ukraine is a signatory on the relevant treaty.<sup>706</sup>

In a case brought against the government of Yemen by an American-based MNE, the US Court of Appeals for the Eleventh Circuit concluded that it had subject matter jurisdiction, 'pursuant to the arbitration exception...where a foreign state has no immunity from a proceeding to confirm an award that may be governed by a treaty... calling for the recognition and enforcement of arbitral awards'.<sup>707</sup>

The waiver of immunity on the grounds of choice of law was discussed in a case brought against Argentina by two Liberian corporations for an attack on the latter's ships in international waters. Here, the corporations first sought justice in local Argentinian courts and after several unsuccessful attempts turned to the Southern District Court of New York. In an appeal, the petitioners invoked, *inter alia*, the Liberian-US BIT. The corporations pointed to the provision in the BIT determining that nationals of the United States and Liberia shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws. The court determined here that 'the FSIA is clearly one of the local laws to which respondents must conform before bringing suit in US courts'. Thus, because the court did not find any FSIA implicit waiver of immunity categories' relevant to the case, it concluded that the District Court had no jurisdiction over the case.<sup>708</sup>

In another case, brought against the government of Fiji, by an MNE based in Virginia, US, the latter sued for breach of contract in a district court in Virginia. Here, the court held that Fiji had waived its immunity under FSIA when it agreed to the choice of law of Virginia contained in the contract with the MNE. The court opinioned that 'Virginia courts are the forum that can best give that guidance', and

---

<sup>706</sup> TMR Energy Ltd v State Property Fund of Ukraine No. 03-7191 (2005) (DC Cir).

<sup>707</sup> No. 99-10880 (2000) 218 F. 3d 129 (Eleventh Cir).

<sup>708</sup> *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 488 US 428 (US Second Cir).



that a 'court of another country would face the task of identifying the Virginia law, and then of both construing and applying it pursuant to Virginia principles'.<sup>709</sup>

As demonstrated above, the issues of an agreement to arbitrate in the United States or an obligation to bring disputes before its courts can generate complicated discussions concerning interpretation. However, it is the issue of a waiver of immunity under foreign courts as basis for a sequential waiver in US courts that demonstrates most acutely the problematic position of the US legal system in the international legal arena.

In the *Davis* case, the US Court of Appeals for the Eleventh Circuit was quite clear when it dismissed the corporation's argument that Yemen has implicitly waived its sovereign immunity in the United States when it agreed to participate in a London court prior to the corporation's enforcement request in the Northern District of Alabama Court. What the court has opined here, therefore, is that American proceedings are to be considered as separate from any other proceedings, with no continuity regarding the legal grounds and hearings of a certain case.<sup>710</sup>

In a case brought against Peru, a corporation sued the monetary authority of Peru in a Peruvian court after it denied the plaintiff's application for compensation for losses it suffered when the exchange rate between Peru and the United States shifted unfavorably for the corporation. The highest court in Peru affirmed a judgment rendered in the corporation's favor, but then reversed its ruling. The corporation sought to enforce the first judgment in US courts because the Peruvian monetary authority had waived jurisdictional immunity under the FSIA both by being subject to the jurisdiction of the courts of Peru pursuant to the Peruvian Constitution and by submitting to the jurisdiction of those same courts. The US Court of Appeals for the Ninth Circuit held that the FSIA's waiver exception to immunity is to be narrowly construed and that a foreign state's submission to the

---

<sup>709</sup> *Eckert International Incorporated v Government of Sovereign Democratic Republic of Fiji*, No. 93-1985 (1994) 32F 3d 77 (US Eleventh Cir).

<sup>710</sup> *Davis International Inc v the Republic of Yemen Ministry of Supply and Trade*, No. 99-10880 (2000) 218 F. 3d 129 (Eleventh Cir).

jurisdiction of the courts of its own country does not constitute, nor warrant, submission to the jurisdiction of the courts of a different sovereign.<sup>711</sup>

The problem of overcoming the immunity problem case-by-case is not confined to cases in which a prior waiver was given by the state in a different country. In a case brought before the Southern District of Florida Court against a financial arm of the Venezuelan government, the court has determined that the latter did not waive its immunity even by initiating a prior proceeding against the plaintiff in a US court.<sup>712</sup>

This research proposes a new legal binding system where every state that has become a party to the Establishing Treaty shall accept ICSCD as the sole recognised and authorised court. According to this proposal, this is a sufficient foundation for determining that it implicitly waived its sovereign immunity. Chapter Five will discuss further the incentives of signing this international Treaty.

In case of non-ratification, the ICSCD would still have jurisdiction over the states, where the MNEs which are obliged to the ICSCD by a binding list<sup>713</sup>, shall force the states into its jurisdiction. This may be achieved partly by the following principles<sup>714</sup>:

1. The list is self-evident in that each ICSCD member will be prohibited from engaging in any commercial activity or signing a contract with a company or state that is either not listed on the list or is not connected in an obvious way to the other party. This shall provide the incentive for MNEs and states to join the list, as without such inclusion they will have to limit their activity to fewer potential business partners.
  2. In a case in which a state is not listed, the MNE will be entitled to request the inclusion of that state for the purpose of ICSCD jurisdiction.
- In other words, there shall be an automatic enforceability of ICSCD

---

<sup>711</sup> *Renato Corzo v Banco Central De Reserva Del Peru* (2001) (US Ninth Cir); Hugh R Koss, Brooke C Galardi, and Eric B Strain, 'The Foreign Sovereign Immunities Act: Assessing the Immunity of Foreign States in US Litigation' (2005) *Aviation Law Alert Working Paper* 1, 6-7.

<sup>712</sup> *Calzadilla v Banco Latino Internacional* (2005) (US Eleventh Cir); Dye PB and others (n 407) 275, 286.

<sup>713</sup> Text to n 683 in ch 5.5.

<sup>714</sup> Text to ch 5.3.

jurisdiction over the states. This will allow the ICSCD system the degree of flexibility needed when dealing with an ever-changing global economy, and to set an order in the current disorderly international legal system.

3. Part of the conditions of the substance of the list is that the contracting MNEs shall be bound to include in their contract agreements a Place of Jurisdiction clause, which refers to the ICSCD or to the 'Contract Approval and Interpretation Mechanism' (CAIM).<sup>715</sup>
4. Furthermore, establishment of the CAIM as an Organ of the ICSCD may harmonise state-MNE contract law, provide a coherent regulative body for contractual disputes, and act as an agreed upon arbitrator in disputes arising from such contracts.

### **Jurisdiction, Applicable Law and Precedence**

One of the most complex issues when concerning the current international commercial legal system is the three-fold question of what constitutes as applicable law, where exactly the borders of the international courts' jurisdiction lie, and how precisely should those courts act regarding the issues of precedence.

All of the above issues directly connect to questions of sovereignty, the purpose of international law and, most importantly, the ability to enforce awards. As the ICSCD existence implies the idea that a responsible international legal system should be free from political intervention and that the purpose of international law is to provide a coherent and self-sufficient legal system with true official authority. Hence, this thesis shall offer an answer to the three-fold question raised above regarding to the principles of national sovereignty, judicial coherence, and enforceability.

The current system offers no single set of unified rules or laws. Most regional and bilateral treaties refer to 'international law' as the relevant applicable law, leaving courts with an extremely wide range of legal documents from which to choose. This confusion is mostly felt, as Pauwelyn points out, where the WTO law

---

<sup>715</sup> Text to n 615 in ch 5.3.

has its deficiencies. In these cases, a non-WTO law is to be invoked as part of the applicable law.<sup>716</sup>

The *Metalclad* case quite clearly demonstrates the problematic nature of law applicability in the commercial international arena. In this case, the tribunal operated under the ICSID's Additional Facility Arbitration Rules and was obligated under NAFTA to arbitrate under 'applicable rules of international law'. This very broad terminology forced the tribunal to spend much time debating of what was the best set of laws, eventually referring to The Vienna Convention on the Law of the Treaties.<sup>717</sup>

However, this problem characterises not only the commercial legal arena, but also the segment in the international law regime. For example, in the *Lockerbie* case, the ICJ panel decided to examine UN Security Council Resolution 748 invoked in defence by the UK and the US as part of the applicable law, although it had jurisdiction to consider claims only under the Montreal Convention.<sup>718</sup>

In this state of affairs, the divergence between different courts is felt rather strongly. In many cases, the result is interference in domestic laws, damaging the finality of domestic judicial awards, and, in extreme cases, even harming the relations of two sovereign states or forcing them to implement 'soft regulation' as a measure of dealing with the unpredictability of the system.<sup>719</sup>

The ICSCD system offers, for the first time, a set of coherent and legally binding laws in the form of the Establishing Treaty to be implemented by the courts. Following Cogan's suggestion, ICSCD laws will be as few as possible, with opportunities for effective re-legislating to promise flexibility and effective supervision. In most cases, as Cogan argues, international courts lack effective supervision because the effects of external mechanisms of control, which are used so well in domestic systems, are mediated by the limitations of the international

---

<sup>716</sup> Pauwelyn (n 690) 911. For further elaboration on this important issue see Taida Begic, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005).

<sup>717</sup> *Metalclad* (n 18).

<sup>718</sup> *Libya v US* (1992) 114 (ICJ); Pauwelyn (n 690) 911.

<sup>719</sup> *ibid.*

system and by the principle of judicial independence. This should be avoided in the new system.<sup>720</sup>

Additionally, in the present state of international commercial law, there is a lack of clarity regarding jurisdiction. While some treaties indicate a specific forum for hearing cases under their framework, most bilateral, regional, and international agreements deliberately lack such a clause and therefore leave international commercial disputes in ambivalent state.<sup>721</sup>

In *Hartford Fire Insurance Company v California*, the state of California and other US states accused English insurance companies of conspiring to force US insurers to neglect important policy practices that were beneficial to consumers, but costly to the insurers. The defendant companies alleged that the US court lacked jurisdiction over their acts, whereby various statutes exempted them from liability, and that principles of comity dictated that they should not be brought before a US court.

The US district court in which the case was previously brought accepted these arguments and dismissed the case. However, The Court of Appeals reversed the dismissal, *inter alia*, based on the observation that the offending foreign acts were directed into the United States. Hence, to ascertain its jurisdiction, the court had to show that it has a connection to commercial activity conducted inside the US.<sup>722</sup>

This case clearly demonstrates the way in which the gap and deficiency in a clear definition of commercial jurisdiction enable MNEs to escape punishment in severe cases concerning consumer protection and monetary stability. The ICSCD system offers a way to mitigate this problem by creating a hierarchic and structured independent system in which it is immediately clear exactly where a potential dispute will be heard.

---

<sup>720</sup> Jacob Katz Cogan, 'Competition and Control in International Adjudication' (2008) 48 Virginia Journal of International Law 411, 431.

<sup>721</sup> Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing 2008) 97, 137.

<sup>722</sup> *Hartford Fire Ins. Co v California* [1993] 509 US 764 (US Supreme Court).

In another case, Ireland submitted claims of violation of a treaty concerning discharges into the Irish sea of radioactive waste by a new processing plant built by the UK close to the Irish border. The question facing the international tribunal was whether the treaty implied exclusive jurisdiction and competence of the EC courts. The tribunal eventually ruled that under the principle of diplomatic comity, and in an attempt not to create contradictory rulings to those of EC courts, it had no basis for jurisdiction.<sup>723</sup>

The MOX case involved a dispute over marine pollution between United Kingdom and Ireland where Ireland requested prescription of provisional measures against the UK, in accordance with Article 290 of the United Nations Convention on the Law of the Sea (UNCLOS). Irelands' provisional measures requests included that UK shall stop from releasing radioactive waste from the MOX plant into the Irish Sea, among other provisional measures.<sup>724</sup> In this case, the ITLOS established a clear threshold to avoid overuse of the precautionary approach, which could result in diminished legitimacy.<sup>725</sup>

In the *Mox Plant* case, the tribunal decided responsibly to eliminate the possibility of contradiction rulings; however, in other cases courts may take the challenge and create much confusion. In this case, the excuse was diplomatic comity; however, in many cases, the basis for arguing against a court's jurisdiction is the question of non-convenience forum.

Thus, in such cases, MNEs require that the forum in which the case is brought be 'convenient', meaning that the forum hearing the case must have some sort of a relation to the case. In the *Hartford* case, it was used to try to rule out a domestic court, but in other cases, it is used to rule out international courts. Some courts also refuse to decide questions they consider 'political' or interfering with the government's ability to implement foreign policy. This type of prudential

---

<sup>723</sup> *Ireland v UK ('MOX Plant Case')* [2003] (EC Permanent Court of Arbitration) <<http://www.pca-cpa.org/showpage>> accessed 6 March 2012.

<sup>724</sup> Tim Stephens, *International Courts and Environmental Protection* 225 (2009). See also M. Bruce Volbeda, *The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS*, 42 *Tex. Int'l L.J.* 211, 213 (2006).

<sup>725</sup> *The MOX Plant Case (Ireland v United Kingdom)*, 126 *I.L.R.* 334.

impediment, as O'Connell argues, 'eliminates many international law cases because they inherently touch on foreign affairs'.<sup>726</sup>

What the ICSCD offers here is a complex system that, under the Establishing Treaty and the auspices of the UN, takes seriously into account issues such as environment, national security, or monetary stability. Shaw argues that international courts do not 'constitute an exclusive, self-contained world, but exist(s) as part of a wide-ranging set of mechanisms'. The discretion given to the panel judges, and their expertise in commercial international affairs, will enable them to make balanced decisions that are free from political interference as well as demonstrate responsibility towards national sovereignty and consumer rights.<sup>727</sup> However, in the new system, sovereignty shall be limited and according to ICSCD jurisdiction.

Here is where the issue of *interpreting* the meaning of terms in the ICSCD Establishing Treaty arises. The principle in the ICSCD system is to avoid divergence of interpretations, as in WTO disputes. For instance, in *US-Shrimp* case, the panel decided to interpret the words 'exhaustible natural resources' in GATT Article XX in accordance with external environmental treaties of its choice.<sup>728</sup>

In *Oil Platforms*, as Pauwelyn points out, the problem of interpretation led to the unwanted situation of narrowing the scope of GATT rules and exceptions when a treaty provision similar to GATT Article XXI on essential security interests was interpreted restrictively with reference to rules of general international law prohibiting the use of force. In the ICSCD system, the interpretation of the agreement will lean upon the expertise of the panel judges.<sup>729</sup>

The ICSCD also constitutes a solution to the extremely problematic political intrusion of the seemingly non-political system of NAFTA: The Trade Commission. The mere existence of this establishment exposes the impossibility of any legal

---

<sup>726</sup> O'Connell (n 701) 61-2.

<sup>727</sup> Malcolm N Shaw, 'International Court of Justice (n 511) 864.

<sup>728</sup> *US - Import Prohibition of Certain Shrimp and Shrimp Products* [1996] DS58 (WTO Tribunal) <<http://www.wto.org/english/tratop>> accessed 6 March 2012; Pauwelyn (n 690) 913.

<sup>729</sup> *Islamic Republic of Iran v US ('Oil Platforms')* [2003] 90 (ICJ) <<http://www.icj-cij.org>> accessed 6 March 2012; Pauwelyn *ibid*.

system under the current regime to act independently of non-legal considerations, for The Trade Commission is an assembly of state representatives acting as an interpretive body (*de facto* appellate court) for NAFTA state-to-state disputes. In the ICSCD system, by contrast, the specific tribunal shall be the only interpretive body, and the Panel of Judges will act as a further appellate court.<sup>730</sup>

Kaufmann-Kohler offers another possible solution by suggesting that a court may request guidance on legal issues from a permanent consultative body. In such a case, the ICSCD shall follow the model of the procedure of Article 234 of the EC Treaty, pursuant to which national courts of Member States request interpretative rulings from the EC on matters of European law. In the ICSCD case, the model will apply to the Panel of Judges. As Kaufmann-Kohler explains, 'if properly designed, such a mechanism would ensure consistency, without the drawbacks of a full-fledged appellate procedure'.<sup>731</sup>

Powell importantly adds that the NAFTA system provides no coherent appellate option, thus leaving the initial tribunal with unbalanced power. Although a party may resume to another tribunal, or to The Trade Commission, no unified appeal court exists at present. In many cases, judges rule on issues not under their expertise, due to unfamiliarity with domestic or international law. The ICSCD's Panel of Judges will be the only high court for appeals in commercial MNE-state disputes.<sup>732</sup>

### **Precedence in the new system**

The following section presents one of the greatest challenges for international law today, which is the question as to the value of precedent. This is a twofold problem in which, on one hand, tribunals have no coherent legal tradition on which to base their rulings and, on the other hand, there exists an inconsistent and unmonitored arsenal of precedents from all around the globe from to choose.

---

<sup>730</sup> Donald M McRae, *Canadian Yearbook of International Law* (UBC Press 1998) 283.

<sup>731</sup> Gabrielle Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?' in E Gaillard and Y Banifatemi (eds), *Annulment of ICSID Awards* (Cambridge University Press 2004) 221.

<sup>732</sup> Stephen J Powell, 'Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas' (2010) 16 *Law and Business Review of the Americas* 217, 226-27.



The first part of this section shall describe the reasons why the lack of precedents is an issue. The second proposes a remedy in the form of creating an acceptable precedent tradition as part as a unified international legal system.

The issue of precedent in international law was debated for the first time at the creation of the Permanent Court of Arbitration in the Hague Conventions of 1899 and 1907<sup>733</sup>. However, the court was permanent in name only, and as Hersch Lauterpacht argued consequently, 'the necessity of providing for a tribunal developing international law by its own decisions had been the starting point for the attempts to establish a truly permanent international court as distinguished from the Permanent Court of Arbitration'.<sup>734</sup>

Similarly, the drafters of the Statute of the Permanent Court of International Justice did not intend to give this court authority to create law. As so Lapradelle declared before the advisory committee of jurists responsible for the preparation of the statute that it would be useful to specify that 'the Court cannot act as legislator' and Lord Phillimore added that 'judicial decisions state, but do not create law'.<sup>735</sup>

However, the increase in the number of courts and arbitral institutions leads to the question whether precedents from one dispute settlement institution are relevant to others. Currently, the commercial international law is characterised by a state of disorder in courts' rulings<sup>736</sup>. In the absence of a precedence regime, those courts are forced to base their awards each time under new grounds. Hence, the current legal system is lacking components of predictability and foreseeability.

Further concern was whether the judgments after appeal to higher authority are binding upon subordinate courts. The Appeals Chamber of the Tribunals for the former Yugoslavia and Rwanda in *Aleksovski* beseeched a positive response, as did as the judgments given by the Grand Chamber of the European Court of

---

<sup>733</sup> Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' *Dispute Settlement* (2011) 2 1 Oxford Journals 5-23.

<sup>734</sup> Hersch Lauterpacht, 'The So-called Anglo-American and Continental Schools of Thought in International Law', *British Yearbook of International Law* (1931) 59.

<sup>735</sup> Permanent Court of International Justice Advisory Committee of Jurists, *Procès-verbaux of the proceedings of the Committee, June 16th – July 24th, 1920, with Annexes* (1920), 584.

<sup>736</sup> The ICJ, ICC, The International Tribunal for the Law of the Sea, The Appellate Body of the World Trade Organization, the European Court of Justice, Inter American and African Human Rights Courts. Iran-US Claims Tribunal and the ICSID.

Human Rights, specifying the wording of Article 30 of the European Convention on Human Rights. The Appellate Body of the WTO decisions seem not to have that affect, and the position is uncertain for the International Criminal Court and the European Court of Justice. However, it seems that in all cases, subordinate organs are prone to respect the decisions of the higher courts.<sup>737</sup>

The ICSCD will consider the methods used by the judicial bodies in the use of its own precedents, as part of the ICSCDs' determination of which previous cases shall be considered as binding precedence.

As Gibson and Drahozal point out, international law is currently lacking a system of binding precedence. Indeed, the ICSID has no binding precedence provision<sup>738</sup>, and NAFTA clearly states that its courts' rulings shall not be considered as precedents<sup>739</sup>. In fact, most of the NAFTA courts' rulings specifically stress this point and, consequently, tribunals must lean upon the respectively new and evolving international law.<sup>740</sup>

Informally, the reality of this legal system may be seen as precedent-leaning. Gibson and Drahozal argue that the practical activity of courts presents 'an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilise international investment law', where 'the reality of the decisional process may sometimes reflect a judicial discretion that is related to a broader understanding of precedent'.<sup>741</sup> However, with no single set of standards principles to establish precedent tradition, the current legal system shall remain less reliable and predictable. This deficiency, increases the risk of overlapping jurisdictions and contradictory judgments.

The swordfish dispute between the European Union and Chile may demonstrate this issue, as the E.U wished to bring before the International Tribunal

---

<sup>737</sup> Guillaume (n 733) 5-23.

<sup>738</sup> Text to n 673.

<sup>739</sup> Text to n 172.

<sup>740</sup> Gibson and Drahozal (n 19) 525-26; Tai-Heng Cheng 'Precedent and Control in Investment Treaty Arbitration' (2006) 30 Fordham International Law Journal 1014, 1016; British Institute of International and Comparative Law, Investment Treaty Law, *Investment Treaty Law: Nationality and Investment Treaty Claims, Fair and Equitable Treatment in Investment* (BIICL 2007) 112.

<sup>741</sup> Gibson and Drahozal, (n 19) 526.

for the Law of the Sea, and Chile before the World Trade Organization. Similarly, in the Mox Plant case with the International Tribunal for the Law of the Sea, an *ad hoc* tribunal and the European Court of Justice were involved.<sup>742</sup>

Another risk in the current legal conduction is the contradictions of jurisprudence that may result from a declared wish to distance precedents that are alienated from the tribunal in request.<sup>743</sup> This can be seen in the *Tadic* case, where the International Criminal Tribunal for the former Yugoslavia wished to oppose the International Court of Justice with regard to the issue of the law governing the responsibility of a state involved in a civil war within the territory of another state.<sup>744</sup>

The current incoherent body of precedence directly connects to the question of interpretation. That is, bearing in mind the ambiguity of the language pertaining to important issues addressed by the agreements such as the GATT definition, the reservations of the term "Security" are very weak<sup>745</sup> as is the definition of Expropriation under NAFTA, where some provisions allow explicit expropriation but also allow indirect expropriation<sup>746</sup>

In a complex case brought by an MNE against the state of Romania<sup>747</sup>, one of the most acute questions facing the ICSID tribunal was whether the relevant treaty constituted an 'umbrella clause' that transforms contractual undertakings into international law obligations. To resolve this difficulty, the judges of the *Romania* case referred to a list of prior ICSID cases dealing with the question. In *SGS v Pakistan*, for example, they found that 'the relevant provision of the bilateral investment treaty (Art 11) does not simply speak of a 'legal framework', and the

---

<sup>742</sup> Yann Kerbrat, 'Le différend relatif à l'usine Mox de Sellafield (Irlande/Royaume-Uni): connexité des procédures et droit d'accès à l'information en matière environnementale' (2004) AFDI 607.

<sup>743</sup> Guillaume (n 733)

<sup>744</sup> International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, (Judgment) Case IT-94-1-A 15 July 1999 s 115. See also *Loizidou v Turkey* (Judgment on Merits) ECHR Rep 1996-VI (18 December 1996) s 56.

<sup>745</sup> See *U.S v Thailand* (n 155 ).

<sup>746</sup> See *Metalclad Corp v the United Mexican States* (n 201).

<sup>747</sup> Ibid.

provision could be interpreted as laying down a kind of general obligation for the host State as a public authority to facilitate foreign investment'.<sup>748</sup>

Thus, the attitude toward treaty interpretation, facts raising jurisdictional issue,; exchange controls, wrongful expulsion, adverse inferences, affidavit evidence, oral testimony, documentary evidence, interim measure, expropriations, standard of compensation, valuation of businesses and tangible property, contract claims including issues of payment, contract formation, termination, construction, performance, breach, repudiation, account stated; and *force majeure* will be based upon a balanced consideration of the Establishing Treaty principles *and* prior ICSCD rulings.<sup>749</sup>

### **The Solution : A Creation of Precedent Tradition**

In this manner, what the ICSCD offers is an *institutionalisation* of the current reality of precedence rulings in which it will be perfectly clear which cases might constitute precedents. For, as Shaw argues importantly, the usage of precedence, in the widest sense, relied upon and cited in subsequent litigation, is crucial for the constitution of the *authoritativeness* of rulings<sup>750</sup>, and hence to the entire authority of the ICSCD. This is a crucial point, for the precedents are the basis the second leg of the ICSCD authority, the first leg being the Establishing Treaty's UN driven authority.

Following Fauchald's terminology, the ICSCD Tribunals shall be more 'legislator-oriented' than 'dispute-oriented' courts, acting in a way that relies heavily on precedents. Laird and Askew argued that the problem of precedence is an acute one, because if one aspires for true consistency between arbitral awards, one needs some formal system of precedence. Otherwise, consistency will be an unrealistic goal.<sup>751</sup>

---

<sup>748</sup> *Noble Ventures Inc v Romania* [2005] ARB/01/11 (ICSID).

<http://italaw.com/documents/Noble.pdf>> accessed 8 March 2014.

<sup>749</sup> Gibson and Drahozal (n 19) 531-32.

<sup>750</sup> Malcolm N Shaw, 'International Court of Justice (n 511) 843.

<sup>751</sup> Ian Laird and Rebecca Askew, 'Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 *Journal of Appellate Practice and Process* 285, 298; Fauchald (n 71) 343.

Schreuer argues that the existence of a structured precedence framework is a fundamental feature of any orderly decision process. The lack of such a framework in the current international legal system bears the consequence of alienating MNEs as well as states from participating in this system. To convince MNEs and states to take part in the new ICSCD framework, including the acceptance of numerous commercial restrictions and obligations, it is necessary to offer them in exchange a reliable and predictable legal system as compensation.<sup>752</sup>

This research supports Schreuer's argument, as it complies with the principles of the new legal system that strive for a unified and coherent legal frame of conduction. However, ICSID tribunal decisions that took place prior to the signing of the Establishing Treaty will be considered obligatory precedents, as long as they fit the Treaty. In addition, the ICSCD precedence-framework shall prefer, when there is no contradiction with the principles of the Treaty, to use valid commonly cited cases and those that have been given a general status as particularly important interpretive arguments.<sup>753</sup> In other words, as shall be set by the Establishing Treaty<sup>754</sup>, the ICSCD shall distinguish which previous national and other case laws might be considered as precedents to be applied in the new system.

Existing ICSID, UNCITRAL and Iran-US Claims Tribunal, as well as the WTO, human rights tribunals, ICJ and the European Court of Justice, the International Tribunal of the Law of the Sea, and the Tribunal of Justice for Andean Community of Nations typically use each other tribunals' decisions only as a non-essential interpretive argument than as an essential one. Moreover, ICSID tribunals almost never refer to cases from other investment tribunals when determining their interpretive methodology. In an event they do refer to such cases, they tend to prefer to use UNCITRAL cases in relation to procedural and

---

<sup>752</sup> Christoph Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (2006) 3 Transnational Dispute Settlement 1, 10.

<sup>753</sup> Fauchald (n 71) 337.

<sup>754</sup> Text to n 548.

jurisdictional issues because of the similarity between the two systems and cases from the Iran–US Claims Tribunal in relation to substantive issues.<sup>755</sup>

Under the auspices of the ICSCD, however, there will be no such distinction between different tribunals' decisions; all ICSID, UNCITRAL and Iran-US Claims Tribunals rulings that fit the Establishing Treaty goals and principles would be expected to be used equally. However, as the ICSCD would initially follow the structure of the ICSID, the remaining systems shall naturally have more changes and alterations to go through.

As one of the goals of the ICSCD is to provide a unified system, the importance of having a coherent usage of law material and applicable law that could be confidently regarded as predictable by states and MNEs cannot be emphasised enough. In this manner, the ICSID tribunals will be obliged to conform to the new order and change their extended flexible approach towards applicable law. This leaves the question to be settled according to the parties themselves or, in the absence of such a choice, under the law of the Contracting State party to the dispute supplemented by appropriate rules of international law.<sup>756</sup>

Franck argues that the current system offers only a 'patchwork of mechanisms' to provide for some judicial consistency, thus lacking review of the merits and correction of legal errors<sup>757</sup>. The offered ICSCD system will provide coherence and unification to the currently disorderly commercial international legal system by relying upon the Establishing Treaty as applicable law and upon precedents, in addition to a clear jurisprudence.

In conclusion, establishing precedence tradition is an essential element in the creation of the new unified and coherent international legal system. Furthermore, applying the precedent in the ICSCD Courts should be in line with the applicable law as determined by the Establishing Treaty.

### **The Question of Enforceability**

---

<sup>755</sup> *ibid.*

<sup>756</sup> Rowat (n 546); Hoellering (n 546) 111.

<sup>757</sup> Kaufmann-Kohler (n 731) 221; Franck (n 606) 1521, 1546-47.

Of all the issues mentioned above, enforceability is the most important and difficult to approach. In the current legal commercial arena, a comprehensive enforcement mechanism is nearly absent. According to O'Connell, 'international law is a monument to successful laws, without much enforcement'. Here, thus, lies the most acute and urgent problem the ICSCD must address.<sup>758</sup>

What does exist is a fragmentary system of attempts, successful to some degree, to enable execution of awards at the regional level. As indicated above,<sup>759</sup> although ASEAN and MERCOSUR offer an investor-to-state dispute settlement mechanism, which is legally binding and enforceable theoretically, the NAFTA system is the only one seriously tested in reality.

However, this NAFTA experience demonstrates how acutely the international legal arena is in need of a coherent enforcement mechanism, for not only the treaty offers a solution for three states only, but its courts' rulings also lack the merit of finality. Therefore, a ruling can be repeatedly questioned without being enforced. Moreover, the NAFTA rulings' enforceability is dependent upon the ability of domestic legal systems, and do not always enjoy the same status as rulings in domestic issues.<sup>760</sup>

Hence, as a principle, decisions under ICSCD arbitration shall be considered *final*, and the member state must execute the rulings, which will be enforceable on the territory of the member state to the *same extent as a local court judgment*, for as Noemi Gal-Or argues, 'vesting private party direct access with tangible power depends on its enforceability and awards'.<sup>761</sup>

Second, the ICSCD awards shall include the option of *monetary compensation*. More specifically, an ICSCD award will include execution and bear

---

<sup>758</sup> O'Connell (n 701) 47-8.

<sup>759</sup> See Chapter 2.2

<sup>760</sup> O'Connell (n 701) 57.

<sup>761</sup> Noemi Gal-Or, 'Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines' (1998) 21 Boston College International and Comparative Law Review 1, 30; Gustavo Vega Cánovas, 'The Experience of NAFTA Dispute Settlement Mechanisms: Lessons for the FTAA' (2003) Atelier ALÉNA working paper 1, 3 <https://samba.huji.ac.il/+CSCO> accessed 6 March 2012.

the consequence of collecting funds, rather than constituting a mere step in the process that leads to collection.<sup>762</sup>

Thirdly, the ICSCD is to be regarded as a strictly commercial-law system, and thus any state-to-state diplomatic negotiations containing political considerations shall be outside its scope.

Moreover, to balance the international legal system and fulfil a problematic enclave in the law, the ICSCD shall include an option for states to sue registered MNEs as well. As indicated above,<sup>763</sup> it is a goal of the ICSCD to mediate between the legal status of political and commercial entities strictly for the purpose of commercial legal action. Here, the ICSCD's departure point is Article X in ASEAN's IGA, which does not confine clearly the dispute to one brought only by an investor. The ICSCD shall extend the point of a clear provision for states to include exactly the same procedures and provisions given to investors.

On another note, while in domestic legal systems the executive or judiciary bodies enforce the law by controlling the assets or freedom of law-breakers, the international legal system lacks a fully developed judiciary and executive power. To ensure that the ICSCD be granted real enforcement means, this work shall adopt the rather bold decision: to provide the Tribunal for the Former Yugoslavia (ICTFY) the authority to send individuals to prisons. In the case of international commercial activity, the subjects will be corporate executives as well as state officials.<sup>764</sup>

However, the emphasis on the need for an efficient enforcement mechanism should not be, by any means, taken as a call for a system based solely upon its ability to force member states and registered MNEs to abide by its rulings and rules. Barkun argues that a system in which compliance is achieved mostly through extensive use of coercion should be regarded as authoritarian and unjust.<sup>765</sup> Thus, the ICSCD enforcement ability will derive first from the initial consent of the UN

---

<sup>762</sup> Steele (n 699) 87-8.

<sup>763</sup> On the issue of state-to-investor arbitration in the current system, see the section 'NAFTA, FTA, ASEAN and MEROSUR: Partial and Problematic Regional Solutions in the Absence of a Unified, coherent and comprehensive International Trade Law System' in this thesis.

<sup>764</sup> O'Connell (n 701) 48, 49.

<sup>765</sup> Michael Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press 1968) 62.



Member States and the registered MNEs. Clyde and Coe point out that an award's relative finality and enforceability depends deeply upon the agreement's acceptance. For example, the wide acceptance of *The New York Convention* (approximately 125 states), and the narrow construction typically given to its refusal grounds, provide awards given under its scope a better chance of being enforced in reality.<sup>766</sup>

However, it is important to stress that the issue of consent refers to the initial stage of signing the Treaty only, and not the parties' consent per case. In other words, states or MNEs can be fully coerced to a monetary compensation, or other sanctions solely based on the ICSCD judicial power.

Tanzi points out that the ICJ is heavily dependent upon the UN political organs to enforce its judgments. The WTO and ICSID are no better, for while they are less dependent upon an initial consent, their tribunals are constructed as mediation bodies under the parties' consent.<sup>767</sup>

To minimise such non-judiciary reliance, the initial ICSCD negotiations shall be constructed in such a way that will provide for, as much as possible, a wide-range inclusion of states and registered MNEs. However, a participation of an MNE or a state in the ICSCD system shall be regarded as obligatory and under stricter and more defined terms than can be found in current international systems.

For instance, under their initial consent, no state, and no governmental body, shall be granted immunity from proceedings against them. This is consistent with the current reality of commercial international law, where most domestic courts do not grant a foreign state or foreign official's immunity from commercial actions or torts. In the US legal system, foreign government officials, who may be immune from carrying out actions within their discretionary functions, may not be immune from violations of law, including international law.<sup>768</sup>

---

<sup>766</sup> Clyde C Pearce and Jack Coe, 'Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed against Mexico' (2000) 23 *Hastings International and Company Law Review* 311, 319-320.

<sup>767</sup> Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *European Journal of International Law* 539, 566-68.

<sup>768</sup> O'Connell (n 701) 60.

For example, in *Hilao v Estate of Marcos*, 10,000 Philippine citizens who suffered torture, disappearance, and summary execution filed a class-action suit against Ferdinand E Marcos in a US court to enforce a judgment of nearly two billion dollars against the former dictator. The US Court of Appeals eventually decided that Marcos shall not be considered immune from violations of law, including international law.<sup>769</sup>

In conclusion, even in a case where a state or MNE is not listed, the other party will be entitled to request the inclusion of that state/MNE for the purpose of ICSCD jurisdiction. In other words, there shall be an automatic enforceability of ICSCD jurisdiction over both parties.

### **The ICSCD – Between Novelty and Reliance upon Existing Frameworks**

The suggested ICSCD offers solutions to all three legal difficulties that can be defined, as mentioned before, under the terms of a lack of *coherence*, *expertise*, and *finality of awards*. While being novel, they derive from the current state of affairs. As for the issue of coherence, the suggested direct tackling of the three-fold problem regarding jurisdiction, applicable law, and precedence offers a sufficient solution based upon unification of existing judicial experience and norms.

In addition, the ICSCD Panel of Judges offers expert jurisdiction that will serve long terms and will thus possess aggregate experience and ability to help unify the emerging system. The need for the panel judges to demonstrate expertise in commercial and investment issues cannot be stressed enough. There are numerous judicial bodies in the current international legal arena, but the most important and effective among them is the ICJ. However, as the experience with international commercial disputes heard in domestic courts shows, the extremely complex MNE-state arena requires specific skills, knowledge, and experience.

This expertise must include both experience in dealing generally with international litigation and in with disputes including issues, such as expropriation, contract breaching, investment, or corporate law. The need for such a dual capability can easily be derived from the experience of the WTO and the ICSID, in

---

<sup>769</sup> *Hilao v Estate of Marcos* [1996] 95-56823 (US Ninth Circ.)

which arbitrators are selected mostly on the basis of the parties' agreement, and thus not under the principle of expertise and professionalism. In the ICSCD, panel judges will be selected solely on the basis of knowledge and experience; here, judges and lawyers with experience in NAFTA, ASEAN and MERCOSUR litigation can serve as the initial group from which further selection can be made.

In this sense, what is offered in the preceding text is a theoretical framework for a legal solution that *follows the economic reality*, rather than the vice versa. If most MNEs are based in numerous countries, then there should be a legal system adapted to this situation, instead of trying to force MNEs into the old international and national systems. If an assembly of treaties and arbitral bodies addressing international investment and trade disputes already exists, the ICSCD can inherit their best merits, leaving behind their many deficiencies.

Essentially, what the ICSCD consists of is an *elaboration* of ideas that already exist vaguely and generally in current treaties and in *de facto* international judicial defaulted frameworks. For example, the prevalent usage of the term 'international law' in bilateral and regional trade treaties is pinned down under the new system to the ICSCD's Establishing Treaty.

However, existing treaties and documents are to be used, but only in a way that does not contradict either the Establishing Treaty or the developing precedence tradition of the ICSCD courts. In this way, MNEs and states will not have the option of 'treaty shopping' to find the most convenient legal document to serve their specific needs.

Hence, under the ICSCD, states will still be held to their prior BITs and other international treaties. However, the ICSCD Establishing Treaty will be considered as more binding, and, in any case of conflict between the latter and other agreements, it will enjoy legal priority. The ICSCD courts will be expected to use these treaties as the applicable law and interpret them in accordance with the Establishing Treaty.

The Establishing Treaty shall initially use language similar to that of most BITs. However, in some cases, conflict will be unavoidable. For instance, if a certain BIT contains an extensive definition of indirect expropriation not acceptable

in the Establishing Treaty, which provides for a narrower definition, the matter under dispute shall be considered according to the latter.

The reliance upon existing legal structures can be seen most clearly in the issue of enforcement, which can be regarded as the main reason for invoking the need for a coherent international system. What the ICSCD offers here is essentially a new implementation of the current NAFTA-like investor-to-state arbitration mechanism and its elevation from the regional to the global arena.

The reproduction of the investor-to-state mechanism has been repeatedly conducted in the bilateral arena (where it also originated, between Canada and the US). As shown above,<sup>770</sup> there was also an (abortive) attempt to implement this mechanism in the international investment arena, in the form of the MAI. This attempt was highly criticised because it was to impinge severely upon national sovereignty and potentially provide MNEs almost unlimited power over governments, due to the ability to seek directly monetary compensation.

Thus, the novelty of the ICSCD in this case lies in that it offers an enforcement mechanism that is at the same time *international*, involving *all aspects of commercial life* (as opposed to investment in particular), as well as *balanced*. The latter, is provided by the UN diplomatic framework of the Establishing Treaty and the authority given to the panel judges to take under consideration such elements as national security and the environment. In addition, based on a vague provision in ASEAN, the ICSCD shall include a clear sovereign shield in the form of a counter state-to-investor dispute mechanism. Finally, the well-defined categories of an MNE or a corporation in the Establishing Treaty provide a balanced approach and ensure that MNEs shall be liable in courts.

As in the case of existing treaties, current judicial bodies, mainly ICSID and US domestic courts, will be able to continue to hear commercial international cases. However, and here lies the novelty of the new system, in doing so, these courts shall be considered 'subsidiaries' of the ICSCD court. Hence, their judges must be registered members of the ICSCD Panel of Judges and the certain tribunal must be constructed in accordance with the procedures of the ICSCD system (with

---

<sup>770</sup> See Chapter 2.2.

respect, for example, to the required number of judges). Moreover, their rulings must be based on the Establishing Treaty and ICSCD precedents.

The auspice of the Establishing Treaty and the coherent precedence system are to be the main incentives for such courts to act as organs of the ICSCD in international cases. In this way, they will not only enjoy judicial consistency, but will also have the opportunity to affect the international legal system, for their judgments shall automatically be considered as potential precedents for further ICSCD judgments.

As to the issue of finality, the ICSCD offers a simple solution by imposing an appellate body consisting of its panel judges. Clearly, in the current system, it is unclear how jurisdiction and ‘forum shopping’ problems can be dealt with, or how one court should treat the decisions of another. In the ICSCD system, the parties to a dispute will be granted a chance to second guess an ICSCD tribunal decision, but only in the form of an appeal within the system.<sup>771</sup>

### **5.5 Incentives for States and MNEs to Participate in New Legal System**

The purpose of the ICSCD, as shown throughout this thesis, is to offer a new judicial organ established by the UN, alongside the ICJ and the ICC, which will specialise in commercial disputes arising between MNEs and states. Although the ICJ demonstrated impressive success and popularity in the 1980s and 1990s, this only masked a long-term trend of decline in the usage of its services. This decline is clearly visible in the cases submission to the ICJ’s jurisdiction and the type of cases heard by the ICJ.<sup>772</sup>

Posner explains this decline by two parallel, and contradictory, processes, which bear great lessons for any future international court, such as the ICSCD. On one hand, he points to the wayward judges supporting their home states’ interests rather than the requirements of international law. On the other hand, he reveals the problem of the lack of sensitivity to the interests of the major international political powers. According to Posner, the first argument suggests that the judges should

---

<sup>771</sup> Martinez (n13) 432.

<sup>772</sup> Posner (n 586).

have applied international law impartially, while the second indicates that the judges should have applied international law with greater sensitivity to political realities.<sup>773</sup>

The issue combining these two problems is the ambiguous treatment of changes in the world's geopolitics. As states enter bilateral and multilateral treaties without having a clear view of their obligations and needs that may arise decades later, international judges should be sensitive to current sovereign interests and interpret old treaties in accordance with them. Therefore, ICSCD Panel Judges will be expected to be knowledgeable in international relations and to take into consideration in their rulings such aspects as a decline or rise of economies or changes in the power-balance between a certain state and another state in which a contracting MNE is based.<sup>774</sup>

However, learning from the ICJ and ICC's experience is not enough to attract states and MNEs into the ICSCD novel system and securing their support. Greater incentives are needed, and they are to be found outside the legal system, in the realm of geopolitics, economics, and international relations. As Choudry argues, one of the main fears of sovereign governments, especially of developing economies, is the wild and unrestricted usage of forum-shopping conducted by MNEs, which results in the isolation of governments from the legal procedure and bypassing important protections of regulatory frameworks enforcing preservation of property rights, national security, or consumer rights.<sup>775</sup>

This is why the ICSCD shall entail a substantive incentive for states by guaranteeing a reliable source of powerful regulation whereby they may take part in its configuration during its establishment. Such issues as regulation of entry and establishment, national treatment, monetary transfers, and protection against dispossession are supposed to be a part of the Establishing Treaty in a way that

---

<sup>773</sup> *ibid* 2.

<sup>774</sup> *ibid* 24.

<sup>775</sup> Aziz Choudry, 'Fighting FTAs, Educating for Action: The Challenges of Building Resistance to Bilateral Free Trade Agreements' (2010) 2 *Journal of Alternative Perspectives in the Social Sciences* 281, 288.

provides for improved and more comprehensive security for governments and citizenries.

In addition, the Treaty shall oblige all registered MNEs to invest in local work-projects to benefit the public in the host state, and to refrain from a departure of a country after exploiting its natural and human resources without leaving behind beneficial infrastructures and job-creating opportunities.<sup>776</sup>

Furthermore, as Rowat suggests, under the ICSID, the states benefit from FDI levels that are probably higher than they would without a dispute resolution mechanism that is perceived as neutral and cost-effective. For this reason, according to Rowat, the ICSID membership is increasing. Moreover, sovereigns, who are traditionally uncooperative and suspicious towards investment liberalisation and 'external' arbitration authority, are more likely to cooperate.<sup>777</sup>

The MNEs shall be libel to the jurisdiction of the ICSCD by definition, which will be initially set by the establishing treaty. All MNEs would be obliged to answer to this new international law established by the Treaty. The ICSCD Tribunal may offer several economic incentives to the MNEs. Any MNE joining the register-list of companies shall be given tax reliefs and other commercial reliefs to benefit its business. The benefit to the MNE will be given in every country where the MNE operates. In addition, the ICSCD courts' expenses shall be covered partly by an annual membership fee on an equal basis regardless of the states and MNEs own participation in specific cases.

MNEs will find this provision to benefit their activities, for it will reduce court fees in cases in which a specific MNE is involved. In addition, the annual membership fee will be constructed in such a way to be less expensive than the sum of taxes an average MNE would have needed to pay worldwide in different states in the absence of the ICSID tax reliefs. Because these taxes are to be significantly reduced under the Establishing Treaty, their 'replacement' – the

---

<sup>776</sup> Rowat (n 546); Hoellering (n 546) 104.

<sup>777</sup> *ibid* 135.

annual membership fee – shall be of a low amount. The remainder of the ICSCD's budget, and its major part, shall be sourced from the UN general funds.<sup>778</sup>

---

<sup>778</sup> Scheffer (n 62) 12, 17.



## CHAPTER SIX: CONCLUSIONS

The objective of this thesis was to examine the numerous deficiencies in the existing cumbersome multi-layered international commercial legal system and to construct a more efficient, acceptable, and enforceable system of judicial process to decide on disputes between MNEs and States. This concept for a new International commercial court would be known as the International Court of State and Corporate Disputes (ICSCD). The ICSCD has been put forward as a means of rectifying the vast majority of the current issues plaguing international commercial law disputes.

The disorder in the current international trade legal system resulted from absence of a *unified, coherent, and comprehensive* international trade law system and tribunal. This is evident in three aspects of the judicial system: first, in the ambiguity surrounding the applicable law; second, in the question of jurisprudence; and, third, in the current problematic precedence tradition.

The question of precedence is perhaps the one of the greatest challenges for international law today. This is a twofold problem in which, on one hand, tribunals have no coherent legal tradition to base their rulings upon and, on the other hand, the existence of an inconsistent and unmonitored arsenal of precedents from all around the globe from which to choose.

The establishment of the ICSCD shall aim to be efficient and professional, as the court will have a large panel of expert-judges selected from multiple nationalities, and therefore, the likelihood of a biased tribunal will be minimised. In the *ad hoc* mechanism of the ICSCD, for instance, at least one member in the panel shall represent every contracting party.

Second, as a comprehensive system specialising in international commercial law, the ICSCD will eventually rely solely on its courts' prior decisions, and thus will offer coherence of judgments. However, what the ICSCD offers initially is an *institutionalisation* of the current reality of precedence rulings in which it will be perfectly clear which cases might constitute precedents. As such, customary international law is another source of legal material that will be used by ICSCD courts. This shall be done, following ICSID experience, in references to

case law from the ICJ, and arbitral tribunals, as well as treaties, in particular the Vienna Convention on the Law of Treaties, and references to documents adopted by the International Law Commission. Furthermore, the ICSCD shall use as applicable law, any international legal material that deemed relevant to commercial litigation.<sup>779</sup>

As mentioned before, precedence is a critical problem today. The ICSCD Panel of Judges will be able to establish precedence not only to solve gaps in the UN establishing treaty, but also deal with new realities, such as new technologies that didn't exist at the time of the signing of the establishing treaty.

Thus, the Establishing Treaty shall refer specifically and explicitly in certain cases that may be relevant to certain international trade treaties, such as GATT, TRIMS, TRIPS, and GATS; regional agreements such as NAFTA, MERCOSUR and ASEAN; BITs; and other international agreements and charters. The Establishing Treaty shall also refer to any relevant domestic litigation cases worldwide to create the most advanced and up-to-date international commercial arbitration.<sup>780</sup>

While states and MNEs are free to use US court decisions in other forms of arbitration, or vice versa, in the ICSCD, the ability to 'forum shop' will be minimal because it offers a unified judicial system. As a self-contained and autonomous body, the ICSCD sitting as an appellate court would hold the ultimate judicial power, manifested in two respects. First, the ICSCD shall be empowered to hear the parties' concerns pertaining to the competence of the tribunal, the AHTS, or the ICSCD as a whole. The second manifestation of the ICSCD's power shall be its jurisdiction to rule on appeals concerning AHTS tribunals' awards. Thus, The Appellate Court shall be the final hearing on all appeals from the AHTS and the ICSCD hearing.<sup>781</sup>

Fourth, according to the ICSCD Establishing Treaty, the categories of what consist as a MNE or a corporation shall be well defined, and thus MNEs will be

---

<sup>779</sup> Text to n 548 in ch 5.1.

<sup>780</sup> Fauchald (n 71) 318.

<sup>781</sup> Text to n 547 in ch 5.1

liable in courts. Hence, the ICSCD will define the 'personality' of MNEs, which shall be liable to its jurisdiction by definition.<sup>782</sup>

In addition, as an international organisation, the ICSCD courts shall not be concerned with questions of jurisdiction of a precise MNEs' nationality; all MNEs will be liable to its unified jurisdiction by definition. The Court will outline its structure and powers as well as define the ambiguous terminology concerning international corporate law between MNEs and states.

The proposal for the ICSCD comes at a particularly opportune moment as the US Supreme Court has recently decided in *Kiobel v Royal Dutch* that the Alien Tort Claims Act does not apply extraterritorially<sup>783</sup>. This may cause a major upheaval for plaintiffs in countries who had looked, in the past, to US courts for justice. However, The Court's decision was not broadly worded and plaintiffs probably shall not dismiss their suits. Plaintiffs' lawyers may turn to the court, this time, through common law tort actions alleging violations of state law, and others may seek a judicial panel in states' courts. The *Kiobel* case only stresses the acute need for the establishment of the ICSCD.

The ICSCD core essence is its international recognised jurisdiction worldwide, compliance, and enforceability of decisions, as both MNEs and states shall be signatories of the Establishment Treaty or otherwise be forced to ICSCD jurisdiction as defendants.

The ICSCD's jurisdiction shall cover all disputes between a Contracting State, including constituent subdivision or agency of a state, and a registered MNE arising directly out of an investment or commercial related agreement or contract, if all parties have consented in writing to submit such a dispute to the ICSCD.<sup>784</sup>

The second manifestation of the ICSCD's power shall be its jurisdiction to rule on appeals concerning AHTS tribunals' awards. Thus, the ICSCD will be the sole judicial body to hear an appeal on an AHTS tribunal's award.<sup>785</sup>

---

<sup>782</sup> See ch 2.1.

<sup>783</sup> [http://www.supremecourt.gov/opinions/12pdf/10-1491\\_l6gn.pdf](http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf)

<sup>784</sup> Text to n 547 in ch 5.1

<sup>785</sup> Text to n 607 in ch 5.2.

As presented in this research, there are thousands of international commercial treaties that have provisions for settling disputes, allowing MNEs to shop around for a settlement system that is most advantageous to them. Thus, The ICSCD is a synthesis of all the positive aspects of the current international commercial law tribunals and BITs that follow the economic reality, rather than the vice versa. Hence, if there an assembly of treaties and arbitral bodies addressing international commercial disputes already exists, the ICSCD inherits their best merits, leaving behind their many deficiencies in the initial screening stage of the Establishing Treaty. Essentially, the proposed ICSCD consists of an *elaboration* of ideas already present, vaguely and generally, in current treaties and in *de facto* international judicial defaulted frameworks.

Another issue with the various treaties and trade organisations is the inability to deter member states from conforming to the regulations of the treaties. In other words, these treaties and organisations lack enforceability. As a principle, decisions under ICSCD arbitration shall be considered *final*, and the member state must execute the rulings, which will be enforceable on the territory of the member state to the *same extent as a local court judgment*, using local authorities to enforce appearance before the court and court decisions.

Second, the ICSCD awards shall include the option of *monetary compensation*. More specifically, an ICSCD award will include execution and bear the consequence of collecting funds, rather than constituting a mere step in the process that leads to collection.<sup>786</sup> Thirdly, the ICSCD is to be regarded as a strictly commercial-law system, and thus any state-to-state diplomatic negotiations containing political considerations shall be outside its scope.<sup>787</sup>

To ensure that the ICSCD be granted real enforcement means, this research adopts the rather bold decision to provide the Tribunal for the Former Yugoslavia (ICTFY) the authority to send individuals to prisons. In the case of

---

<sup>786</sup> Steele (n 699) 87-8.

<sup>787</sup> Text to n 759 in ch 5.5.

international commercial activity, the subjects will be corporate executives as well as state officials.<sup>788</sup>

Thus, the Establishing Treaty shall function as an 'international codex', a legal text that will eventually be regarded as the largest contextual framework for courts' interpretation of contracts and agreements. In this manner, the ICSCD expands the very limited definition of 'context' in the Vienna Convention on the Law of Treaties, which restricts this term either to any agreement relating to the treaty or to any instrument created by one or more parties in connection with the conclusion of the treaty.<sup>789</sup> As such, the international codex shall include a collection of applicable laws, which are relevant to the Establishing Treaty.<sup>790</sup>

As this thesis has proposed, the ICSCD would provide answers for the vast majority of the current problems of international commercial law. The power of ICSCD shall be incorporated in the integration of different levels and logics of regulation. It will settle two different logics, the voluntary and the mandatory, and be simultaneously private and public. That is, while proposed and designed by private actors, it will be framed and monitored by public authorities.<sup>791</sup>

Additionally, under the auspices of the UN, an Establishing Treaty shall be created that will provide a codex of law where most of these international commercial law issues shall be handled. In this manner, the Treaty offers a novelty, for instead of referring generally to 'international law' as the applicable law, as in the case of most trade and investment agreements, it provides a defined framework of references. Most importantly, these references are to be ordered, debated, and positioned in a coherent way. This systematic reference system for international agreements shall also address the contradictions and potential discrepancies between various agreements, and offer guidance to the Treaty regarding which principles, codes and provisions to espouse and which ones to abandon.<sup>792</sup>

---

<sup>788</sup> O'Connell (n 701) 48 ,49.

<sup>789</sup> Fauchald (n 71) 319.

<sup>790</sup> Text to n 548 in ch 5.1.

<sup>791</sup> Lapointe and Gendron (n 317) 4.

<sup>792</sup> Text to n 548 in ch 5.1.

Hopefully, the UN shall have the ability to create such a treaty free of politics and lobbying by special interest groups. The greatest opposition will come from the MNEs that may lobby their governments to stop or create a weak court via vague wording to provide large loopholes for abuse. The patronage of the UN gives a number of positive advantages to such a court. First, the ICJ and the ICC provide precedents for the establishments of an international court. Both courts are widely accepted and used. The ICSCD would be a logical 'continuation' of the other two courts, making the acceptance of the idea much easier.

The ICSCD agreement shall be considered as binding for all MNEs' sections and subsidiaries, regardless of their location or position. Further, and likely of a greater significance in some cases, the ICSCD shall include a novel *binding list of MNEs* that shall be considered as sufficient and inclusive. The general principle of this list will be whether an MNE's separate parts function as one economic unit, and will take into account not only the much-elusive formal control of the MNE, but also its effective control and the location from which that control is being exercised. The strength of such a list is self-evident in that each ICSCD member will be prohibited from engaging in any commercial activity or signing a contract with a company that is either not listed or is not connected in an obvious way to such a company. This shall provide the incentive for MNEs to join the list, as without such inclusion, they will have to limit their activity to ICSCD countries at a minimum.

However, such an incentive can only be provided if the ICSCD is supported by powerful states, such as the US, China, and Germany. Only if MNEs are under an actual threat on their commercial activity with such states will they agree to limit their beneficial activities in undeveloped countries. The involvement of powerful states is also important for ensuring the accord of undeveloped countries. The latter, who might be more inclined to waiver their citizens' rights on behalf of foreign investments, are to accept the provisions of the Establishing Treaty only under diplomatic pressure. Pressure by the G-8 states will help ensure the acceptance of the Establishing Treaty by underdeveloped countries

Furthermore, it is important for the Establishing Treaty to include as many states as possible, as it will be difficult to impose the ICSCD system upon unwilling

states. Thus, even in the case of the Tribunal for the Former Yugoslavia (ICTFY), as O'Connell argues, rulings against former Yugoslavia leaders are heavily dependent upon local courts or local enforcement mechanisms.<sup>793</sup>

In a case in which a company is not listed, the host state will be entitled to request the inclusion of that company. This will have, as argued here, a dual effect. First, it will allow the ICSCD system the degree of flexibility needed when dealing with an ever-changing global economy and offer a means of dealing with the current disorderly, yet rigid, international legal system.

A strong establishing treaty shall encourage MNEs as well as states to take a part in the ICSCD as a principle of operation, *before* rather than *after* disputes arise. In other words, MNEs and sovereign states will be in this way obliged to act according to legally binding and internationally agreed-upon rules regardless of the outcome of their commercial activity. This may help the creation of the much-needed coherent and reliable legal precedence tradition necessary for the ICSCD to function properly.

There are several reasons why both States and MNEs will agree and support the establishment of the ICSCD. The mere availability of an effective judicial system that can enforce its decisions will affect the behaviour of parties to potential disputes. The ICSCD will cause investors and host states to avoid actions that might involve them in arbitration that they are likely to lose.<sup>794</sup>

Member states of the UN, especially developing countries, which have used the US court system up to now as a judicial legal platform, shall support the creation of an impartial international commercial court. Cases that had been heard in the recent years in US courts can be heard in the near future in the ICSCD.

Finally, probably one of the most important aspects of the ICSCD establishment shall be the issue of enforcement where the courts shall have the right to use local law enforcement to bring concerned parties to court and to enforce courts decisions.

---

<sup>793</sup> O'Connell (n 701).

<sup>794</sup> Christoph Schreuer, 'Courses on Dispute Settlement' (n 476) 19.

In conclusion, the ICSCD offers a solution to the existing acute problematic issues in the current international legal system by providing a new comprehensive international legally binding system. The new tribunal shall operate as international economical expert regulatory body with one set of guidelines and wide representation that will regulate international companies' activities from the contractual stage through the business operation. The ICSCD shall have monitoring and follow-up systems that would minimise the inconsistencies and incoherencies with regard to the many existing codes and guidelines. As seen throughout this work, establishment of such tribunal is a necessity in the ever-increasing globalisation and the expanding of MNEs conduct worldwide. Hopefully, it may be one more stage in developing the international legal arena in regard to MNE-state dispute settlements.



## Bibliography

- AAPL, *Asian Agricultural Products Ltd. v Sri Lanka* [1990] ARB/87/3 (ICSID), Final Award.
- Addo M.K 'Human Rights and Transnational Corporations-an Introduction' in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999).
- Af-Cap Inc v Republic of Congo* Cms462 F3d 417 Nov. 2004.
- Aguirre D, 'Multinational Corporations and the Realization of Economic, Social and Cultural Rights' (2004) 35 Cal. W. Int'l L.J. 53.
- Akande D, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 The International and Comparative Law Quarterly 309
- Akhavan P, 'The Contribution of the Ad Hoc Tribunals to International Humanitarian Law' (1997) 13 American University International Law Review 1509
- Alvarez J.E, 'Are Corporations 'Subjects' of International Law?' (2010) 9 1 Santa Clara Journal of International Law, <<http://law.scu.edu/corplaw/file/Alvarez-Sept-2010.pdf>> accessed 13 September 2012.
- Alvarez-Jimenez A, 'The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?' (2009) 9 1 Journal of International Economic Law 289.
- American Manufacturing & Trading, *American Manufacturing & Trading, Inc. v Democratic Republic of Congo* [1997] ARB/93/1 (ICSID).
- Amerasinghe CF. *Principles of the Institutional Law of International Organizations*. 1st edition. Cambridge: Cambridge University Press, 1996. ISBN 0521562546
- Annual Reports on the OECD Guidelines for Multinational Enterprises' <[http://www.oecd.org/document/20/0,3343,en\\_2649\\_34889\\_39602772\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/20/0,3343,en_2649_34889_39602772_1_1_1_1,00.html) > accessed 22 December 2010.
- Antoniadis A, 'The European Union and WTO Dispute Settlement: in Search of a Normative Framework for Autonomous Measures (forthcoming) ' [2005] EUSA 9th Biennial International Conference
- Anzorena and others, 'International Commercial Dispute Resolution' (2006) 40 International Legal Developments in Review: 2005: Disputes 251.

Anzorena CIS, Wisner R, Coe, JJ Jr., Salomon C.T. & Gans, KS, 'The Rise Of Bilateral Investment Treaties: Protecting Foreign Investments and Arbitration' [2010] In- House Defense Quarterly 58.

Appellate Body' (World Trade Organization 2011)  
 <[http://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm)>  
 accessed 10 April 2011.  
 Appellate Body, 'EC-Regime for the Importation, Sale and Distribution of Bananas' WT/DS27/AB/R.

Arbitration Scorecard: Contracts' (Appleby)  
 <<http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202431683613>>  
 accessed 26 June 2011

Archibugi D and Pietrobelli C, 'The globalisation of technology and its implications for developing countries Windows of opportunity or further burden?' (2003) 70 Technological Forecasting & Social Change 861–83.

Arechaga EJ, , 'Amendments to the Rules of Procedure of the International Court of Justice' (1973) 67 American Journal of International Law 1.

Arzandeh A and Hill J, 'Ascertaining the Proper Law of an Arbitration Clause Under English Law' (2009) 5 Journal of Private International Law 425.

Avi-Yonah RS, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization' [2002] University of Michigan Public Law and Legal Theory Research Paper  
 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=323224](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=323224)> accessed 28 August 2011.

Azinian, *Azinian, Davitian, & Baca v Mexico* [1999] ARB (AF)/97/2 NAFTA (ICSID).

Azurix, *Azurix Corp. v Argentine Republic* [2006] ARB/01/12 (ICSID).

Baade HW, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1 Kluwer 198).

Backer LC, 'Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality' (2006) 41 Tulsa Law Review 541.

Bakan J, *The Corporation* (Constable & Robinson Ltd, London 2004).

Baldwin E, Kantor M, and Nolan M, 'Limits to Enforcement of ICSID Awards' (2006) 23(1) Journal of International Arbitration 1.

- Barkun M, *Law without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press, 1968).
- Barral B, 'The Brazilian Experience in Dispute Settlement' (2007) ECLAC Project Document GER/06/003  
<[http://www.eclac.org/comercio/publicaciones/xml/6/32116/The\\_Brazilian\\_Experience\\_in\\_Dispute\\_Settlement\\_LCW147.pdf](http://www.eclac.org/comercio/publicaciones/xml/6/32116/The_Brazilian_Experience_in_Dispute_Settlement_LCW147.pdf)> accessed 26 June 2011.
- Barton JH, Goldstein JL, Josling TE and Steinberg RH, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (4th edn, Princeton University Press 2008) 146.
- Basran S. The Impact of Ruggie's Guiding Principles for Human Rights? CSR International March 26, 2012 <[www.csrinternational.org/the-impact-of-ruggies-guiding-principles-for-human-rights](http://www.csrinternational.org/the-impact-of-ruggies-guiding-principles-for-human-rights)> accessed 23 April 2014.
- Begic T, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005).
- Bellia AJ, and Clark BR, 'Alien Tort Statute and the Law of Nations' (2011) 78 *University of Chicago Law Review* 445.
- Bello JH, 'The Dispute Settlement Understanding: Less is More' (1996) 90 *American Society of International Law* 416.
- Berger KP, 'International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts' (1998) 46 *The American Journal of Comparative Law* 129.
- Bernier I and Roy M, 'NAFTA and MERCOSUR: Two Competing Models?' in Gordon Mace and Louis Bélanger (eds), *The Americas in Transition: The Contours of Regionalism* (Lynne Rienner Publishers 1999).
- BIICL, *Investment Treaty Law: Nationality and Investment Treaty Claims, Fair and Equitable Treatment in Investment* (2007).
- Biwater, *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* [2008] ARB/05/22 (ICSID).
- Blumberg PI, *The Multinational Challenge to Corporate Law* (Oxford University Press, New York, NY 1993).
- Bondzi-Simpson PE, *Legal Relationships between Transnational Corporations and Host States* (Quorum Books 1990).
- Bonell MJ, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005).

- Born GB, *International Civil Litigation in United States Courts* (3rd edn, Kluwer Law International 1996).
- Bottini G, 'Indirect Claims under the ICSID Convention' (2008) 29 *University of Pennsylvania Journal of International Law* 563.
- Bottomly S 'Taking Corporations Seriously: Some Considerations for Corporate' (1990) VOL 19 *Federal Law Review* 203
- Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 - Dist. Court, Calif. March 2004.
- BP, 'Our Commitment to Integrity: BP Codes of Conduct' (St Ives Burrups Limited 2005)  
<[http://www.bp.com/liveassets/bp\\_internet/globalbp/STAGING/global\\_asset/s/downloads/C/coc\\_en\\_full\\_document.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_asset/s/downloads/C/coc_en_full_document.pdf)> accessed 7 November 2011.
- Bradford A, 'When the WTO Works, and How it Fails' (2010) 300 *Working Paper Chicago Public Law and Legal Theory* 1.
- Bradley A, 'Corporate Liability Under the Alien Tort Statute: Federal Common Law as the Standard for Third Party Liability' (2009) 16 *Human Rights Brief* 13.
- Brand RA, 'Consent, Validity, and Choice of Forum Agreements in International Contracts' (2009) *Legal Studies Research Paper* 2009-3  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1517810](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517810)> accessed 10 September 2011.
- Branson DM, 'Holding Multinational Corporations Accountable? Achilles Heels in Alien Tort Claims Act Litigation' (2010) 30 *University of Pittsburgh Legal Studies Research Paper* 1  
<[https://samba.huji.ac.il/+CSCO+0h756767633A2F2F636E637265662E666665612E70627A++/sol3/papers.cfm?abstract\\_id=1671620](https://samba.huji.ac.il/+CSCO+0h756767633A2F2F636E637265662E666665612E70627A++/sol3/papers.cfm?abstract_id=1671620)> accessed 10 October 2011.
- Bratton W, 'Pari Passu and a Distressed Sovereign's Rational Choices' (2004) 53 *EMORY Law Journal* 823, 825
- Brewer TL and Young S, *The Multilateral Investment System and Multinational Enterprises* (2nd ed) (Oxford University Press 2001).
- Brower CN and Steven LA, 'Who Then Should Judge: Developing the International Rule of Law under NAFTA Chapter 11' (2001) 1 *Chicago Journal of International Law* 193.
- Brown CP, *Self-Enforcing Trade: Developing Countries and Dispute Settlement* (The Brookings Institution 2009).

- Brown R, 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources' (1984) 33 *The International and Comparative Law Quarterly* 218.
- Brunner C, *Force Majeure and Hardship under General Contract Principles: Exemption for non-Performance in International Arbitration* (Wolters Kluwer 2009).
- Buckley PJ and Casson M, *The Future of the Multinational Enterprise* (2nd edn) (Antony Rowe Ltd, Chippenham, Wiltshire 1991).
- Buckley PJ & Casson M, *The Economic Theory of Multinational Enterprise* (The Macmillan Press Ltd, London and Basingstoke 1985).
- Buckley RP, 'Now We Have Come to the ICSID Party: Are Its Awards Final and Enforceable' (1992) 14 *Sydney Law Review* 358.
- Burke-White W.W. & Von Staden A, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration' (2010) 35 *The Yale Journal of International Law* 283.
- Busch ML, 'Developing Countries and GATT/WTO Dispute Settlement' (2003) *QSBC* 1.
- Calzadilla v Banco Latino Internacional (2005) (US Eleventh Cir); Dye PB and others, 'International Litigation' (2006) 40 *International Law* 275, 286.
- Canada v Australia: Uncooked Salmon* [1998] WT DS18/R.
- Canada v France: Asbestos* [2000] WT DS135/R.
- Canner SJ, 'The Multilateral Agreement on Investment' (1998) 31 *C Int'l L.J* 657.
- Cannon JR, 'Binational Panel Dispute Settlement under Article 1904 of the United States-Canada Free Trade Agreement: A Procedural Comparison with the United States Court of International Trade' (1991) 22 *Law and Policy in International Business* 689.
- Cánovas GV, 'The Experience of NAFTA Dispute Settlement Mechanisms: Lessons for the FTAA' (2003) *Atelier ALÉNA working paper* 1  
<<https://samba.huji.ac.il/>> accessed 6 March 2012.
- Cardenas EJ and Tempesta G, 'Arbitral Awards under MERCOSUR's Dispute Settlement Mechanism' (2001) 4 *Journal of International Economic Law* 337.
- Case of Sutton's Hospital, 10 Coke 250a, 253, 303, 77 Eng. Rep. 960, 970-71 (1612).

Case no IT-95-14/1 *The Prosecutor v Zlatko Aleksovski* (Judgment in appeal) 24 March 2000, s 113

Cemex Asia Holdings Ltd v. Republic of Indonesia (ICSID Case No. ARB/04/3)

Chalamish E, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement' (2009) 34 Brooklyn Journal of International Law 303.

Chantornvong S and McCargo D , 'Political Economy of Tobacco Control in Thailand' (2001) TC 48-49

Cheng TH and Trisotto R, 'Reasons and Reasoning in Investment Treaty Arbitration' (2009) 32 Suffolk Transnational Law Review 409.

Cheng TH 'Precedent and Control in Investment Treaty Arbitration' (2006) 30 Fordham International Law Journal 1014.

Chia SY, 'Accelerating ASEAN Trade and Investment Cooperation and Integration: Progress and Challenges' in Gugler P and Chaisse J (eds), *Competitiveness of the ASEAN Countries: Corporate and Regulatory Drivers* (Edward Elgar Publishing 2010).

Choi WM, 'FTAs and Safeguard Norms: Their Variation and Compatibility' (2011) 6 Asian Journal of WTO and International Health Law and Policy 81.

Choi WM, 'The Present and Future of the Investor-State Dispute Settlement Paradigm' (2007) 10 Journal of International Economic Law 725.

Choudry A, 'Fighting FTAs, Educating for Action: The Challenges of Building Resistance to Bilateral Free Trade Agreements' (2010) 2 Journal of Alternative Perspectives in the Social Sciences 281.

CISG, 'ICC Arbitration Case No. 8128' [1995].

*Citizens United v Federal Election Commission* 558 US (2010).

Civello P, 'The TRIMs Agreement: A Failed Attempt at Investment Liberalization' (1999) 8 Minnesota Journal of Global Trade 97.

Clapham A, 'Human Rights Obligations of Non-State Actors' (2006) 88 863 International Review of the Red Cross 79.

Clyde PC and Coe J, 'Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed against Mexico' (2000) 23 Hastings International and Company Law Review 311

CME, *CME Czech Republic B.V. v Czech Republic* [2001] (UNCITRAL), Partial Award.

CMS, *Gas Transmission Co. v Argentina Republic* [2007] ARB/01/8 (ICSID).

Codes of Conduct: Expanded Review of their Contents" (2001) Working Papers on International Investment 6/2001

<<http://www.oecd.org/dataoecd/57/24/1922656.pdf>> accessed 12 October 2011.

Cogan JK, 'Competition and Control in International Adjudication' (2008) 48 Virginia Journal of International Law 411.

Compa LA, 'International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies' (1993) Cornell University ILR School working paper 117 <<https://samba.huji.ac.il/>> accessed 6 March 2012

Concerns and responses (1)' (World Trade Organization 2011)  
<<http://www.wto.org/english.htm>> accessed 18 April 2011.

Concerns and responses (2)' (World Trade Organization 2011)  
<<http://www.wto.org.htm>> accessed 18 April 2011.

Continental Casualty, *Continental Casualty v Argentina Republic* [2008] ARB/03/9.

Cordonier MC (ed.), *Sustainable Development in World Investment* (Kluwer, 2011).

Correa CM, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (3rd Zed Book 2002).

Cottier T, 'The State of International Economic Law' (2009) 12(1) Journal of International Economic Law 3.

Crivellaro A, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 Law and Practice of International Courts and Tribunals 371.

Dañino, R 'Making the most of International Investment Agreements: A Common Agenda' (Symposium Co-Organized by ICSID, OECD and UNCTAD, Paris, December 2005) 1.

da Silveira MA, 'Anticipatory Breach Under the United Nations Convention on Contracts for the International Sale of Goods' (2005) 2 Nordic Journal of Commercial Law 1.

*Davis International Inc v the Republic of Yemen Ministry of Supply and Trade* No. 99- 10880. (2000) 218 F.3d 129 (Eleventh Cir).

Dawwas A, 'Alteration of the Contractual Equilibrium Under the UNIDROIT Principles' (2010) 2 Pace University School of Law International Law Review 1.

- de Arechaga EJ, 'The Amendments to the Rules of Procedure of the International Court of Justice' (1973) 67 *The American Journal of International Law* 1.
- de Salvio GL and Sá Cabral JG, 'Considerations on the MERCOSUR Dispute Settlement Mechanism and the Impact of its Decisions in the WTO Dispute Resolution System' (2006) 4 CEBRI - Brazilian Center for International Relations 1.
- De Schutter O, 'Transnational Corporations and Human Rights: An Introduction' (2005) Global Law Working Paper 01/05 Symposium- 'Transnational Corporations and Human Rights' <[www.law.nyu.edu/idcplg?IdcService=GET\\_FILE&dDocName=ECM](http://www.law.nyu.edu/idcplg?IdcService=GET_FILE&dDocName=ECM)> accessed 28 August 2011.
- Delaume GR, 'ICSID Arbitration and the Courts' (1983) 77 *The American Journal of International Law* 784 n3.
- Delaume GR, 'ICSID Arbitration Proceedings: Practical Aspects' (1985) 5 *Pace Law* 563.
- Delmas-Marty M, 'Globalization and Multinational Corporations' (1 January 2008) <[http://www.goodplanet.info/eng/Contenu/Points-de-vues/Globalization-and-multinational-corporations/\(theme\)/284](http://www.goodplanet.info/eng/Contenu/Points-de-vues/Globalization-and-multinational-corporations/(theme)/284)> accessed 18 August 2011.
- Demirbas D, 'The EU Regulation on GMOs, Multinationals Biotechnology Companies and their Lobby Group, EuropaBio' (2003) 13 *Eubios Journal of Asian and International Bioethics* 11.
- d'Errico P, 'Corporate Personality and Human Commodification' (1997) *Marxism* 99, *Rethinking Marxism, Rethinking MARXISM. Remarx Volume 9*, 99-113
- Dervort T. R. V, *International Law and Organization* (Sage Publications, Inc. Thousand Oaks, California 1998) 222
- Desierto D, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter' (2011) 49 *Columbia Journal of Transnational Law* 1.
- Deva S, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003-04) 19 *Connecticut Journal of International Law* 1.
- DiMatteo LA, 'Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law', (2002) 43 *International Law Journal* 569.
- Dodge WS, 'Award in *Pope and Talbot, Inc v Government of Canada*: Introduction' (2000) 23 *Hastings International and Comparative Law Review* 431.



Dodge WS, 'Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy' (2010) 51 Harvard International Law Journal 36.

Dopplack Renee, Inside Justice, 'Comparison of the ICJ and the ICC'  
[http://www.insidejustice.com/law/index.php/intl/2008/11/10/differences\\_icc\\_icj](http://www.insidejustice.com/law/index.php/intl/2008/11/10/differences_icc_icj) accessed 12 August 2013

*Dow Chemical Co* [2005] 422 F3d 827 (US Ninth Cir)

Drezner DW, 'Who Rules? The Regulation of Globalization' (University of Chicago Press, August 2002) <<http://danieldrezner.com/research/whorules.pdf>> accessed 11 August 2011.

Duke Energy, *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador* [2008] ARB/04/19 (ICSID)

Dye PB and others, 'International Litigation' (2006) 40 International Law 275.

Dypski M, 'An Examination of Investor-State Dispute Resolution under the MERCOSUR and NAFTA Regimes' 2002 8 Law and Business Review of the Americas 217.

Eagleton D, 'Under the Influence' (ActionAid International, January 2006)  
 <[http://www.actionaid.org.uk/.../174\\_6\\_under\\_the\\_influence\\_final](http://www.actionaid.org.uk/.../174_6_under_the_influence_final)>  
 accessed 30 July 2012.

Egli G, 'Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions' (2007) 34 Pepperdine Law Review 1064.

Eisenhut D, 'Sovereignty, National Security and International Treaty Law: The Standard of Review of International Courts and Tribunals with Regard to "Security Exceptions"' (2010) 48 AV 431.

*Elliott Associates Lp v Banco De La Nacion the Republic of Peru* [1998] 194 F3d 363 (US Second Cir)

Enron, *Enron Corp. Ponderosa Assets, L.P. v Argentina Republic* [2007] ARB/01/3 (ICSID).

Ernest Young, Institutional Settlement in a Globalizing Judicial System, 54 Duke L. J. 1143, 1150 (2005).

*EU & Japan v US: Myanmar Sanctions* [1997] WT/DS88.

*EU v US: Automobile Fuel-Efficiency* [1994] DS31.

European Commission Economic and Financial Affairs Market functioning in Network Industries ISSN 1725-3209 Feb. 2013

- Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008)
- Exxon, *Exxon and Venezuela, Mobile Corporation and Others v Bolivarian Republic of Venezuela* [2010] ARB/07/27 (ICSID).
- Fatouros AA, 'On the Implementation of International Codes of Conduct: An Analysis of Future Experience' (1981) 30 *The American University Law Review* 941.
- Fallon RH. Jr., Reflections on the Hart and Wechsler Paradigm, 47 *Vand. L. Rev.* 953, 964-6 (1994).
- Fauchald OK, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 *The European Journal of International Law* 301.
- Ferguson J, 'California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA' (2000) 11 *Colorado Journal of International Environmental Law and Policy* 499.
- Ferrari F, 'Fundamental Breach of Contract under the UN Sales Convention - 25 Years Article 25 CISG' (2006) 25 *Journal of Law and Commerce* 489.
- Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)
- Foley S. 'Apple admits it has a human rights problem', *The Independent* 14th February 2012 <[www.independent.co.uk/news/world/asia/apple-admits-it-has-a-human-rights-problem-6898617.html](http://www.independent.co.uk/news/world/asia/apple-admits-it-has-a-human-rights-problem-6898617.html)> accessed 23 April 2014
- Footer ME, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 *Michigan State University College of Law Journal of International Law* 33.
- Ford S, 'International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers' (2010) 43 *John Marshall Law Review* 715.
- Foster GK, 'Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 *Columbia Journal of Transnational Law* 201
- Franck SD, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521.
- Freund E, *The Legal Nature of Corporations* (Lenox Hill Pub 1971).

- Friedrich J, 'Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' (2008) 9[11] German Law Journal 1539.
- Gaillard E and Banifatemi Y (eds), *Precedent in International Arbitration* (Juris Publishing 2008).
- Gallagher P, *Guide to Dispute Settlement* (World Trade Organization, Kluwer Law International 2002).
- Gal-Or N, 'Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines' (1998) 21 Boston College International and Comparative Law Review 1.
- Gantz D, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement' (2003) 19 American University International Law Review 679.
- Garcia F.J, 'The Moral Hazard Problem in Global Economic Regulation' (2008) paper 227 Boston College Law School Faculty Papers  
<<http://lawdigitalcommons.bc.edu/lfp/227>> accessed 10 August 2011.
- Garcia-Bolvar O.E., 'Protected Investments and Protected Investors: The Outer Limits of ICSIDs of Reach' (2010) 2(1) Trade, Law and Development 145.
- GATT, *European Community v US: Tuna/Dolphin 2* [1994] DS29.
- Gautier P, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' in J.A. Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Kluwer Law International 2000).
- Gazzini T, 'The Legal Nature of WTO Obligations and the Consequences of Their Violation' (2006) 17(4) The European Journal of International Law 723.
- Gibson CS and Drahozal CR, 'Iran-United States Claims Tribunal Precedent in Investor-State Arbitration' (2006) 23 Journal of International Arbitration 521
- Gilpin R, *The Political Economy of International Relations* (Princeton University Press, Princeton, New Jersey 1987).
- Glamis Gold Lt v The United States of America(A NAFTA Chapter 11 Arbitration under the UNCITRAL Arbitration Rules before the ICSID June 6, 2009
- Global Exchange, 'Top Ten Reasons to Oppose the World Trade Organization' (Global Exchange 2008)<<http://www.globalexchange.org/campaigns/wto/toptenwto2008.pdf>> accessed 18 April 2011.

Gonzales CG, 'An Environmental Justice Critique Of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms' (2011) 32 *University of Pennsylvania Journal of International Law* 723.

Goodman CL, 'Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' (2007) 28 *University of Pennsylvania Journal of International Economic Law* 449.

Gotanda JY, 'Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations' (2009) 44 *Villanova University School of Law School of Law Working Paper Series* 1.

Gotzmann N, 'Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute' (2008) 1(1) *QLSR* 37.

Gould E, 'Financial Instability and the GATS Negotiations' (2008) 9 *Briefing Paper Canadian Centre for Policy Alternatives* 1.

Granato L and Oddone CN, 'Argentina facing international claims over foreign investments' (2006) *Centro Argentino de Estudios Internacionales Programa Derecho Internacional Working Paper* <<http://caei.com.ar/es/programas/di/53.pdf>> accessed 26 June 2011.

Grimmett JJ, *Dispute Settlement in the World Trade Organization: An Overview* (Congressional Research Service 2006).

Guerin B, 'A Warning Etched in Cement in Indonesia' (Asia Times, 29 January 2005) <[http://www.atimes.com/atimes/Southeast\\_Asia/GA29Ae02.html](http://www.atimes.com/atimes/Southeast_Asia/GA29Ae02.html)> accessed 26 June 2011.

Guiguo W, 'Impact of Globalization on State Sovereignty' (2004) 3 *Chinese Journal of International Law* 473.

Guillaume G, 'The Use of Precedent by International Judges and Arbitrators' *Dispute Settlement* (2011) 2 1 *Oxford Journals* 5-23.

Guttenberg AZ, *The Language of Planning: Essays on the Origins and Ends of American Planning Thought* (University of Illinois Press, 1993).

Habermas J, *The Postnational Coalition: Political Essays* (MIT Press 2001).

Hall C, 'The Foreign Corrupt Practices Act: A Competitive Disadvantage, but for How Long?' (1994) 2 *Tul. J. Int'l & Comp. L.* 289.

*Hartford Fire Ins. Co v California* [1993] 509 US 764 (US Supreme Court).

- Hathaway O, Kiobel Commentary: The door remains open to “foreign squared” cases, SCOTUSblog (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases> accessed 26 June 2013.
- Harolds LR, 'Some Legal Problems Arising out of Foreign Flag Operations', 28 Fordham Law Rev. 295 article 5 (1959).
- Hawk BE, 'OECD Guidelines for Multinational Enterprises' 46 Fordham L. Rev. 241 (1977-1978.)
- Hedley AR, 'Transnational Corporations and their Regulations: Issues and Strategies' (1999) 40 International Journal of Comparative Sociology 215.
- Herman L, 'Settlement of International Trade Disputes: Challenges to Sovereignty - A Canadian Perspective' (1998) 24 Canada-United States Law Journal 121.
- Hesselink HW and de Vries GIP, *Principles of European Contract Law* (Kluwer 2001).
- Hew D and others, 'AIA-Plus: Building on Free Trade Agreements (ASEAN and Five DPs - CER, China, India, Japan, Korea)' (2006) REPSF Research Project 04/010, <<http://www.aseansec.org/aadcp/repsf/docs/04-010-Chapter2-InvestmentJurisprudence.pdf>> accessed 26 June 2011.
- Hilao v Estate of Marcos [1996] 95-56823 (US Ninth Circ.
- Hodgkinson SL, 'Are Ad Hoc Tribunals an Efficient Tool for Prosecuting International Terrorism Cases?' (2010) 24 Emory International Law Review 515.
- Hoekman BM and Kostecki MM, *The Political Economy of the World Trading System* (3rd edn) (Oxford University Press 2009).
- Hoellering MF, 'UNCITRAL Model Law on International Commercial Arbitration' (1986) 20 International Lawyer 327 n2.
- Hofgard K, 'Is this Land Really our Land? Impacts of Free Trade Agreements on United States Environmental Protection' (1993) 23 Environmental Law 635.
- Houthoff Buruma, 'Investment Arbitration: The Role of Bilateral Investment Treaties' (2011) 2 In-House Counsel Practical Guide 12.
- Hughes V, 'The WTO Dispute Settlement System- from Initiating Proceedings to Ensuring Implementation: What Needs Improvement?' in Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press 2006).

- Husisian G, 'Implementing an Integrated, Risk-Based Approach' (Corporatecomplianceinsights.com, 11 June 2010)  
<<http://www.corporatecomplianceinsights.com/2010/compliance-strategies-for-multinational-corporations-implementing-an-integrated-risk-based-approach/>> accessed 3 September 2011.
- I.C.J., 5 February 1970, Barcelona Traction, Light and Power Company Ltd., I.C.J Reports 1970.
- Ibrahim AM, 'International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms' (2011) 7 Eyes on the ICC 157.
- ICC Arbitration Case No. 6149' [1990].
- ICC Arbitration Case No. 6281' [1989]
- ICC Arbitration Case No. 7153' [1992]
- ICC Arbitration Case No. 7197' [1992]
- ICC Arbitration Case No. 7399' [1993]
- ICC Arbitration Case No. 7531' [1994]
- ICC Arbitration Case No. 7565' [1994]
- ICC Arbitration Case No. 7585' [1992]
- ICC Arbitration Case No. 8790' [2000]
- ICC Dispute Resolution Services, 'Arbitration Clauses' (Regional Seminar for Eastern Africa, Rwanda, February 2011).
- ICC in 2011 Achievements, Goals and Leadership' (ICC 2011)  
<<http://iccwbo.org/uploadedFiles/ICCin2011.pdf>> accessed 4 June 2011.
- ICC, 'Arbitration Today' (ICC International Court of Arbitration 2011)  
<<http://www.iccwbo.org/court/arbitration/id4584/index.html>> accessed 4 June 2011.
- ICSID Article 54 <<https://icsid.worldbank.org/ICSID/StaticFiles/facility/partD-chap09.htm>> accessed 26-5-2014
- ICSID Caseload – Statistics' (ICSID, 2011)  
<<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English21>> accessed 11 august 2011.

ICSID, 'About ICSID' (ICSID 2011)  
 <[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home)> accessed 13 June 2011.

*India etc. v US "Shrimp-Turtle"* [1998] case Nos. 58, 61.

ICSID, (University of Vienna 2009)  
 <[http://www.univie.ac.at/intlaw/wordpress/pdf/100\\_icsid\\_epil.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf)> accessed 13 June 2011.

ICSID Convention, Regulations and Rules  
 <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)> accessed 14 May 2014.

International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, (Judgment) Case IT-94-1-A 15 July 1999 s 115. See also *Loizidou v Turkey* (Judgment on Merits) ECHR Rep 1996-VI (18 December 1996) s 56.

International Company for Railway Systems (ICRS) v Hashemite Kingdom of Jordan [2009] ARB/09/13 (ICSID); ICSID Convention (n 484) Art 16.

Introduction to the WTO Dispute Settlement System' (World Trade Organization 2011) <<http://www.wto.org.htm>> accessed 23 April 2011.

Israel Ministry of Foreign Affairs, 'Bahrain Environmental Code of Conduct for Middle East' (Israel Ministry of Foreign Affairs 1994)  
 <<http://www.mfa.gov.il/MFA/Peace%20process/Guide%20to%20the%20Peace%20Process/Bahrain%20environment>> accessed 21 March 2011.

Jacovides AA, 'International Tribunals: Do They Really Work for Small States' (2001) 34 New York University Journal of International Law and Politics 253.

Jägers N, 'The Legal Status of the Multinational Corporation Under International Law' in Michael K. Addo (ed) Human Rights Standards and the Responsibility of Transnational Corporations (Kluwer Law International 1999).

Jenkins R, 'Corporate Codes of Conduct, Self-Regulation in a Global Economy' (Technology, Business and Society Program Paper 2, United Nations, April 2001).

Jensen ET, 'Incentivizing and Protecting Informants Prior to Mass Atrocities Such as Genocide: An Alternative to Post Hoc Courts and Tribunals' (2006) 29 Houston Journal of International Law 113.

*John Doe v Unocal Corporation* (US Ninth Cir) No. 99-55576 April 27, 2001

- Kadic v. Karadzic: Opinion of 2nd Circuit re: Subject Matter Jurisdiction U S Court of Appeals Second Circuit Nos. 1541, 1544 October 13, 1995
- Kagalwalla A, 'NAFTA Chapter 11 Tribunals and their Impact on Signatory States: A Parallel Judicial System and its Many Potential Dangers' (2008) 3 Entrepreneurial Business Law Journal 95.
- Kalamiya K, 'Rape of Sovereignty: OTRAG in Zaire' (1979) 14 Review of African Political Economy 16.
- Karaha Bodas Co Llc v Perusahaan Pertambangan Minyak Dan Gas Bumi* [2004] (US Fifth Cir) No. 02-20042. 03-20602.
- Karamanian SL, 'Overstating the "Americanization" of International Arbitration: Lessons from ICSID' (2004) 19 Ohio State Journal of Dispute Resolution 5.
- Kaufmann-Kohler G, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?' in E Gaillard and Y Banifatemi (eds), *Annulment of ICSID Awards* (2004).
- Keitner CI, '*Kiobel v Royal Dutch Petroleum*: Another Round in the Fight over Corporate Liability under the Alien Tort Statute' (2010) 14 The American Society of International Law Insight 1.
- Keller H, 'Corporate Codes of Conduct and their Implementation: The Question of Legitimacy' (Yale University 2008)  
<[http://www.yale.edu/macmillan/Heken\\_Keller\\_Paper.pdf](http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf)> accessed 18 October 2011.
- Keohane RO, Moravcsik A, and Slaughter AM 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54(3) International Organization 457, 466
- Keohane RO and Doorn OV, 'The Multinational Firm and International Regulation' (1975) 29(1) International Organization 169, 184
- Keohane RO, 'Global Governance and Democratic Accountability' in David Held and Mathias Koenig-Archibugi M.(eds), *Taming Globalization: Frontiers of Governance* (Cambridge Press 2003).
- Kerbrat Y, 'Le différend relatif à l'usine Mox de Sellafield (Irlande/Royaume-Uni): connexité des procédures et droit d'accès à l'information en matière environnementale' (2004) AFDI 607
- Khor M, 'Patents, Compulsory License and Access to Medicines: Some Recent Experiences' (draft, Third World Network 2007).
- Kiobel v Royal Dutch Petroleum Co.* 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).



- Kim D, 'Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System' (2011) 86 New York University Law Review 242.
- Kinley D, 'From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 Virginia Journal of International Law 931.
- Kinyua K, 'Assessing the Benefits of Accepting Amicus Curiae Briefs in Investor-State Arbitrations: A Developing Country's Perspective' (2009) 4 Stellenbosch University Faculty of Law Working Paper Series  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310753](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310753)> accessed 27 April 2012.
- Klabbers J, 'The Concept of Legal Personality' (2005) 2 11 Ius Gentium 35.
- Kobrin S.J, 'Globalization, Transnational, Corporation and the Future of Global Governance', in Andreas G Scherer and Guido Palazzo (eds), *Handbook of Research on Global Corporate Citizenship* (Edward Elgar 2008).
- Koenig-Archibugi M, 'Transnational Corporations and Public Accountability' (2004) 39(2) Government and Opposition 234.
- Koenig-Archibugi M and Zürn M, *Non-State Actors in Global Environmental Governance: New Arrangements Beyond the State* (Palgrave Macmillan 2005)
- Kolk A, Tulder van R, and Welters C, 'International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?' (1999) 8[1] Transnational Corporations 143.
- Konstantopoulos v Diamante Cia De Vapores, SA, 170 F Supp 662 (SDNY1959)
- Koss HR, Galardi BC, and Strain EB, 'The Foreign Sovereign Immunities Act: Assessing the Immunity of Foreign States in US Litigation' (2005) Aviation Law Alert Working Paper 1  
<[http://www.nixonpeabody.com/linked\\_media/publications/ALA\\_03102005.pdf](http://www.nixonpeabody.com/linked_media/publications/ALA_03102005.pdf)> accessed 10 October 2011.
- Kruger P, Denner W and Cronje J, 'Comparing Safeguard Measures in Regional and Bilateral Agreements' (2009) ICTSD Programme on Agricultural Trade and Sustainable Development Research Paper 22,  
<<http://ictsd.org/downloads/2009/07/safeguardweb.pdf>> accessed 26 June 2011 .
- Kumar N, 'Investment Provisions in Regional Trading Arrangements in Asia: Relevance, Emerging Trends, and Policy Implications' (2007) Asia-Pacific Research and Training Network on Trade Working Paper 46

<<http://www.unescap.org/tid/artnet/pub/wp4607.pdf>> accessed 26 June 2011.

Kurtz J, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment' (2002) University of Pennsylvania Journal of International Economic Law 713.

Laird I and Askew R, 'Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 Journal of Appellate Practice and Process 285.

Lancaster University Management School, 'Trade Dispute Settlement Mechanisms: The WTO Dispute Settlement Understanding in the Wake of the GATT' [2005] Working Paper Lancaster University 1.

*Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6.

Lando O, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 American Journal of Comparative Law 379.

Lapointe A and Gendron C, 'Corporate Code of Conduct: The à Montréal 2003) <<http://www.crsdd.uqam.ca/Pages/docs/pdfArticles/LapointeGendroncodes.HTM>> accessed 18 October 2011.

Lash WH, 'The Decline of the Nation State in International Trade and Investment' (1996-97) 18 CLR 1011.

Lauterpacht H, 'The So-called Anglo-American and Continental Schools of Thought in International Law', British Yearbook of International Law (1931) 59.

Lawrence R.D, 'Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution' [2003] American Business Law Journal <<http://www.allbusiness.com/legal.html>> accessed 13 April 2011.

Leathley C, *International Dispute Resolution in Latin America: An Institutional Overview* (Kluwer Law International 2007).

Lee PL, 'Central Banks and Sovereign Immunity', (2003) 41 Columbia Journal of Transnational Law 327.

Legal Effects of Panel and Appellate Body Reports and DSB Recommendations and Rulings' (World Trade Organization 2011) <<http://www.wto.org.htm>> accessed 23 April 2011.

- Levine E, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 19 Berkeley Journal of International Law 200.
- Levy DL and Prakash A, 'Bargains Old and New: Multinational Corporations in Global Governance' (2003) 5 Business and Politics 131.
- LG&E, *LG&E v Argentina Republic* [2006] ARB/02/1.
- Li Y, 'Remedies for Breach of Contract in the International Sale of Goods: A Comparative Study between the CISG, Chinese Law and English Law with reference to Chinese Cases' (2010) Thesis for the degree of Doctor of Philosophy <<http://eprints.soton.ac.uk>> accessed 9 September 2011 1.
- LICRA v Yahoo US District Court* N,D, California, San Jose 145 F.Supp.2d 1168 29 Media L. Rep. 2008
- Lilienthal, DE, *The Multinational Corporation*. CIT 1960
- Liu H, 'A Missing Part in International Investment Law: The Effectiveness of Investment Protection Of Taiwan's BIT's vis-a-vis ASEAN States' (2009) 16 University of California Davis Journal of International Law and Policy 130.
- Lowenfeld AF, *International Economic Law* (Oxford University Press 2002).
- Lungisile Ntsebeza et al. v. Citigroup, Inc., et al. US District Court SD of NY, (1499 JES) Nov. 2004
- Lurtz R, 'Resolving Trade Disputes in Asia: An Essay about the Laws, Institutions, and Cultures' in Antons C (ed), *Law and Development in East and Southeast Asia* (Routledge Curzon 2003).
- Lutz RE, 'Law, Procedure and Culture in Mexico under the NAFTA: The Perspective of a NAFTA Panelist' (1996) 3 Southwestern Journal of Law and Trade in the Americas 391.
- Ljalaye DA, *The Extension of Corporate Personality in International Law* (Oceana Publications, Inc., 1978)
- Macdonald DS, 'Chapter 11 of NAFTA: What are the Implications for sovereignty?' (1998) 24 C-USLJ 281.
- Maffezini, *Maffezini v Spain* [2000] ARB/97/7 (ICSID), Award on Jurisdiction.
- Malawer S.S, 'Extraterritoriality of U.S. Economic Legislation and U.S. Multinationals' (2011) <[http://www.global-trade-law.com/Extraterritoriality%20of%20U.S.%20Legislation %20to.ppt](http://www.global-trade-law.com/Extraterritoriality%20of%20U.S.%20Legislation%20to.ppt)> accessed 30 August 2011.

Markakis v. Liberian S/S the Mparmpa Christos, 161 F. Supp. 487 (S.D.N.Y. 1958)  
District Court, S.D. New York

Markakis v Mparmpa Christos , No. 249, Docket 25288. June 1959

Mataitoga, I 'The World Trade Organization Dispute Settlement Mechanism: A  
Developing Country Perspective' (The High Court of Fiji) 3  
[http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm#17](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17)> accessed 27  
August 2013

Mattli W and Woods N (eds), *The Politics of Global Regulation* (Princeton University  
Press, New Jersey 2009).

McCaw KL, 'Freedom of Contract versus the Antidiscrimination Principle: A Critical  
Look at the Tension between Contractual Freedom and Antidiscrimination  
Provisions' (1996) 7 Seton Hall Constitutional Law Journal.

McInerney TF, 'Putting Regulation before Responsibility: The Limits of Voluntary  
Corporate Social Responsibility' (2005) 2(3) Voices of Development Jurists  
5.

McKeon PA, 'International Criminal Court: Balancing the Principle of Sovereignty  
against the Demands for International Justice' (1997) 12 St John's Journal  
of Legal Commentary 535.

McMillan F, 'Corporate Disclosure On-Line: An Appropriate Response to  
Globalisation' (1998) 21 2 University of New South Wales Law Journal 55.

McRae DM, *Canadian Yearbook of International Law* (UBC Press 1998).

Martinez, J S 'Towards an International Judicial System' Stanford Law Review 429,  
432 (2003) 56

'Members and Partners' (OECD)  
<[http://www.oecd.org/pages/0,3417en\\_36734052\\_36761800\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417en_36734052_36761800_1_1_1_1_1,00.html)> accessed 15 November 2010.

Merrills JG, *International Dispute Settlement* (5th Cambridge 2011).

*Metalclad Corporation v. The United Mexican States*, ICSID Case No.  
ARB(AF)/97/1

'Mexican firm, Cemex, reportedly settles ICSID case with Indonesia' (INVEST-SD:  
International Institute for Sustainable Development Investment Law and  
Policy Weekly News Bulletin, 10 January 2005) [http://www.iisd.org/itn/wp-content/uploads/2010/10/investment\\_investsd\\_jan10\\_2005.pdf](http://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_jan10_2005.pdf) accessed 26  
June 2011.

*Mexico v US: Tuna/Dolphin 1* [1991] DS21.

Meyer L, 'Soft Law for Solid Contracts - A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization' (2006) 34 *Denver Journal of International Law and Policy* 119.

Miller M and Thomas D, 'Sovereign Debt Restructuring: Judge Griesa, the vultures and creditor rights' (2007) 30 *10 The World Economy* 1491-1509.

*Misima Mines Pty Ltd v Independent State of Papua New Guinea* [1996] ARB/96/2 (ICSID)

Moloo R and Jacinto J, 'Environmental and Health Regulation: Assessing Liability under Investment Treaties' (2011) 29 *Berkeley Journal of International Law* 1.

*Mondev International Ltd v United States of America* [1999] ARB(AF)/99/2 (ICSID); *North American Free Trade Agreement* (hereinafter *NAFTA*) [1994]

Moran M, 'Governing European Corporate Life' in Grahame Thompson (ed), *Governing the European Economy* (SAGE 2001).

Muchlinski P, *Multinational Enterprises and the Law* (Blackwell Publishers Ltd, Oxford December 1999).

Muchlinski PT, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 *International Lawyer* 1033.

Muchlinski PT, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007).

Muchlinski PT and Dine J, *Multinational Enterprises and the Law 2007-8* (SOAS University of London 2008)

Mullally M, 'Alien Tort Statute' (2005) 1 *In-House Perspective* 8.

Murphy MT, 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1989) 12 *Fordham International Law Journal* 727.

Murphy SD, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 *Columbia Journal of Transnational Law* 389.

Murray J, 'Corporate Codes of Conduct and Labor Standards' (1998) *Corporate Codes of Conduct*, Paper 7 <<http://digitalcommons.ilr.cornell.edu/codes/7>> accessed 19 March 2011.

Nader R, *In Pursuit of Justice: Collected Writings 2000-2003* (Seven Stories Press 2004).

NAFTA Article 1136< [www.sice.oas.org/trade/nafta/chap-112.asp](http://www.sice.oas.org/trade/nafta/chap-112.asp)> accessed May 25 2014

NAFTA overview of the Dispute Settlement Provisions <<https://www.nafta-sec-alena.org/Default.aspx?tabid=93&language=en-US>> accessed May 15 2014

Nelson TG, 'Investor-State Arbitration and Investment Treaty Protection - The South-East Asian Angle' (Resources Law Conference in South-East Asia, Kuala Lumpur, February 2009)  
<[https://www.skadden.com/content/Publications/Publications1869\\_0.pdf](https://www.skadden.com/content/Publications/Publications1869_0.pdf)> accessed 26 June 2011.

Neumayer E, 'The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak' (2004) 4(3) Global Environmental Politics 1.

Newell P, 'Environmental NGOs, TNCs, and the Question of Governance' in Assetto VJ and Stevis D (eds), *The international political economy of the environment* (Lynne Rienner Publishers 2001).

Niklasson S, 'The OECD Guidelines for MNEs and the UN Draft Code of Conduct: Some Political Considerations' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1, Kluwer 1980) 144

NIKE, Inc., et al., *Petitioners v. Marc Kasky*. No. 02-575, June 26, 2003

Norén G, *The Role of Business in Society* (Svenskt Näringsliv 2004).

Nowrot K, 'New Approaches to the International Legal Personality of Multinational Corporations towards a Rebuttable Presumption of Normative Responsibilities' 1993 4 <<http://www.esil-sedi.eu/english/pdf/Nowrot.PDF>> accessed 23 September 2012.

O'Connell ME, 'Enforcement and the Success of International Environmental Law'(1995) 3 Indiana Journal of Global Legal Studies 47.

OECD Guidelines for Multinational Enterprises' (OECD)  
<[http://www.oecd.org/document/28/0,3343,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html)> accessed 30 December 2010.

OECD Watch, *ECCHR, Sherpa and UGF v Cargill Cotton* (OECD Watch 2011)  
<[http://oecdwatch.org/cases/Case\\_195](http://oecdwatch.org/cases/Case_195)> accessed 7 November 2011.

- OECD Guidelines for Multinational Enterprises' (OECD)  
<[http://www.oecd.org/document/28/0,3343,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html)> accessed 30 December 2010
- OECD, 'About OECD' (OECD)  
<[http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1,00](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00)> accessed 15 November 2010.
- Olyana Holdings LLC v Republic of Rwanda [2010] ARB/10/10 (ICSID)
- OIL SPILL BY THE AMOCO CADIZ OFF THE COAST OF FRANCE US COURT OF APPEALS (7th CIR) no.954 F.2d 1279 Jan 1992
- Pauwelyn J, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Michigan Journal of International Law 903.
- Peng MW, *Global Strategy* (SOUTH-WESTERN CENGAGE Learning, Mason 2009).
- Permanent Court of International Justice Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th – July 24th, 1920, with Annexes (1920), 584
- Perriëns J, 'UNAIDS Report on Compulsory Licensing and Access to HIV Drugs' (Conference on Community and Home Care for People with HIV Infection, Paris, 1999) <<http://lists.essential.org/pharm-policy/msg00355.html>> accessed 16 May 2011.
- Peterson LE, 'All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties' in ed Lyuba Zarsky, *International Investment for Sustainable Development: Balancing Rights and Rewards* (Earthscan 2005).
- Pimott D, 'WTO Rules Against US in Internet Gambling Case' Financial Times (London, 2007).
- Pope and Talbot, Inc. v Government of Canada* (United States Department of State) <<http://www.state.gov/s/l/c3747.htm>> accessed 26 June 2011.
- Posner EA, 'The Decline of the International Court of Justice' (2004) 233 Chicago John M Olin Law and Economics Working Paper 1  
<[https://samba.huji.ac.il/~CSCO+0h756767633A2F2F6A6A6A2E796E6A2E68707576706E74622E727168+/files/files/233.eap\\_.icj\\_.pdf](https://samba.huji.ac.il/~CSCO+0h756767633A2F2F6A6A6A2E796E6A2E68707576706E74622E727168+/files/files/233.eap_.icj_.pdf)> accessed 27 April 2012.
- Posner EA, 'The Decline of the International Court of Justice' (2004) John M Olin and Economics Working Paper 233

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=629341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629341)> accessed 11 August 2011.

Powell SJ, 'Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas'(2010)16 Law and Business Review of the Americas 217.

Q+A – Indonesia's Dispute with Newmont Unit over Share Sale' (Intellasia News Online, 17 August 2009).

Rand W, Hornick RN, and Friedland P, 'ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction' (1986) 19 New York University Journal of International Law and Politics 33.

Reisman M, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 4 Duke Law Journal 739.

Ruggie J, 'Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Human Rights Council 17th Session Agenda item 3 21st March 2011

ICC International Court of Arbitration 2011  
<<http://www.iccwbo.org/collection34/folder332/id5334/printpage.html?newsxsl=&articlexsl=>> accessed 4 June 2011.

Rikowski G, 'Transfiguration: Globalisation, the World Trade Organization and the National Faces of the GATS'(2002)Information for Social Change 1.

Robertson L S, Bonal X and Dale R, 'GATS and the Education Service Industry: The Politics of Scale and Global Reterritorialization' (2002) the University of Chicago Press 472.

Rojas MJ, 'A New Era: The Regulation of Investment in Mexico' (1993) 1 US-Mexico Law Journal 41.

Rosa AK, 'Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution'(1994) 15 Michigan Journal of International Law 255.

Rosett A, 'UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven' (1997) Uniform Law Review 441.

Rowat MD, 'Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA' (1992)33 HILJ 103.

Rubin SJ 'Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development' (1981) 10(4) AM U J INT'L L & POL'Y 1279-80.



- RSM Production Corporation and others v Grenada* [2005] ARB/10/6 (ICSID)
- Rugman, AM, *The Oxford Handbook of International Business* (Oxford University Press, New York 2008).
- Rugman AM and Gestrin M, 'New Rules for Multinational Investment' (2007) 39 *The International Executive* working paper 1  
<<https://samba.huji.ac.il/+CSCO+> > accessed 6 March 2012.
- S.D. Myers, *S.D. Myers Inc v Canada* [2000] NAFTA (UNCITRAL), First Partial Award.
- Salazar A, 'NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law' (2010) 27 *Arizona Journal of International and Comparative Law* 31.
- Salbu SR, 'Transnational Bribery: The Big Questions' (2001) 21 *NW J Int'l L & Bus* 435.
- Salini, *Salini Costruttori Spa and Italstrade Spa v Kingdom of Morocco* [2003] 42 *I.L.M.* 609.
- Saluka, *Saluka Investments BV v The Czech Republic* [2006] (UNCITRAL), Partial Award.
- Sanford R, 'The Canada-United states Free Trade Agreement: Its Aspects, Highlights, and Probable Impact on Future Bilateral Trade and Trading Agreements' (1989) 7 *Dickinson Journal of International Law* 371.
- Santa Clara v Southern Pacific* 118 US Reports 394 (1886).
- SARL Benvenuti and Bonfant v People's Republic of the Congo* [1976] ARB/77/2 (ICSID);
- Schatz S, 'Effect of the Annulment Decisions in *AMCO v Indonesia* and *Klöckner v Cameroon* on the Future of the International Centre for the Settlement of Investment Disputes' (1988) 3 *American University Journal of International Law and Policy* 481.
- Scheffer DJ, 'The United States and the International Criminal Court' (1999) 93 *The American Journal of International Law* 12.
- Schermers HG and Blokker NM, *International Institutional Law: Unity within Diversity* (3rd edn, Martinus Nijhoff 1995).
- Schlechtriem P, 'Termination and Adjustment of Contracts' (1999) 1 *European Journal of Law Reform* 305.

- Scholte J.A, 'Global Capitalism and the State' (1997) 73(3) *International Affairs* 427.
- Schreuer C, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (2006) 3 *Transnational Dispute Settlement* 1.
- Schreuer C, 'Courses on Dispute Settlement' (United Nation Conference on Trade and Development, New York, 2003).
- Schreuer C, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *Journal of World Investment and Trade* 357.
- Schreuer C, 'International Centre for Settlement of Investment Disputes (ICSID)' (University of Vienna 2009) 1  
<[http://www.univie.ac.at/intlaw/wordpress/pdf/100\\_icsid\\_epil.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf)> accessed 13 June.
- Schreuer C 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20(4) *Arbitration International* 325.
- Schreuer C, *The Dynamic Evolution of the ICSID System* (University of Vienna 2006) <[http://www.univie.ac.at/intlaw/wordpress/pdf/85\\_cspubl\\_86.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/85_cspubl_86.pdf)> accessed 14 June 2011.
- Schwartz R, 'Are the OECD and UNCTAD Codes Legally Binding' (1977) 11 *International Lawyer* 529.
- Schwebel SM, 'Ad hoc chambers of the International Court of Justice' (1987) 81 *American Journal of International Law* 831.
- Sedlak DR, 'ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?' (2004) 23 *Penn State International Law Review* 147.
- Sempra, *Sempra Energy International v Argentine Republic* [2007] ARB/02/16 (ICSID).
- SGS, *SGS v Philippines* [2004] ARB/02/6 (ICSID), Decision on Jurisdiction.
- Shany Y, 'Contract Claims vs Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims' (2005) 99 *The American Journal of International Law* 835
- Shaw M, *International Law* (4th edn, Cambridge University Press 1987).
- Shaw M, *International Law* (6th edn, Cambridge University Press 2008).
- Shaw M, 'International Court of Justice: A Practical Perspective' (1997) 46 *International and Comparative Law Quarterly* 831.

- Sihanya B, 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya' (WTO)  
<[http://www.wto.org/english/res\\_e/booksp\\_e/casesstudies\\_e/case19\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casesstudies_e/case19_e.htm)> accessed 15 May 2011.
- Sikkink k, 'Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF code' (1986) 40 4 International Organizations
- Simi TB and Kaushik A, 'The Banana War at the GATT/WTO' (2008) 1 Trade Law Brief.
- Sinaltrainal v Coca-Cola Company* (US Eleventh Cir) 2009
- Sinclair S, GATS: How the World Trade Organization's New 'Services' negotiations Threaten Democracy (Social Development Publications 2000).
- Skadden, 'New ICSID Annulment Decisions Exposes Possible Gap in United States Investment Treaty Protection' (2010)  
<[http://www.skadden.com/content/Publications/Publications2159\\_0.pdf](http://www.skadden.com/content/Publications/Publications2159_0.pdf)> accessed 20 June 2011.
- Smith G, 'An Introduction to Investor-State Arbitrations', (2010) 13 International Trade and Business Law Review 3.
- Soley DA, 'ICSID Implementation: An Effective Alternative to International Conflict' (1985) 19 International Lawyer 211.
- Sornarajah M, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010).
- Soufraki, *Soufraki v UAE* [2004] ARB/02/7 (ICSID), Decision on Jurisdiction.
- Sosa v Alvarez-Machain* [2004] 542 US 692 (US Second Cir)  
<[http://www.leagle.com/xmlResult.aspx?xmldoc=20041234542US692\\_11212.xml&docbase=CSLWAR2-1986-2006](http://www.leagle.com/xmlResult.aspx?xmldoc=20041234542US692_11212.xml&docbase=CSLWAR2-1986-2006)> accessed 10 October 2011,
- St. Marie G, 'The Hindu Environmental Code of Conduct' (eHOW 2010)  
<[http://www.ehow.com/facts\\_6781005\\_hindu-environmental-code-conduct.html](http://www.ehow.com/facts_6781005_hindu-environmental-code-conduct.html)> accessed 21 March 2011.
- Stanley TW, 'International Codes of Conduct for MNC's: A Sceptical View of the Process' (1981) 30 The American University Law Review 941, 976
- Steele M, 'Challenges to Enforcing Arbitral Awards against Foreign States in the United States' (2008) 42 International Lawyer 87.
- Stephan PB, 'A Becoming Modesty: US Litigation in the Mirror of International Law' (2002) 52 DePaul Law Review 627.

- Stephens T, *International Courts and Environmental Protection* (2009)
- Stephenson S (ed.), *Services Trade in the Western Hemisphere: Liberalization, Integration, and Reform* (RR Donnelly and Sons 2000).
- Strong SI, 'Enforcement of Arbitral Awards against Foreign States or State Agencies' (2006) 26 *Northwestern Journal of International Law and Business* 335.
- Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* [1997] ARB/03/19 (ICSID), 2000 award.
- Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529, [2006] All ER (D) 156
- Swan A, 'NAFTA Chapter 11 - "Direct Effect" and Interpretive Method: Lessons from *Methanex v United States*' (2009) 64 *University of Miami Law Review* 21.
- Swigart L, 'National Judge: Some Reflections on Diversity in International Courts and Tribunals' (2010) 42 *McGeorge Law Review* 223.
- Tahyar BH, 'Confidentiality in ICSID Arbitration after *AMCO Asia Corp v Indonesia*: Watchword or White Elephant' (1986) 10 *Fordham International Law Journal* 93.
- Talpis J and Krnjec N, 'Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to a Mouse' (2006) 13 *Southwestern Journal of Law and Trade in the Americas* 1.
- Tanzi A, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *European Journal of International Law* 539, 566-68
- TechRights website, <http://techrights.org/comes-iowa-trial-exhibits>.
- Tecnicas Medioambientales Tecmed SA v United Mexican States* [2004] ARB(AF)/00/2 (ICSID)
- The Determinants of Foreign Direct Investment: A Survey of the Evidence* (United Nations Centre on Transnational Corporations 1992).
- The Economist (2007) 382(8511) 69.
- The Office of the United States Trade Representative <<http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>> accessed 25 July 2012

The Umuchinshi Initiative, 'Can the OECD Guidelines Protect Human Rights on the Ground? A Case Study' (University of Toronto 2008).

'The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1 Kluwer 1980).

Thrasher RD and Gallagher KP, '21st Century Trade Agreements: Implications for Development Sovereignty' (2010) 38 *Denver Journal of International Law and Policy* 313.

*Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Ass'n*, 549 F.2d 597 (9th Cir. 1976)). 86.

Tokios, *Tokios Tokeles v Ukraine* [2004] ARB/02/18 (ICSID).

Trachtman J.P, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harv. Int'l L.J.* <<http://www.worldtradelaw.net/articles/trachtmandomain.pdf> >accessed 16 April 2011.

Trade Law Clinic (E780) 2010 UN conference on Trade and Development, International Trade agreements section

Trakman L, 'Foreign Direct Investment: Hazard or Opportunity?' (2009) 41 *George Washington International Law Review* 1.

*TMR Energy Ltd v State Property Fund of Ukraine* No. 03-7191. (2005) (DC Cir)

Tuck AP, 'Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules' (2007) 13 *Law and Business Review of the Americas* 885.

Tully S, *Corporations and International Law-Making* (Brill 2007).

UN Charter, Chapter XVI: MISCELLANEOUS PROVISIONS Articles 103 , 105.

UNCITRAL, 'ICC Arbitration Case No. 5713' [1989] *Case Law on UNCITRAL Texts* Abstract No.45.

UNCoTa Development,' *WORLD INVESTMENT PROSPECTS SURVEY 2007–2009* (New York and Geneva 2007).

UN Code of Conduct ILO <<http://www.actrav.ilo.org/actrav-english/telearn/global/ilo/guide/main.htm>> accessed May 26 2014

United Nations Economic and Social Council , UN.org, 'About Ecosoc' suppl. 2, E/5466 1974.

- United Nations, The Determinants of Foreign Direct Investment: A Survey of the Evidence (United Nations Centre on Transnational Corporations 1992) E.92.II.A.2 ST/CTC/121.
- United States International Trade Commission, 'ASEAN: Regional Trends in Economic Integration, Export, Competitiveness, and Inbound Investment for Selected Industries' (2010) USITC Investigation Paper 332-511 <<http://www.usitc.gov/publications/332/pub4176.pdf>> accessed 26 June 2011.
- United States Supreme Court, *Sosa v Alvarez Machain* [2004] 124 S 2739.
- Vagts DF, 'The Multinational Enterprise: A New Challenge for Transnational Law' (1969) 83 Harv. L. Rev. 739.
- VAMAS, 'Code of Conduct Applied to Vietnamese Enterprises Sending Workers for Overseas Employment' (International Labour Organization 2010).
- Van Ngo M, 'Corporate Practitioner's Perspective on Recent Supreme Court Cases' (2010) 5 Charleston Law Review 43, 54.
- Vernon R, 'The World Trade Organization: A New Stage in International Trade and Development' (1995) 36 Harvard International Law Journal 329.
- Viscasillas, MP, 'UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions' (1996) 13 Arizona Journal of International and Comparative Law 383
- Vivendi Universal, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic* [2002] 41 ILM 1135 5.
- Volbeda M. B, The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS, 42 Tex. Int'l L.J. 211, 213 (2006).
- Voon T and Yanovich A, 'The Facts Aside: The Limitations of WTO Appeals to Issues of Law' (2006) 40(2) Journal of World Trade 239.
- Wallace CD, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (1st edn, Springer 2002).
- Wallace CD, *Legal Control of the Multinational Enterprise* (Springer, Verlag New York December 1982).
- Walsh W, 'Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality' (2006) 24 Berkeley Journal of International Law 444.

- Wang G, 'Foreign Investment Policies, Sovereignty and Growth' (2003) 27 Telecommunications Policy working paper 267, 273  
<<https://samba.huji.ac.il/+CSCO>> accessed 6 Mach 2012.
- Weiler T, 'NAFTA Investment Arbitration and the Growth of International Economic Law' (2002) 36 Canadian Business Law Journal 405.
- Weiss F, 'Manifestly Illegal Import Restrictions and Non-Compliance with WTO Dispute Settlement Rulings: Lessons from the Banana Dispute' in Ernst U. Petersmann and Mark A. Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford University Press 2003).
- Wendlandt M, 'SGS v *Philippines* and the Role of ICSID Tribunals in Investor-State Contract Disputes' (2008) 43 Texas International Law Journal 523.
- Werhane PH, *Persons, Rights, and Corporations* (Prentice-Hall, Inc., Englewood Cliffs, N.J. 1985).
- What is The WTO?' (World Trade Organization 2011) <<http://www.wto.org.htm> > accessed 10 April 2011.
- Wiwa, Ken v Royal Dutch Petroleum Company* [2000] 226 F3d 88 (US Second Cir)
- Wilner GM, 'Transfer of Technology: The UNCTAD Code of Conduct' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (vol 1 Kluwer 1980).
- Woodward WJ, 'Saving the Hague Choice of Court Convention' (2008) 29 University of Pennsylvania Journal of International Law 657.
- World Development Movement, 'Developing Alternatives' (2000) World Development Movement Discussion Paper  
<[http://infotek.fph.ch/d/f/1530/1530\\_FRE.msword?public=FRE&t=.msword](http://infotek.fph.ch/d/f/1530/1530_FRE.msword?public=FRE&t=.msword)> accessed on 8 August 2011.
- WTO, 'A Unique Contribution' (World Trade Organization 2011)  
<[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm)> accessed 10 April 2011.
- Xiao J, 'The ASEAN-China Investment Agreement: A Regionalization of Chinese New BITs' (2010) 9 Society of International Economic Law Working Paper 2010/09, 14  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1629202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629202)> accessed 26 June 2011
- Yahoo!, Inc. v La Ligue Contre Le Racisme et L'Antisemitisme*, 145F.Supp. 2d 1168, 1171 (N.D. Cal.2001)

Yunez-Naude A, 'Lessons from NAFTA: The Case of Mexico's Agricultural Sector' (2002) FRWB.

Zacklin, R 'The Failings of Ad Hoc International Tribunals' (2004) 2 Journal of International Criminal Justice 541, 544-45

Zimmermann A, 'Ad Hoc Chambers of the International Court of Justice' (1989) 8 Dickinson Journal of International Law 1.