

THE APPEAL OF ICSID AWARDS: HOW THE AMINZ
APPELLATE MECHANISM CAN GUIDE REFORM OF ICSID
PROCEDURE

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TABLE OF CONTENTS

I.	INTRODUCTION	568
II.	THE ICSID AND APPEAL OF ARBITRAL AWARDS.....	571
	A. <i>The ICSID: Past and Present</i>	571
	B. <i>The ICSID Annulment Mechanism</i>	572
	C. <i>Proposals for Reform of Review of Awards at the ICSID</i>	575
III.	INTERNATIONAL COMMERCIAL ARBITRATION	578
IV.	THE ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND.....	579
V.	MAPPING THE AMINZ ARBITRAL APPELLATE RULES ONTO THE ICSID SYSTEM.....	582
	A. <i>Confidentiality</i>	582
	B. <i>The Impact of the New Appellate Mechanism upon the Annulment Process</i>	584
	C. <i>Issues Subject to Appeal</i>	587
	D. <i>Structuring the New Appellate Mechanism</i>	589
	E. <i>Appellate Procedure at the ICSID</i>	591
VI.	CONCLUSION.....	592

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I. INTRODUCTION

The use of international arbitration as an alternative to litigation in national courts has increased rapidly over the past three decades.¹ This has occurred in part because of the recent precipitate growth in foreign direct investment.² As a dispute resolution mechanism based on mutual consent, international arbitration must be attractive to both governmental and private parties in order to provide an advantage over other methods of dispute resolution, thereby encouraging parties to arbitrate their disputes.

The advantages of international arbitration generally include quicker resolution of disputes, lower costs than traditional litigation, avoidance of potential “home field” bias for one of the parties, and confidentiality, among many others.³ Allowing parties to settle their disputes in a manner predetermined by contract is undoubtedly a positive development in a rapidly globalizing world, especially when it results in increased certainty in the dispute resolution process for all of the parties involved. While this process is ideal, international arbitration suffers from a few serious problems that, if not addressed, will hinder its future prospects as an efficient method of dispute resolution.

In the process of seeking rapid finality, developments specific to international investment arbitration have created two primary problems that produce uncertainty. The first problem is the almost universal lack of a genuine appellate process that would allow parties to appeal awards resulting from the faulty legal reasoning of tribunals.⁴ Consequently, errant legal rulings made by arbitrators are not subject to any meaningful form of judicial review.⁵ Second, the lack of clear precedent creates additional uncertainty, exacerbated by the problem that some arbitral agreements seem to be intentionally drafted to avoid settled domestic law on certain contractual

¹ Stavros Brekoulakis, *International Arbitration: Basic Principles and Characteristics*, QFINANCE 1, 2 (2011), <http://www.qfinance.com/contentFiles/QF02/g1xtn5q6/12/2/international-arbitration-basic-principles-and-characteristics.pdf>.

² Christopher M. Ryan, *Discerning the Compliance Calculus: Why States Comply with International Investment Law*, 38 GA. J. INT'L & COMP. L. 63, 64 (2009).

³ Peter Sherwin et al., *The Decision to Arbitrate*, in PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION: MANAGING, RESOLVING, AND AVOIDING CROSS-BORDER BUSINESS OR REGULATORY DISPUTES (Jennifer R. Scullion et al. eds., 2011), available at <http://www.proskauerguide.com/arbitration/19/I>.

⁴ Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?*, 7 PEPP. DISP. RESOL. L.J. 269, 270–72 (2007).

⁵ See generally *id.* (arguing the legitimacy of international arbitration is threatened by the absence of an arbitral appeals process). The ICSID annulment mechanism does not amount to a form of judicial review in the sense that, under this process, the legal reasoning of arbitral tribunals may not be reviewed. See discussion *infra* Part II.B.

issues.⁶ While this latter problem is of greater concern in the commercial and employment contexts,⁷ it does raise an important point about international investment arbitration, namely, the role of precedent.

The lack of both appellate review and clear precedent creates uncertainty in international investment arbitration. The former creates problems for the parties involved in any specific dispute and the latter for the legal regime as a whole. The importance of foreign direct investment to the global economy cannot be underestimated, and in order to assure its continued role in the international economy, these issues must be confronted.⁸ This Note will address the importance of establishing a system of appellate review in international investment arbitration, particularly at the International Centre for Settlement of Investment Disputes (ICSID), which is the leading international arbitration institution for the settlement of investor-state disputes.⁹ The ICSID currently uses an annulment mechanism in lieu of providing an appellate option.¹⁰ This annulment procedure has arguably increased uncertainty in international investment arbitration.¹¹

Over the past few years, research on international investment arbitration has developed considerably, particularly with regard to the ICSID.¹² The topics addressed have included the annulment mechanism at the ICSID, the role of precedent in investment arbitration, and the problem of uncertainty in the field. This body of research provides a foundation upon which this Note seeks to build by considering a recent development in commercial arbitration.

In order to improve understanding of the method by which an appellate mechanism might work, this Note will consider an existing arbitral appellate mechanism at a commercial arbitration organization as a template for an appellate procedure at the ICSID. In contrast to an analysis of the appellate

⁶ Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 190 (2006).

⁷ *Id.*

⁸ For more substantive discussions on the importance of foreign direct investment in the international economy, see, e.g., Robert D. Hormats, Under Sec'y for Econ., Energy & Agric. Affairs, Remarks at the World Investment Forum: Importance of Investment in the Global Economy (Sept. 6, 2010), available at <http://www.state.gov/e/rls/rmk/2010/146894.htm>.

⁹ See Girard Gibbs LLP & Lazareff Le Bars AARPI, *International Arbitration*, <http://www.internationalarbitrationlaw.com/arbitration-courts/icsid> (last visited Jan. 7, 2013) [hereinafter *International Arbitration*] (noting that in the international context, investor-state disputes generally involve a national government and at least one foreign investor).

¹⁰ See ICSID Convention, Regulations and Rules, Part F, Ch. VII, Rules 50–55 (Apr. 10, 2006), <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap07.htm> (outlining the ICSID annulment procedure).

¹¹ See generally Dohyun Kim, Note, *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System*, 86 N.Y.U. L. REV. 242 (2011) (arguing the ICSID's annulment process has created an additional layer of inconsistent decisions).

¹² See discussion *infra* Parts II, III.

mechanism previously considered by the ICSID in 2004,¹³ using an arbitral appellate procedure that is already in existence will provide a more direct insight into how an ICSID appellate mechanism might look and how it would function best.

This Note will use the appeals rules for arbitration recently enacted at the Arbitrators' and Mediators' Institute of New Zealand, Inc. (AMINZ) as a starting point for analyzing an appellate framework at the ICSID. The appellate process at the AMINZ is only a few years old¹⁴ and while this Note will provide some insight into it, an independent study of this mechanism is beyond the scope of this analysis. Instead, the AMINZ appellate system will be used to shed light on possible reform of the process at the ICSID. Beyond providing a basic background of the AMINZ, it is only within the context of the ICSID procedure that the AMINZ will be evaluated, and any claims made herein should be taken in that light.

Using the AMINZ appellate rules as a framework for an ICSID appellate procedure will help not only to illustrate how to effectively implement such reforms, but will also assist in evaluating potential problems that such a mechanism might encounter and how to address those issues effectively. Because international commercial and investment arbitration vary to a degree in both their goals and procedures, using an actual appellate process as a framework illustrates the manner in which appeals of investor-state tribunal awards might vary from the commercial arbitration setting. It is the objective of this Note to provide such insight and to act as a basis for further research into the topic as the necessity for an appellate procedure at the ICSID is likely to grow in the coming years.

Critically, the appellate mechanism proposed in this Note will address the two major shortcomings of the current ICSID annulment procedure. First, it will remedy the genuine lack of an appellate process at the ICSID. With a new appellate mechanism, parties will be able to appeal awards based on legal grounds, thus remedying parties' concerns that an award will be issued against them that is not subject to appeal, regardless of how errant the tribunal's legal reasoning might have been. Second, the proposed mechanism will increase certainty in international investment law as the appellate tribunals establish a clearer body of precedent.¹⁵ By settling legal

¹³ ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* 19–26 (ICSID, Discussion Paper, Oct. 22, 2004), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf.

¹⁴ *AMINZ Arbitration Appeal Tribunal*, BUILDING DISPUTES TRIBUNAL (2010), <http://www.buildingdisputestribunal.co.nz/ARBITRATION/AMINZ+ARBITRATION+APPEAL+TRIBUNAL.html>.

¹⁵ While the precedential value of such holdings might weigh more heavily with ICSID arbitral tribunals than with external tribunals, there is no reason to believe the precedential

inconsistencies rendered by arbitral tribunals, parties will be able to make future decisions with a better understanding of the possible legal ramifications of their actions.

Part II presents background material on the ICSID. First, the organization's general characteristics are discussed. Second, an evaluation of the current annulment mechanism and its insufficiency in light of the current needs of international investment law are provided. Third, current proposals for reform of the ICSID's review procedure are presented, including the reasons such proposals fall short of accomplishing their intended goals.

Part III provides a general background of developments in international commercial arbitration, with particular attention given to procedures for appeal of awards. Part IV presents a closer look at the AMINZ, and the defining characteristics of its recently enacted appellate mechanism. Part V provides an analysis of how the AMINZ appellate mechanism could be successfully mapped onto the ICSID system. Key issues analyzed include the confidentiality of proceedings, the extent to which the new mechanism would replace the current annulment mechanism, the categories of issues that would be subject to appeal, the manner in which the appellate mechanism would structurally operate, and how the critical procedural rules would function. Lastly, Part VI concludes the Note.

II. THE ICSID AND APPEAL OF ARBITRAL AWARDS

A. *The ICSID: Past and Present*

The ICSID was created after the ICSID Convention, a multilateral treaty promulgated by the World Bank, entered into force in late 1966.¹⁶ The primary purpose for creating the ICSID was to facilitate the arbitration and conciliation of international investment disputes.¹⁷ Today, it accomplishes this in three ways.¹⁸ First, the ICSID Convention itself and the Regulations and Rules promulgated by the ICSID Administrative Council "provide[] the

impact would be limited to ICSID proceedings. Indeed, the presence of this new corrective procedural mechanism would probably have the effect of increasing the general precedential value of ICSID awards since they would now have to withstand the scrutiny of genuine legal review.

¹⁶ *About ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last visited Jan. 8, 2013).

¹⁷ *Id.*

¹⁸ *ICSID Dispute Settlement Facilities*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_sett1_facilities (last visited Jan. 8, 2013).

basic procedural framework for conciliation and arbitration of investment disputes arising between member countries and investors that qualify as nationals of other member countries.”¹⁹ Second, the Additional Facility Rules adopted in 1978 “authoriz[e] the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the [ICSID] Convention.”²⁰ Lastly, the ICSID may administer proceedings under the UNCITRAL Arbitration Rules²¹ and appoint arbitrators in the event two parties authorize the ICSID to do so.²²

Since 1994, the annual number of cases registered by the ICSID has risen steadily, until 2003 when the number of cases filed increased rapidly.²³ Over half the cases filed in the institution’s thirty-nine year history have been filed since 2003.²⁴ With 158 signatory States, of which 147 have also deposited ratification,²⁵ the ICSID is considered the leading international arbitration institution for investor-state disputes.²⁶

B. *The ICSID Annulment Mechanism*

The recent increase in cases filed at the ICSID has raised important questions about the effectiveness of the institution’s procedural rules.²⁷ One of the procedural tools that has attracted much criticism over the past several years from both parties involved in proceedings at the ICSID and experts in the field is the annulment mechanism.²⁸

¹⁹ *Id.*

²⁰ *Id.*

²¹ The United Nations Commission on International Trade Law (UNCITRAL) is the principal international trade law organization at the United Nations. The body’s goal is the promotion of modernization and harmonization of international business rules. *About UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/about_us.html (last visited Jan. 8, 2013). The UNCITRAL has promulgated its own model arbitration rules that are often used in alternative dispute resolution. *2010 — UNCITRAL Arbitration Rules*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last visited Jan. 8, 2013). For more information about the UNCITRAL, *see generally* UNCITRAL, <http://www.uncitral.org/uncitral/en/index.html>.

²² *ICSID Dispute Settlement Facilities*, *supra* note 18.

²³ ICSID, *The ICSID Caseload - Statistics 7* (2011), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32>.

²⁴ *Id.*

²⁵ *Member States*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&packageName=MemberStates_Home (last visited Jan. 8, 2013).

²⁶ *About ICSID*, *supra* note 16; *International Arbitration*, *supra* note 9.

²⁷ Johanna Kalb, Comment, *Creating an ICSID Appellate Body*, 10 UCLA J. INT’L L. & FOREIGN AFF. 179, 181 (2005).

²⁸ *See, e.g.*, Claire Stockford, *Appeal Versus Annulment: Is the ICSID Annulment Process Working or Is It Now Time for an Appellate Mechanism?* (2011), <http://www.crowell.com/files/I>

Under the ICSID's procedural rules, awards may only be annulled on five grounds: (1) "the Tribunal was not properly constituted," (2) the Tribunal "manifestly exceeded its powers," (3) one of the arbitrators was corrupt, (4) there was "a serious departure from a fundamental rule of procedure," and (5) "the award has failed to state the reasons on which it is based."²⁹ When it was originally established, the ICSID's annulment mechanism was a boon to investor-state arbitration because it helped avoid the "pitfalls of national legal systems" from which international commercial arbitration often suffers.³⁰ Indeed, it was one of the unique elements that originally contributed to the Convention's success.³¹ More recently, however, as annulment committees have continued to issue more annulment decisions, it has become clear that they have often annulled awards based on legal rather than procedural grounds.³² In these specific cases, this action effectively turns the annulment process into a de facto appellate procedure capable of reviewing the legal holdings of the original tribunals.

In contrast, a relatively recent annulment decision, *CMS v. Argentina* illustrates the opposing dilemma for the ICSID annulment process.³³ In that case, the annulment committee refused to strike an award although it acknowledged the faulty legal reasoning of the original tribunal.³⁴ Despite the fact that the annulment committee made the correct decision by holding that it could not annul an award due to an error of legal reasoning, Argentina, nevertheless, refused to honor the award.³⁵

In part due to these two opposing dilemmas, many parties and experts have called for a reform of the annulment system, and even its replacement with a genuine mechanism for appellate review.³⁶ Although these problems

s-the-ICSID-Annulment-Process-Working-or-is-it-Now-Time-for-an-Appellate-Mechanism.pdf; Kim, *supra* note 11; see also *Yale Journal of International Law's 2012 ICSID Conference*, FOREIGN & INT'L BLOG (Nov. 2, 2012, 9:33 AM), <http://library.law.yale.edu/blogs/foreign-international-blog/2012/02/09/yale-journal-international-laws-2012-icsid-conference>.

²⁹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 66(1), Aug. 27, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

³⁰ Hans Van Houtte, *Article 52 of the Washington Convention: A Brief Introduction*, in ANNULMENT OF ICSID AWARDS 11, 11 (Emmanuel Gaillard & Yas Banifatemi eds., 2004).

³¹ *Id.*

³² Thomas W. Wälde, *ICSID 'Annulment Committee'*, TRANSNAT'L DISP. MGMT., Feb. 2004, at 24.

³³ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 136 (Sept. 25, 2007), 14 ICSID Rep. 251, 275–76 (2009).

³⁴ *Id.*

³⁵ Luke E. Peterson, *Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout*, LAW.COM (June 25, 2009), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202431736731&slreturn=20130009204331>.

³⁶ See *infra* Part II.C.

alone are substantial enough to cast doubt on the annulment mechanism, another concern has surfaced more recently that is likely to become more exacerbated over time.

As more annulment committees have been convened and more decisions released, it has become clear that these holdings have added yet another layer of inconsistency to the decisions of the original arbitral tribunals.³⁷ Given the judicialization that investor-state arbitration at the ICSID is currently undergoing,³⁸ this pattern of inconsistent annulment decisions could threaten the future legitimacy of the ICSID system.³⁹ Consequently, calls for reform or replacement of the annulment system have increased over the past several years.

Concern about inconsistent decisions has become especially pertinent as the issue of precedent in investment arbitration has arisen. Although no strict doctrine of precedent in international investment arbitration exists, research has demonstrated that prior published awards often impact how future arbitral tribunals rule.⁴⁰ Inconsistent decisions, at both the initial arbitration and the annulment stage, undoubtedly produce much uncertainty for parties arbitrating investment disputes.⁴¹ While the argument that finality is more important to parties than certainty does merit some consideration, especially as investors continue to win awards at a high frequency,⁴² it is unlikely that an investment dispute resolution mechanism based solely on finality will continue indefinitely at the expense of accuracy and certainty.⁴³ This becomes especially true where the losing party is likely to suffer significant

³⁷ Kim, *supra* note 11, at 246.

³⁸ Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 59–60 (2010).

³⁹ Kim, *supra* note 11, at 246.

⁴⁰ See generally Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1031 (2007) (noting arbitral tribunals tend to identify relevant prior decisions, compare the cost of departing from and adhering to precedent, decide whether to follow or depart from prior decisions, and then explain their choice).

⁴¹ The SGS cases (*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Iran* and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*) are one example of inconsistent decisions made at the ICSID. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1569 (2005) (“In the SGS cases, one ICSID tribunal held that the ‘umbrella clause’ cannot transform a failure to pay fees under a concession contract into a treaty breach, while another ICSID tribunal came to the opposite conclusion.”). See generally Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1064–78 (2007) (discussing the inconsistent ICSID holdings on Most-Favored Nation Clauses).

⁴² Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444, 445 (2006).

⁴³ See Franck, *supra* note 41, at 1548.

monetary damages. While member states often advance the interests of investors,⁴⁴ it is unlikely they will continue to do so in the face of increasing uncertainty.

Countries such as Ecuador, Bolivia, and Venezuela, which have left the ICSID convention, and Nicaragua, which has threatened to do so, argue that the ICSID process fails to produce fair results.⁴⁵ General distrust of foreign investors aside, the fact that several ostensibly erroneous awards have been rendered by the ICSID bolsters their arguments. Additionally, the fact that these countries have been sued frequently by investors probably influenced their decision to withdraw. Because damages can sometimes run into the billions and even tens of billions of dollars and potentially erroneous and inconsistent holdings are not subject to review, many countries are hesitant to place themselves on the hook on an ongoing basis.

C. *Proposals for Reform of Review of Awards at the ICSID*

In 2004, due to the increasing awareness and concern about the deficiencies of the ICSID annulment system, the ICSID Secretariat included in a discussion paper the possible need for appellate review and even proposed how such a system might operate.⁴⁶ In the publication the Secretariat cited the increasing number of investment treaties that include provisions for appellate review⁴⁷ and the need “to foster coherence and consistency in the case law emerging under investment treaties.”⁴⁸ Since this time, however, the ICSID has not moved forward with any plans to implement an appellate mechanism.

A variety of models have been proposed for a system of appellate review at the ICSID. One proposal posits that a permanent appellate body should be established to rule on all investment treaty matters regardless of whether the original procedure was carried out at the ICSID.⁴⁹ This approach would be difficult because, in addition to requiring the consent of all the member states

⁴⁴ Omar E. García-Bolívar, *The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements*, 6 J. WORLD INVESTMENT & TRADE 751, 751 (2005).

⁴⁵ See Joshua M. Robbins, *Ecuador Withdraws from ICSID Convention*, PRACTICAL LAW CO. (Aug. 12, 2009), <http://arbitration.practicallaw.com/2-422-1266>; John L. Gardiner et al., *Nicaragua Threatens Withdrawal from ICSID: Implications for Investors*, SKADDEN (Apr. 24, 2008), https://sasmf.com/content/Publications/Publications1391_0.pdf; Press Release, ICSID, Venezuela Submits a Notice Under Article 71 of the ICSID Convention (Jan. 26, 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>.

⁴⁶ ICSID Secretariat, *supra* note 13, at 14–16, annex 1–5.

⁴⁷ *Id.* at 14, para. 20.

⁴⁸ *Id.* at 14–15, para. 21.

⁴⁹ Franck, *supra* note 41, at 1524.

to amend the ICSID Convention to make awards appealable,⁵⁰ it would also require separate consent to make awards rendered under all other investment treaty dispute settlement institutions subject to review by the new appellate body.

The procedural difficulties of enacting such an appellate body cannot be underestimated. Doing so would require the consent and agreement of all state members of the international investment community. Where such consensus could not be achieved, the new appellate body—charged with the task of fostering consistency in international investment arbitral awards—would quickly find the reach of its decisions placed into question. This would likely be the case where some members of a multilateral investment treaty (MIT) or free trade agreement ratified the new appellate body while others did not. The new appellate body's authority and credibility would essentially come to rely entirely upon the universal agreement of all states that are part of the international investment community to subject all of their investment agreements and disputes to the new appellate mechanism. Establishing such a mechanism from scratch would be all but impossible in the complicated system of investment treaties and free trade agreements already in place, with the catch being that if universal consent could not be achieved, the new mechanism would lose its most attractive feature—its universality.

Another proposed solution has been the independent creation of appellate bodies for each individual investment treaty.⁵¹ This possibility would, however, lead to further fragmentation in investment dispute resolution,⁵² and as such, is unlikely to be a favorable model. Because the number of investment treaties is almost certain to continue to rise, such an appellate process would produce a system of progressively increasing fragmentation.

Under such a system, several potential problems could arise. First, the individual mechanisms themselves would undoubtedly vary from treaty to treaty, resulting in disparate legal holdings. This would become especially problematic where principles of international law are at issue because one of the goals of such a system would be to create consistency and certainty rather than forum-by-forum variation. Additionally, because each appellate body would undoubtedly operate differently,⁵³ the legitimacy and stability of each institution could vary. Consequently, since increasing consistency and uniformity (and thereby certainty) is a major goal of establishing an appellate

⁵⁰ ICSID Convention, *supra* note 29, art. 66(1).

⁵¹ Kim, *supra* note 11, at 276.

⁵² ICSID Secretariat, *supra* note 13, at 15–16, para. 23.

⁵³ For example, some might provide for the creation of ad hoc arbitral tribunals, while others might have a permanent appellate tribunal, and still others might be composed of members of national courts or bureaucracies.

mechanism for international investment arbitration, a treaty-by-treaty approach would be ineffective.

Another proposal would involve the establishment of a body similar to the NAFTA Free Trade Commission (FTC).⁵⁴ While this is not an appellate mechanism per se, it would be able to provide a check on inconsistent rulings.⁵⁵ Interpretations by the NAFTA FTC are binding on all future arbitrations under NAFTA, thus such a mechanism should be able to correct inconsistencies in tribunal decisions and altogether eliminate current annulment inconsistencies.⁵⁶

There has been concern, however, that bodies like the NAFTA FTC, which are comprised of domestic bureaucrats, often make self-serving decisions that threaten the legitimacy of the institution.⁵⁷ Additionally, these bodies would almost certainly have to be established at the treaty level, since having ministers from each sovereign party to the treaty is important in helping establish the legitimacy of binding interpretations. If such a system were enacted at a larger level, the increased number of sovereigns represented would almost certainly make the process too cumbersome to be of any use. Implementing something like the NAFTA FTC on a larger scale could raise concerns among states that their limited representation might result in problems regarding the level of consensus required for a binding interpretation. Additionally, there could be concerns among states that sovereigns with greater influence might have greater sway on a system that would necessarily bind them as well. Many states would likely object on this basis.

Since this proposal would have to be enacted at the treaty level, it would encounter many of the same issues as establishing an actual appellate body for each treaty, including legitimacy and inconsistency problems. Such a mechanism would not, therefore, be useful in achieving greater consistency and certainty in the interpretation of international investment law.

Despite all that has been written over the past several years about the faults of the current annulment mechanism and the need for a system of appellate procedure, to date, the ICSID has not instituted any reforms to this critical aspect of its procedure. While this is due at least in part to the difficulty of gaining the necessary consensus for such reform, current concerns are unlikely to subside and will probably increase as tribunals and annulment committees continue to issue inconsistent awards and annulment rulings. Consequently, the effort to establish an appellate mechanism at the ICSID is now more important than ever.

⁵⁴ Kim, *supra* note 11, at 277.

⁵⁵ *Id.*

⁵⁶ Franck, *supra* note 41, at 1604.

⁵⁷ *Id.* at 1604–05.

III. INTERNATIONAL COMMERCIAL ARBITRATION

Commercial arbitration, which in contrast to investor-state arbitration usually involves two private parties, has stumbled upon similar problems, albeit without the annulment mechanism that makes procedure at the ICSID so unique. Generally, the only recourse parties have to a disagreeable commercial arbitral decision is to appeal to the national courts at the site of the arbitration.⁵⁸ This nation-based system of review for international arbitral awards has produced a wide variation in parties' rights depending upon where the seat of arbitration is located.⁵⁹ Countries such as the United States, Great Britain, and China have not allowed a strict appeal of international arbitration awards,⁶⁰ at least not based on faulty legal reasoning. This line of thought holds that parties assume this risk when they enter into the arbitration agreement. In contrast, countries such as Austria and South Africa do allow "for appellate review of international commercial awards."⁶¹ Consequently, such widely varying results have made the determination of where the parties agree to hold the arbitration one of the most important decisions in drafting an international arbitration agreement.

Appeals of domestic commercial arbitration awards have, however, been permitted in several countries. Among them is the United States, where in 2000 the Center for Public Resources (CPR) Institute for Dispute Resolution was the "first major private commercial arbitration institution to establish separate, optional rules governing appeals procedures."⁶² Since then, other arbitration institutions have established appellate procedures, including the AMINZ.⁶³ This development in commercial arbitration is important not only for the ongoing effects it has on commercial arbitration, but also because of the example it provides for the related, but distinct, field of investment arbitration.

⁵⁸ Gleason, *supra* note 4, at 287.

⁵⁹ *See id.* (noting the lack of uniformity in standards and methods applied by national courts).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 555 (2000); *CPR Arbitration Appeal Procedure and Commentary*, CPR INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (2007), <http://cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/604/CPR-Arbitration-Appeal-Procedure-and-Commentary.aspx>.

⁶³ *AMINZ Arbitration Appeal Rules*, AMINZ COUNCIL (May 27, 2009), http://www.aminz.org.nz/Category?Action=View&Category_id=173 [hereinafter *AMINZ Appeal Rules*].

IV. THE ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND

The AMINZ is the largest professional organization for dispute resolution in New Zealand.⁶⁴ Having begun as a Branch of the Chartered Institute of Arbitrators (UK) in the 1970s, the organization incorporated as the Arbitrators' Institute of New Zealand in 1987.⁶⁵ Due to mergers with two other dispute resolution institutions, the institute was renamed as the Arbitrators' and Mediators' Institute of New Zealand in 1996.⁶⁶ The organization currently provides services in several areas of dispute resolution including: arbitration, mediation, negotiation, facilitation, conciliation, investigation, expert determination, and adjudication.⁶⁷

In 2009, the AMINZ enacted an arbitration appellate mechanism.⁶⁸ The Appeals Rules state their purpose "is to encourage, . . . the efficient, confidential and high-quality resolution of appeals from arbitral awards on questions of law."⁶⁹ The appellate system at the AMINZ was created primarily to address concerns over the confidentiality of dispute resolution proceedings.⁷⁰ Prior to the enactment of the Appeals Rules, appeals were sent to the High Court of New Zealand.⁷¹ In effect, this would take proceedings that were confidential at the AMINZ and result in their disclosure as soon as they entered the public court system.⁷² The AMINZ appellate mechanism was designed to correct this problem.

The AMINZ appellate procedure has many important features. Because its framework will be analyzed in reference to the manner in which an appellate mechanism at the ICSID could successfully function, it is important to become familiar with several of the defining factors of the AMINZ appellate structure.

As a starting point, filing an appeal within the AMINZ is provided as an alternative to appealing to the High Court of New Zealand.⁷³ For the

⁶⁴ AMINZ, <http://www.aminz.org.nz/MainMenu> (last visited Jan. 11, 2013).

⁶⁵ *About Us: Overview*, AMINZ, http://www.aminz.org.nz/Category?Action=View&Category_id=44 (last visited Jan. 11, 2013).

⁶⁶ *Id.*

⁶⁷ *Dispute Resolution Processes*, AMINZ, http://www.aminz.org.nz/Category?Action=View&Category_id=90 (last visited Jan. 11, 2013).

⁶⁸ *AMINZ Appeal Rules*, *supra* note 63.

⁶⁹ *Id.* art. 1.1.

⁷⁰ *Arbitration Appeals Tribunal*, AMINZ, http://www.aminz.org.nz/Category?Action=View&Category_id=172 (last visited Jan. 11, 2013).

⁷¹ *AMINZ Arbitration Appeal Tribunal*, *supra* note 14. The High Court of New Zealand is not to be confused with the Supreme Court of New Zealand, which was formerly called the Privy Council. *The History of the Court System*, THE COURTS OF NEW ZEALAND, <http://www.courtsofnz.govt.nz/front-page/about/system/history/overview> (last visited Jan. 11, 2013).

⁷² *Id.*

⁷³ *Arbitration Appeals Tribunal*, *supra* note 70.

Appeals Rules to apply, parties must agree to a right of appeal under the Rules.⁷⁴ Where there is such a right, parties are prohibited from taking any legal action against the other party or parties regarding the issue “until the time for filing an appeal has expired and no appeal has been filed or, if an appeal has been filed, until such appeal has been . . .” resolved.⁷⁵ However, the rules explicitly allow legal action after the time for filing an appeal at the AMINZ has expired, or after the Arbitration Appeal Tribunal (AAT) has made its final award.⁷⁶ Consequently, appeal within the AMINZ is optional, and resort to the High Court is the default procedure unless otherwise provided in the agreement to arbitrate.⁷⁷ The appeal is available only where the seat of arbitration has been either agreed to or found to be in New Zealand.⁷⁸

The Rules provide for the creation of three new bodies at the AMINZ: the Arbitration Appeals Committee (AAC), the Arbitration Appeal Panel (AAP), and the ad hoc Arbitration Appeal Tribunals (AATs). The AAC consists of three qualified members appointed by the AMINZ Council (the Council)⁷⁹ for renewable three-year terms.⁸⁰ The AAP is the other permanent body, and is comprised of former judges and other qualified arbitrators.⁸¹ Members of the AAP act as a pool of candidates for the third new body, the AATs, which are formed on an ad hoc basis.⁸²

An appeal under the Rules is only available if it is based on a question of law, which includes legal errors found in the original arbitration decision and those errors that were not on the record.⁸³ By limiting appeals to questions of law, this notably excludes questions regarding the absence or insufficiency of evidence upon which the decision was rendered, and questions regarding interpretation and inferences drawn from facts.⁸⁴ After the appellant files the appeal, the respondent may file a notice of cross-appeal as long as it is within the time provided for filing and notice of opposition to the appeal has been

⁷⁴ *AMINZ Appeal Rules*, *supra* note 63, art. 4.2.

⁷⁵ *Id.* art. 4.3.

⁷⁶ *Id.* art. 4.4.

⁷⁷ *Clauses for Your Agreement: Supplemental Clause for Use by Parties Wishing to Invoke the AMINZ Arbitration Appeals Rules*, AMINZ, http://www.aminz.org.nz/Category?Action=View&Category_id=512 (last visited Jan. 11, 2013).

⁷⁸ *AMINZ Appeal Rules*, *supra* note 63, art. 3.3.

⁷⁹ The Council is the AMINZ's main administrative body. A president, vice president, and five councillors comprise the Council. *Council and Staff*, AMINZ, http://www.aminz.org.nz/Category?Action=View&Category_id=97 (last visited Jan. 11, 2013).

⁸⁰ *Schedule, The Constitution of the AMINZ Arbitration Appeals Committee*, AMINZ, § A (2008), http://www.aminz.org.nz/Category?Action=View&Category_id=434.

⁸¹ *AMINZ Appeal Rules*, *supra* note 63, art. 2.1.

⁸² *Id.* arts. 1.1., 2.1.

⁸³ *Id.* art. 2.1.

⁸⁴ *Id.*

given, or if the AAT determines that a delay was warranted under the circumstances.⁸⁵

AATs are appointed on a case-by-case basis by the AAC and have either one or three members.⁸⁶ The AAC must take under consideration any requests made by the parties regarding any qualifications the arbitrator(s) require(s) and, in the event the parties are of different nationalities, the AAC will consider appointing an arbitrator of a different nationality than either of the parties.⁸⁷ Moreover, the parties may decide among themselves who the arbitrator(s) for the AAT will be, if the parties agree within five working days after all respondents have filed a notice of opposition.⁸⁸ In the absence of party wishes to the contrary, the AAC will select a sole arbitrator to hear the appeal.⁸⁹ Although all AAT members will generally be selected from the AAP, under exceptional circumstances, the AAC may select arbitrators who are not members of the AAP.⁹⁰

In the instance where one party seeks to bar an arbitrator from hearing an appeal, the AAC shall rule on the challenge.⁹¹ In such a case, the AAC's ruling is not subject to appeal.⁹² An oral hearing may be dispensed with if the parties agree, and the AAT may then make its decision based solely on the filings.⁹³

Rules regarding the award procedure are very important in any arbitration, particularly where the arbitration is the final permitted appeal (e.g. in New Zealand under the AMINZ), because the only other option parties will have is the public court system. Unless otherwise agreed by the parties, "the AAT shall state the reasons upon which its award is based."⁹⁴ In the event that there are three arbitrators in disagreement on an issue, a majority of two shall be determinative, and if no majority is present, the Chairman of the AAT shall be the one to decide.⁹⁵

Prior to issuing its award, the AAT may, using "its absolute discretion," require that all or part of the award issued by the original tribunal be paid to the other party or placed in escrow pending the outcome of the appeal.⁹⁶ The

⁸⁵ *Id.* art. 5.4.

⁸⁶ *Id.* art. 6.1.

⁸⁷ *Id.* art. 6.2.

⁸⁸ *Id.* art. 6.6.

⁸⁹ *Id.* art. 6.8(c).

⁹⁰ *Id.* art. 6.9. Such exceptional circumstances may relate to overseas appointments, but are ultimately left to the discretion of the AAC.

⁹¹ *Id.* art. 7.6.

⁹² *Id.*

⁹³ *Id.* art. 8.3.

⁹⁴ *Id.* art. 9.1.

⁹⁵ *Id.* art. 9.2.

⁹⁶ *Id.* arts. 10.1, 10.1(a).

AAT may also require that any party comply with any other order that was made in the original award.⁹⁷

Where the parties have agreed to a right of appeal under the Appeals Rules, the AAT is granted all the powers of the High Court of New Zealand, except that the AAT may not remand the award to the original “tribunal where that tribunal is unwilling or unable to accept the remission.”⁹⁸ In the event the original tribunal is unable or unwilling to accept the remand, the AAT may at its discretion rule on the issue itself.⁹⁹ Lastly, in the case of withdrawal by the appellant of the original appeal, the respondent still has the right to continue any cross-appeal(s) it has filed.¹⁰⁰ The abovementioned provisions of the Appeals Rules are the most crucial to understanding the appellate procedure.

V. MAPPING THE AMINZ ARBITRAL APPELLATE RULES ONTO THE ICSID SYSTEM

While the AMINZ appellate structure provides a solid basis for what an actual, successful appellate mechanism at the ICSID might look like, there are several questions to consider when applying the AMINZ rules to the ICSID. First, what issues arise regarding confidentiality? Second, would the new appellate mechanism replace the current system of annulment, and if so, to what extent? Third, what issues would be subject to appeal? Fourth, how would the appellate mechanism structurally function? And finally, how would the mechanism’s critical procedural rules best operate? As this analysis will show, the AMINZ appellate mechanism provides many useful insights into these questions.

A. Confidentiality

The first major issue, confidentiality, is preliminary to the analysis of the substantive appellate mechanism and is the fundamental reason the AMINZ appellate rules were created.¹⁰¹ The ICSID appellate mechanism’s purpose, however, would be entirely different from the goal of establishing a confidential appellate procedure. Under the original AMINZ arbitral procedure, an award was only subject to appeal to the High Court, where the original arbitral proceeding would enter the public record and lose

⁹⁷ *Id.* art. 10.1(b).

⁹⁸ *Id.* art. 12.1.

⁹⁹ *Id.*

¹⁰⁰ *Id.* art. 13.2.

¹⁰¹ *Arbitration Appeals Tribunal*, *supra* note 70.

confidentiality.¹⁰² The appellate system enacted by the AMINZ was designed specifically to address this problem.¹⁰³

In contrast, confidentiality is not one of the reasons an appellate mechanism at the ICSID is necessary. The current method provides for an annulment process within the ICSID structure, so whatever procedure for confidentiality is provided for in the original arbitration can be preserved in the annulment proceeding. However “[u]nlike international commercial arbitrations between two private corporations, which are generally confidential, investment treaty arbitrations are subject to lower levels of confidentiality.”¹⁰⁴

To be sure, confidentiality does play a role at the ICSID,¹⁰⁵ albeit a lesser one than in commercial arbitration. For one, ICSID Rule 48(4) provides that even where the parties choose not to have the award published, the ICSID will still include in its publications excerpts of the tribunal’s reasoning.¹⁰⁶ Additionally, many ICSID awards and proceedings are made public pursuant to the wishes of the parties and are easily accessed at the ICSID’s website.¹⁰⁷

Publication of awards by the ICSID and its obligatory release of tribunals’ reasoning, even in cases where one or both parties wish to keep the proceedings confidential, further illustrate the precedential value of tribunal awards. In addition to maintaining the transparency of the ICSID as an organization, publication of awards also provides future guidance for parties and arbitrators regarding past and current legal reasoning in international investment law. The importance of disclosure in international investment arbitration cannot be understated.

With disclosure comes public scrutiny. Because international investment law, i.e., the principles and rules of public international law relevant to foreign investments, is a rapidly developing field, it was inevitable that arbitrators would occasionally render contradictory awards. These conflicts have raised urgent questions about the extent to which awards are bound by a system of precedent, and, more broadly, whether

¹⁰² *AMINZ Arbitration Appeals Tribunal*, *supra* note 14.

¹⁰³ *See id.* (describing the establishment of the tribunal).

¹⁰⁴ Cheng, *supra* note 40, at 1014–15.

¹⁰⁵ For an explanation of the ICSID’s confidentiality rules, *see* Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 995–96 (2001) (stating the ICSID Arbitration Rules provide for the privacy of the proceedings and a duty of confidentiality on the tribunal).

¹⁰⁶ ICSID Convention, *supra* note 29, Rule 48(4).

¹⁰⁷ *Search Online Decisions and Awards*, ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward> (last visited Jan. 11, 2013).

international investment law is stable and predictable. International arbitrators have acknowledged that these issues may influence both the actual legitimacy and the public's perceptions of legitimacy of investment treaty arbitral awards, and . . . international investment law itself.¹⁰⁸

While this point need not be belabored, it is worthy of note because the ICSID arbitral appellate body, unlike the AMINZ appellate tribunals, would be issuing decisions that will help to clarify points of international investment law rather than preserving arbitral appeals from the public sphere. This benefit cannot be gained without maintaining at least the minimal level of disclosure that the ICSID currently mandates of all of the matters it handles. Consequently, while the AMINZ appellate mechanism is informative regarding how an appellate structure can successfully operate at the ICSID, its rules regarding confidentiality will inevitably be somewhat at odds with those of the ICSID.

B. The Impact of the New Appellate Mechanism upon the Annulment Process

Another important consideration is whether the new appellate mechanism will need to replace the current annulment process, and if so, whether it would need to do so in whole or in part. This Note argues that while the current annulment mechanism could be replaced by the appellate structure, it should not be. Instead, the appellate body should be permitted to operate parallel to the annulment committees, with parties having the option to choose between the two mechanisms, either prior to arbitration proceedings or after they have begun.

The AMINZ reform is instructive on this point. The AMINZ appellate structure is an alternative to appealing to the New Zealand High Court¹⁰⁹ rather than as a replacement of the public appeals option. In much the same way, the current annulment mechanism could remain intact at the ICSID when the new appellate body is added.¹¹⁰ This Note argues that this structure should be maintained for several reasons.

¹⁰⁸ Cheng, *supra* note 40, at 1015–16.

¹⁰⁹ *Arbitration Appeals Tribunal*, *supra* note 70.

¹¹⁰ While it is beyond the scope of this Note to discuss the issues of judicialization in arbitration that a new appellate body creates, it should not be ignored entirely. Judicialization is often perceived as a negative development in arbitration because one of the original goals of arbitration is to avoid some of the aspects of judicialization, such as the impact prior awards have on the future actions of governmental and private entities. Briefly addressed, this is not the case either at the AMINZ or at the ICSID. First, the original AMINZ process already provided for introducing cases into the public judicial system. Thus, by allowing confidential

First, the annulment mechanism generally allows for a speedier resolution of conflicts than an appellate mechanism allowing for appeals based on legal issues. Indeed, finality is a reason that substantive review of awards has not to date been permitted at the ICSID¹¹¹ and is the key reason such review is not available.¹¹² Many investors are attracted to the current ICSID arbitration process in part because of its high degree of finality.¹¹³ Despite the inconsistencies the current annulment process permits to exist at the original award stage and the further ambiguities it creates within annulment holdings themselves, there is no reason to believe that every party would favor accuracy over finality. Indeed, the reason that the annulment process still exists today, rather than an option for substantive review of awards, is due at least in part to the desire of some parties to have such a system available. If this were not the case, and all parties disapproved of the annulment process, reforms addressing the topic at issue would have been implemented long ago. Not every party will desire accuracy over finality now or at any time during the future, and this Note does not posit that they will.¹¹⁴ Consequently, should the ICSID institute reforms, it must strive to maintain as much as possible those aspects of its current process that make it attractive to various parties. To do so would retain its broad appeal to investors and states alike and preserve, if not increase, its share of international investment arbitrations.

Allowing parties to choose which mechanism will be available to them after the initial award is rendered has several advantages. First, parties that prefer the finality that the annulment process provides will be able to maintain the status quo by settling their disputes at the ICSID rather than seeking out an alternative forum. Parties valuing the accuracy of the legal reasoning of awards, however, will be permitted to appeal awards on legal grounds through the new ICSID appellate mechanism.

appeals within the AMINZ, this aspect of judicialization was actually reduced. At the ICSID, the proposed reform would actually increase judicialization, but for various reasons established in earlier research and reasserted in this Note, this change is actually a positive development in international investment law. For a more complete analysis of the judicialization of the ICSID and its effects, *see generally* Kim, *supra* note 11, at 252–58 (arguing that to enhance its legitimacy, the ICSID needs to be able to place a check on inconsistent awards made at the tribunal level).

¹¹¹ Walsh, *supra* note 42, at 444–45.

¹¹² *Id.* at 444.

¹¹³ *Id.*

¹¹⁴ While some parties may prefer the current level of finality over increased certainty and therefore would not choose the appellate option, this does not preclude a desire to benefit from the increased certainty that precedent from appellate tribunals would create even at the original arbitral stage. Indeed, as is discussed further below, the effects of precedent from an appellate body will likely be felt even by parties that choose not to allow the substance of their awards to be appealed.

This approach is beneficial because implementing the new appellate mechanism in this manner will not only present the parties with the advantage of choice, but also allow the precedential effect of the new appellate body to take hold despite maintaining the annulment process. As the appellate body begins issuing rulings on substantive appeals, all parties will have the advantage of increased certainty that precedent provides. While this does not guarantee that awards subject to the annulment mechanism will be accurate, as errors in tribunals' legal reasoning will still not be appealable for parties using this procedure, it will increase the chance that the original tribunals will apply legal principles correctly. Greater accuracy during the original arbitration will be facilitated by the emergence of a single body of precedent from the appellate tribunal. Consequently, all parties will benefit from the increased certainty of these reforms whether or not they choose to directly engage the substantive appeal option.

The introduction of choice raises another important issue in this process, namely, which mechanism will be the default in instances where the parties cannot agree. If the parties cannot reach an agreement and one party is absolutely opposed to the default option, the ICSID's dominant position in international investment arbitration may be jeopardized as parties consider other forums in which to settle their disputes. For reasons to be elaborated upon below, however, this concern is almost certainly unjustified.

The AMINZ structure is once again instructive on this point. At least initially, the annulment mechanism should be retained as the default option at the ICSID because it maintains the status quo. The AMINZ reform is informative because retaining the status quo as the default option permits parties to retain a higher degree of certainty with respect to what review mechanism will be available to them. Prior to the reform, parties knew that by agreeing to arbitration at the AMINZ their awards might be subject to appeal to the High Court where the arbitration proceedings would be disclosed. While confidentiality is not an issue on this point in ICSID proceedings, the underlying reasoning is identical: when investors and states initially consented to resolve their disputes at the ICSID, they understood their awards would be subject to the annulment mechanism. Although the comparative benefits of the substantive appellate option over the annulment mechanism can be touted as a reason to make the new appeals option the default, this idea was not part of the parties' initial reasoning. When consent to ICSID jurisdiction was originally given,¹¹⁵ parties could not have foreseen that they would be subject to a substantive appeals process. Consequently, without the consent of all parties to a dispute, they should not be forced to

¹¹⁵ Assuming consent was given prior to the reforms proposed in this Note.

subject themselves to the new appellate body when they originally agreed to the annulment process by engaging in arbitration at the ICSID.

The AMINZ model should be applied by the ICSID in reforming its process in this regard. First, keeping the current annulment mechanism in place allows the ICSID to maintain its support base that prefers that procedural element, while simultaneously allowing for these parties to benefit from the increased certainty that precedent established by the new appellate body provides. Second, allowing the annulment mechanism to remain the default review procedure affirms the parties' original expectations. It also adds the benefit of predictability from new precedent and provides the parties with the option of agreeing to have awards issued in their disputes subject to substantive review.

C. Issues Subject to Appeal

As discussed in Part IV, the right to appeal to an AAT at the AMINZ is limited to questions of law. Appeals based on the absence or insufficiency of evidence and interpretations or inferences based on these facts are impermissible. An ICSID appellate body should adopt this rule, with one important caveat regarding the current grounds for annulment.

Before discussing this modification, the reasons for permitting appeals of questions of law, while prohibiting appeals based on questions of fact, bears repeating. Doing so is important to justify total prohibition of review of evidence and facts where an argument for such appeals could be made. An argument in favor of allowing evidentiary and factual issues to be appealed could be asserted on the basis that if parties agree to have their disputes be subject to appeal on these issues, they should be free to do so. The new ICSID appellate mechanism should emulate the AMINZ process by not allowing appeal over a free range of issues subject solely to the limit of the parties' consent for the following reasons.

Foremost, some measure of finality should be maintained in the awards of arbitral tribunals. If every issue of fact becomes subject to appeal, then awards by the original tribunal run the risk of becoming meaningless and superfluous.¹¹⁶ To become a credible system of appeal, review must be limited to legal issues.

Because the appellate body will hear appeals only where all the factual issues and inferences have already been determined, all parties and the appellate tribunal will have a degree of certainty regarding the factual record. Another benefit from permitting appeals only on questions of law is that the

¹¹⁶ While this would certainly not be a universal occurrence, the possibility that this could occur would jeopardize the strong reputation of the ICSID's dispute resolution mechanism, as it would for any judicial or arbitral system.

new appellate body will provide for flexibility, accuracy, and certainty that do not currently exist at the ICSID, while also keeping the grounds for appeal within respectable limits. Further, limiting appeals to questions of law avoids jeopardizing the current strengths that make arbitration at the ICSID so attractive to investors and states alike.

There is, however, one important caveat to an appellate mechanism that arises under the ICSID framework and not under the AMINZ procedure: whether issues that are currently subject to annulment should be issues that can be later appealed to an appellate tribunal. The five grounds for annulment should be separate grounds for appeal to the appellate tribunals apart from questions of law.¹¹⁷ There are two reasons this policy should be enacted.

First, allowing appeal of the five grounds for annulment does not extend the issues for appeal to evidentiary and factual questions. Instead, the grounds for annulment are much more specific. While they do not extend to questions of law, they serve an important purpose in protecting parties from awards where there were serious problems with the tribunal, such as it was not properly formed, exceeded its authority, or one of its members was corrupt.¹¹⁸ The last two grounds—there was a serious and fundamental procedural error or the award does not contain a statement of the reasoning upon which it is based—are also equally serious problems.

Next, in order to maintain parties' basic expectations, both at the ICSID and for dispute resolution in general, such serious flaws must be able to be addressed by any appellate or annulment mechanism. Because parties will have the ability to opt out of the annulment mechanism and into the new appellate system, it would be inappropriate and damaging to the reputation of the ICSID process if new appellate tribunals could not reverse an award for one of the five reasons for which they can currently be annulled. The AMINZ procedure is not instructive on this point because its new appellate mechanism actually mirrors the prior process at the AMINZ, where the appellate tribunal is given the same authority as that of the High Court in handling an appeal.¹¹⁹ Because of this fundamental difference, the new ICSID appellate body should have explicit authority to hear all appeals based on the grounds for annulment where the parties have agreed to a right to appeal.¹²⁰

¹¹⁷ See *supra* note 29 and accompanying text (referencing the ICSID Convention).

¹¹⁸ *AMINZ Appeal Rules*, *supra* note 63, art. 52.

¹¹⁹ *Id.* art. 12.1.

¹²⁰ The issue of precedent involving issues appealed based on the five grounds for annulment need not be dwelled upon at great length here, but it is worth mentioning. As discussed in Part II above, the annulment committees have actually added an additional layer of inconsistency to ICSID awards. Thus, the fact that the appellate tribunals can review awards on these grounds, although not on appeal from the annulment committees themselves

D. Structuring the New Appellate Mechanism

The next issue in ICSID appellate reform, which is the actual structure of the mechanism itself, is fundamental to the long-term success of the ICSID appellate system. The AMINZ mechanism provides guidance on many of the issues that arise in this area.

As discussed in Part IV, the AMINZ reforms created three new bodies to carry out the appellate process: the AAC, the AAP, and the AATs. This structure is useful for several reasons, and should be implemented by the ICSID with certain limited modifications.

The AAC can be easily replicated at the ICSID. The members of the AAC would be appointed by the Secretariat, which is already responsible for “providing institutional support for . . . ICSID proceedings,” assisting in establishing commissions, tribunals, and committees, and administering the proceedings of cases.¹²¹ The exact number of members of the AAC need not be limited to three. In the interest of both representing the interests of the ICSID’s various member states while concurrently not making the AAC too large and cumbersome, a body comprised of a minimum of five members and not too many more would seem to be an appropriate solution.

The AAC would be primarily responsible for establishing the AATs for each case on an ad hoc basis. Allowing the AAC to appoint the AATs, rather than the Secretariat, will help foster confidence in the new mechanism because it will be transparent, a smaller body than the Secretariat, and solely responsible for dealing with arbitral appeals. Establishing an independent AAC to administer appellate proceedings will avoid the possibility of the Secretariat becoming overburdened, and allowing the Secretariat to appoint the individual members of the AAC will ensure that it still maintains a role in the administration of appellate proceedings. As at the AMINZ, members of the ICSID AAC should be appointed for a renewable term of three years. This provides for stability in leadership at the AAC while also allowing the organization to be flexible by replacing members as they, or the Secretariat, deem necessary.

The next institutional body that would need to be established is an AAP where appellate level arbitrators would be pooled. This group of arbitrators

as the two mechanisms are mutually exclusive, will almost certainly help foster consistency on these issues. Additionally, it is arguable that the inconsistency at the annulment stage is caused at least in part by the uncertainty annulment committees have regarding the extent of their authority. Due to its clear position as an appellate body with the ability to rule on legal issues, this factor would not be present in the new appellate mechanism, with the consequence that overall certainty would be increased in the process.

¹²¹ *Organizational Structure of ICSID*, ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Organization%20and%20Structure&pageName=Organization> (last visited Jan. 11, 2013).

would ideally be specialists and professionals in international investment arbitration who would be willing to make a long-term availability commitment to hear appeals at the ICSID.

The value of having a permanent pool of arbitrators is even more important at the ICSID than at the AMINZ because of the precedential effect the decisions by the AATs will have. By creating a consistent group of appellate tribunal members who will be available to serve on several appellate tribunals over time, consistency can be more easily established, which will help to foster certainty. As a measure of comparison, if there were no AAP, and appellate arbitrators were instead selected on an entirely independent basis, consistency in decision-making would likely be jeopardized. By having a permanent pool of arbitrators where members enter and exit the organization slowly, consistency can be promoted at both the micro and macro levels. At the level of the individual appeal, parties will know who the possible tribunal members will be, while the system as a whole will benefit from having a limited group of experts in the field making appellate level decisions about international investment law. This structure will help strengthen the system as a whole while maintaining the flexibility of being able to slowly integrate new members into the AAP.

Under the AMINZ procedure, arbitrators apply to the AMINZ Council, and not to the AAC, for admission to the AAP.¹²² This procedure can be easily replicated at the ICSID by allowing the Secretariat to determine who will be admitted to the AAP. Allowing the Secretariat rather than the AAC to make these decisions is important for a few reasons.

First, the fact that the AAC appoints members of the AAP to the individual AATs provides a strong case for a separate decision-maker determining who should serve on the AAP. The AAC's role at the AMINZ is to administer the appellate proceedings, not to organize the mechanism itself. This role falls to the AMINZ Council. Similarly, while the ICSID Secretariat will not be responsible for the day-to-day appellate procedure, the primary responsibility for organizing the ICSID appellate mechanism would rest with it. Consequently, the AMINZ appellate procedure is quite instructive on this point and can be replicated at the ICSID.

Second, having the Secretariat determine admission to the AAP will provide an additional layer of review when it comes to the composition of the AATs. Rather than having the AAP and AATs chosen by the same group of people, it is beneficial and more legitimate to have separate groups of people involved in selecting who will be on the AAP and who will hear a specific appeal on an AAT.

¹²² *Admission Criteria*, AMINZ, http://www.aminz.org.nz/Category?Action=View&Category_id=435 (last visited Jan. 11, 2013).

The third reason for allowing the Secretariat to appoint individuals to the AAP is that the Secretariat is a permanent body of non-rotating members, while members of the AAC are in a more temporary position. Because members of the AAP are subject to a renewal of their term every few years, allowing permanent members of the Secretariat to determine who occupies these positions is a better option than allowing members of the AAC, who are also subject to renewal by the Secretariat. This procedure will help to maintain greater uniformity in the nomination process, as there is generally less turnover among members of the Secretariat than of the AAC.

In short, it is the role of the Secretariat to organize the appellate structure at its most general level. The AAC, which is composed of temporary members responsible for the administration of individual appeals, operates the system established by the Secretariat on a day-to-day and case-by-case basis. Consequently, the current ICSID structure lends itself to organizational reform using the AMINZ structure as a model.

The AMINZ procedure for establishment of individual AATs by the AAC can also be replicated at the ICSID. While the role of the AAC in appointing individual members to the AATs has been discussed above, discussion of the constitution and role of the individual AAT in the appellate procedure lends itself best to analysis with the next issue: the new appellate procedure.

E. Appellate Procedure at the ICSID

The last issue that arises in considering a new appellate mechanism at the ICSID is its actual procedure. While not all procedural elements are called into issue in this analysis, some must be addressed because they are crucial to the successful operation of the ICSID appellate process. Many of these elements relate to and develop from the foregoing analysis, and once again the AMINZ appellate procedure successfully maps onto and guides the development of the proposed ICSID appellate mechanism.

In determining the appellate arbitrators for the AATs, the AMINZ AAC is allowed to consider the input of the individual parties.¹²³ The AAC ultimately makes all determinations regarding the composition of the AAT,¹²⁴ although it may also consider the wishes of the parties.¹²⁵ This procedure can be replicated at the ICSID and is important so that the ICSID itself, through the AAC, will be able to determine the members of the tribunal and how many members will hear the appeal. Selection of AAT arbitrators by the AAC will help the ICSID maintain tighter control over the appellate process than it does over the original arbitral tribunals. This

¹²³ *AMINZ Appeal Rules*, *supra* note 63, art. 5.1(a)(i).

¹²⁴ *Id.* art. 6.1.

¹²⁵ *Id.* art. 6.2.

control is important because the appellate tribunals will often be involved in clarifying difficult legal issues and even rectifying different approaches taken by earlier arbitral tribunals that are in conflict with one another. Allowing the ICSID AAC to ultimately determine the composition of the individual tribunals will ensure that none of its members are picked by one of the parties solely on self-serving grounds. While selection of arbitrators by the parties is allowed and indeed important for the constitution of the original tribunal because parties often attempt to appoint arbitrators who they believe will sympathize with their case, appeals are designed to address legal mistakes of those tribunals and will have further reaching precedential effects. Consequently, the appellate tribunals should not be appointed by the parties themselves, but should be chosen by the AAC because the ACC is more concerned with the integrity of the system as a whole than on the wishes of the parties to the appeal.

Another procedural rule that is important for the ICSID to adopt from the AMINZ appellate process is the requirement that the AATs state the reasoning for their awards. This is important at the ICSID not only to help further clarify and settle the matter between the parties themselves, but also as a procedural element for the appellate mechanism to foster consistency and certainty for parties in the future regarding the status of international investment law. Indeed, it is crucial that the ICSID adopt this procedural mechanism. Even where the parties may agree to keep their arbitration confidential, the ICSID can still continue to state the basic reasoning in its regular publications as it already does under confidential annulment proceedings.

A final procedural element that is important to carry over from the AMINZ appellate tribunals is the power of the ICSID AATs to have full review of the award including the ability to remand the award to the original tribunal, unless that tribunal is either unwilling or unable to conduct the remand. This is a useful procedure at the AMINZ that allows the AATs to review awards within their sphere of legal review while also allowing them to remand the case to allow the original tribunal to rule on issues that are its responsibility to determine. Importantly, the AMINZ rules also provide that if the original tribunal cannot be reconstituted, the AAT may rule on the issue itself if it wishes. Allowing the ICSID AATs to do this would strengthen its new mechanism by preventing cases from being delayed where the original tribunal is not available to rule on an issue.

VI. CONCLUSION

The ICSID is currently at an important juncture in its development as the leading forum for the arbitration of international investment disputes. The

past decade has seen a tremendous growth in applications to arbitrate disputes at the ICSID, which is in large part due to the institution's many strengths. In the process, however, some underlying problems have become increasingly exposed, most notably the continuing use of the unreformed annulment mechanism. The field of international investment arbitration is subject to an increasing number of disputes that often address important and unsettled issues of investment law. The ICSID however, has not yet developed a way to resolve inconsistencies caused by divergent decisions among tribunals on certain legal issues, nor developed a way to correct a legal error in any single case. Early on in the institution's life, consistency seemed to be a sacrifice worth making in exchange for finality. Nonetheless, as inconsistent decisions become more problematic with the growth of the field of international investment it has become apparent that the ICSID can no longer ignore the need for consistency, certainty, and predictability in international investment law if it is to continue to lead as the primary dispute resolution institution. While the present annulment mechanism need not be eliminated, it should not remain the sole process available for the review of arbitral awards.

Several alternatives have been presented to solve this current problem in international investment law. For various reasons discussed in Part II above, these proposals are either unfeasible or would not adequately address the issues. By analogizing to a new arbitral appellate mechanism used in commercial arbitration (the AMINZ), this Note has provided insight into how a more conventional appellate mechanism might function at the ICSID and what points of consideration are necessary when instituting such reforms. The time has come for the ICSID and its signatory members to begin to confront these issues and, in so doing, develop a new procedure that will be able to address the complex and unsettled issues of international investment law in the twenty-first century.