
The Concept of Appeal in International Dispute Settlement*

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Abstract

The WTO Appellate Body represents an innovation in international law in that an international adjudication authority now operates as a final instance to hear appeals arising from international arbitral (panel) procedures. It is thereby strongly emulating domestic appellate courts without, however, possessing the characteristics that make appellate courts the institutions of justice that they are. Following this trend in a cutting-edge fashion are several other inter-governmental arrangements that had been either concluded (Central America Free Trade Agreement (CAFTA), the Olivos Protocol in the Southern Common Market (Mercosur)) or proposed (the US Congresses' 2002 Trade Promotion Authority Act, the ICSID Discussion Paper of 22 October 2004, the third draft Free Trade Area for the Americas). They embrace the concept of a permanent international instance for appeal from arbitral awards, particularly regarding investment agreements including also disputes arising between the state (public) and the individual legal person (private).

1 Introduction

One of the innovations in international law¹ introduced in the Marrakech Agreement Establishing the World Trade Organization (WTO)² was the Appellate Body (AB), then unique among global and multilateral organizations. Presumably, for trade

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¹ Throughout the article, I use 'international law' and 'public international law' interchangeably.

² Agreement establishing the World Trade Organization, 1994, available at: www.wto.org.

and investment matters, the international community now has an international adjudicatory authority that operates as a *final* instance to hear appeals arising from its international *panel* procedures. The cutting-edge WTO AB precipitated a following as several other multilateral inter-governmental arrangements were either concluded (the International Centre for the Settlement of Investment Disputes (ICSID) amendments,³ Central America Free Trade Agreement (CAFTA-DR-US),⁴ the Olivos Protocol in the Southern Common Market (MERCOSUR),⁵ the US Congress' 2002 Trade Promotion Authority Act),⁶ or proposed (the third draft Free Trade Area for the Americas (FTAA)⁷). They embrace the concept of a permanent international instance for appeal from arbitral or panel awards, including also investment disputes arising between the state (public) and the individual legal person (private). Arguably, in principle, this trend is inspired by the concept of domestic *appellate courts*.⁸ But, is it really assuming such a role?

Much has been written about the gap between theory and practice regarding compliance with WTO panel as well as AB awards. A review of the literature shows that in the discourse on the judicialization of international organizations and regimes, the *inductive* approach focusing on various aspects of the appeal procedure, e.g. standard of review, relation to domestic courts and domestic law, judicial law-making, effectiveness of the process, etc.,⁹ has been dominant. Similarly, the literature on annulment of an award has been largely focused on ICSID procedures and the investor–state relationship.¹⁰ In this article, I am arguing that what require

³ ICSID Discussion Paper, 22 Oct. 2004, and Amendments to the ICSID Rules and regulations. ICSID News Release, 5 Apr. 2006, available at: www.worldbank.org/icsid/highlights/03-04-06.htm.

⁴ Annex 10F-Appellate Body or Similar Mechanism, Chapter Ten Investment, The Central America–Dominican Republic–United States Free Trade Agreement, 2004, available at: www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

⁵ *Protocolo de Olivos para la Solución de Controversias en el MERCOSUR*, Secretariat MERCOSUR, 2000, available at: www.mercosur.int/msweb/principal/contenido.asp.

⁶ US Model Bilateral Investment Treaty (BIT), 2004, Office of the US Trade Representative, available at: www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html; see also Hornbeck, 'A Free Trade Area of the Americas: Status of Negotiations and Major Policy Issues', *CRS Report RS20864*.

⁷ Third Draft Agreement – November 21, 2003. Free Trade of the Americas Draft Agreement. FTAA.TNC/w/133/Rev.3, available at: www.ftaa-alca.org/FTAADraft03/Index_e.asp.

⁸ It generally coincides with appellate mechanisms in other areas, for instance, in the International Criminal Tribunal for the Former Yugoslavia (ICTY). However, appellate bodies in the area of international criminal and humanitarian law are distinguishable primarily due to the evidentiary rules as well as judicial appointment procedures governing the entire adjudicatory process leading up to appeal. The first report of the ICTY clearly states: '9. Certain basic traits of the Tribunal stand out to distinguish it not only from war crimes tribunals of the past but also from any other mechanism for international dispute resolution': *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, ICTY Annual Report, UN GA Forty-Ninth Session A/49/342–S/1994/1007, 29 Aug. 1994, available at: <http://www.un.org/icty/rappannu-e/1994/index.htm>. For lack of space, I will defer this discussion for another time.

⁹ To which I will refer throughout this article.

¹⁰ Bjorklund, 'The Continuing Appeal of Annulment: Lessons from *Amco Asia* and *CME*', in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), at 471.

a profound debate are rather deliberations on the purpose and role of appeal (and finality) in general, and specifically in international law. Therefore, the focus will be on (a) the meaning of finality in international trade and investment dispute settlement (DS),¹¹ and (b) the corollary designation of ‘appellate’ to adjudicative bodies in international trade and investment law, which do not satisfy those characteristics that make municipal¹² appellate courts the institutions of justice that they are.

The main common denominator arising explicitly or implicitly in the discourse is that an appeal instance is warranted as a means to harmonize an increasingly fragmented international jurisprudence and law. In the following preliminary thoughts on the subject, which I tackle in a *deductive* approach, I explore the theoretical teleology of finality and how it is served by the appeal process. I begin by identifying the meaning of, and purpose served by, finality for justice and the rule of law (consistency, integrity, and certainty). I then discuss two core principles of law designed to sustain finality – *res judicata* and *stare decisis*. Next, I analyse the divide separating international law theory from practice, and arising from the difference between municipal law (in which these principles are rooted) and international law; and apply it to the difference between courts and tribunals (litigation and arbitration). I then list some of the issues emerging from the international legislation’s legalization of DS and adjudication (mainly the WTO, North American Free Trade Agreement (NAFTA),¹³ and ICSID provisions), which, when juxtaposed with the principles above, reveal the paradoxical nature of contemporary international ‘appeal’. In conclusion, I argue that in order to prevent further discontinuities in public international law and satisfy the need for finality, a discussion of the relationship between the theoretical and practical developments of public international law must precede, at least accompany, the development and design of procedural aspects of appeal.

¹¹ Due to the recent proliferation of treaties and DS mechanisms and bodies, resulting in paralleling and competing jurisdictions and awards, those experts focusing their attention on the subject of finality most typically concentrate on DS in trade and investment. In the report on *The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (International Law Commission, UN GA Fifty-Eighth Session, 13 Apr. 2006, available at [http://untreaty.un.org/ilc/summaries/...](http://untreaty.un.org/ilc/summaries/)), the Chairman, Martti Koskeniemi, addresses several issues pertinent to finality. Nevertheless, the report does not discuss the issue of appellate review. Although reference is occasionally made to the role of hierarchy, the report specifies as follows:

‘12. ... But what does this do to the objectives of legal certainty and the equality of legal subjects?’

13. The previous paragraph raises both institutional and substantive problems. The former have to do with the competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves’ (at 13). Other notable attempts at coming to grips with the transformative evolution of international law have also left the appellate review outside their scope of study: see, e.g., Teitel, ‘Humanity’s Law: Rule of Law for the New Global Politics’, 35 *Cornell Int’l LJ* (2002) 355.

¹² Throughout the article, I use ‘municipal’, ‘domestic’, and ‘national’ interchangeably.

¹³ Secretariat. North American Free Trade Agreement 1994, available at: www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78.

2 Finality

What constitutes finality in international law was and remains ‘still unclear’.¹⁴ Hart’s characterization may offer the closest definition: ‘[a] supreme tribunal has the *last* word in saying what the law is, and when it has said it, the statement that the court was “wrong” has no consequence within the system: no one’s rights or duties are thereby altered’.¹⁵ Much of the literature addressing finality discusses the interest of the international community, and consequently of international law, in finality;¹⁶ the nature of international law as presumably favouring finality;¹⁷ or proposes various prisms through which to seek an understanding of finality in international law.¹⁸ However, I found little discussion of the *meaning* of finality in international law,¹⁹ and, similarly, almost no discourse on the *essence* of the ultimate process leading to finality, namely appeal.²⁰

To understand the full-scale of implications of the (trans)forming new process of appellate review in a developing international law, I employ the positivist measuring yard. Within this legal theory, which served the international community for most of the past century, the adjudicative system in public international law is postulated as a legal system designed to fulfil the justice-as-fairness needs of the international system of states.²¹ Procedurally, any justice system serves fairness by fostering certainty through

¹⁴ J. Jackson quoted in Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), at 253, n. 114.

¹⁵ H.L.A. Hart, *The Concept of Law* (2nd edn., 1994), at 141.

¹⁶ E.g., Shany, *supra* note 14, at 170.

¹⁷ E.g., indirectly, R. Dworkin, *Law’s Empire* (1986), at Ch. 7.

¹⁸ E.g., R. Muellerson, *Ordering Anarchy. International Law in International Society* (2000).

¹⁹ Although there is ample discussion of *res judicata*, which represents one component of finality. Most recent and significant is the treatment of *res judicata* by the International Court of Justice (ICJ) in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, General List 91, available at: www.icj-cij.org/homepage/index.php?lang=en.

²⁰ Here, too, there is a growing literature about procedures that may be considered as necessary components of an appeal process, but I have not seen any discussion of the link of appeal to finality in public international law. Bjorklund mentions the dichotomy of correctness and finality as a tension governing arbitration, not appeal (*supra* note 10, at 504–505, 512).

²¹ I am not ignoring the importance and right to justice of non-state actors (NSAs) in the international system. I am simply acknowledging the origins of that legal system. See T.M. Franck, *Fairness in International Law and Institutions* (1995). Teitel, like many others by now, identifies an ethos of a new global rule of law that ‘challenges the international legal system’s prevailing bases and values in a number of ways’ (*supra*, note 11, at 359). She provides an important analysis of several theoretical tensions with conflicting practical outcomes, e.g. between domestic and international law, humanitarian and human rights law, international criminal law and the law relating to national self-determination. These suggest a possible departure from a positivist approach governing international law to what she refers to as a humanitarianist’s approach. See, for instance, also Gal-Or, ‘Private vs. Public International Justice: The Role of ADR in Global and Regional Economic Treaties’, in R.C. Thomsen and N.L. Hale (eds), *Canadian Environments: Essays in Culture, Politics and History* (2005), xx, 205–229 (hereinafter ‘Private vs. Public International Justice’); Gal-Or, ‘Outsourcing of Justice: Applying the Legitimacy Test of Fairness to the Institutionalisation of International Commercial Arbitration’, in J. Meyer *et al.* (eds), *Reflexive Representations: Politics, Hegemony, and Discourse, in Global Capitalism* (2004), at 127–139 (hereinafter ‘Outsourcing of Justice’).

the combination of consistency and integrity.²² However, the recent mushrooming of many international courts and tribunals, and the often different, at times contradictory, awards they produce,²³ suggest a development in public international law which is anathema to justice, even to the notion of legality,²⁴ because it lacks uniformity.

Consistency may take two forms, which are not contradictory and, combined, contribute to integrity: vertical and horizontal.²⁵ Vertical consistency arises from the interpretation of the law as progressing through a hierarchy of authoritative adjudicatory instances. In other words, the hierarchy of courts represents steps towards finality: first comes the award of the panel, then of the AB; or, at a certain level comes the decision about a particular case in the European Court of First Instance (ECFI), but it is the European Court of Justice (ECJ) which determines whether the lower instance's interpretation is consistent with the 'scheme of principles'.²⁶ This order is universal to law, hence it applies respectively to the examples of international trade law or European law. In the vocabulary of municipal law, vertical consistency means *levels of appeal*.

Horizontal consistency secures that rights and obligations remain identical and universal across time and subject matter as they arise in different cases and under varying circumstances. A judgment in one case of anti-dumping violation will uphold the same rights and obligations as a judgment in another case of dumping; and if the same rights and obligations are in question in a case of illegal subsidy, the judgment in the subsidy case is expected to conform to the position regarding these rights and obligations as taken in the dumping case. In the vocabulary of municipal law, horizontal consistency means *stare decisis*, precedent.²⁷

Taken together, both types of consistency – vertical and horizontal – are integrated to represent uniformity and, consequently, reinforce certainty about the system at large. This promotes satisfaction with adjudicative awards, contributes to finality, which in turn feeds into the sense of certainty. However, as mentioned above, the development in public international law lacks uniformity. For once, theoretically,

²² Regardless of the variety of socio-cultural specific substantive moral and ethical underpinnings of fairness.

²³ E.g. Bjorklund, *supra* note 10; Sosnow, Morellato, and Millen, 'Softwood Lumber as Case Study: Canada–U.S. Dispute Resolution under NAFTA and the WTO', 6(3) *Canadian Int'l Lawyer* (2005) 131 (hereafter: Sosnow *et al.*).

²⁴ In the sense that the court interprets (and, according to a branch of international legal experts, also creates) the law, and the subjects of the law are bound to adhere to it. See Teitel, *supra* note 11, and 'Private vs. Public International Justice' and 'Outsourcing of Justice', *supra* note 21, on the need for new interpretive principles and the shift in legitimacy and authority, as well as Gal-Or, 'Towards a Transdisciplinary Discourse on the Link of Trade and Investment, International Law, and Global Governance: Is a New Terminology Needed?', presented at several conferences 2004–2006, currently under consideration for publication (hereinafter 'Towards a Transdisciplinary Discourse').

²⁵ I find this distinction by Dworkin (*supra* note 17, at 227) useful, although in a different manner from that employed by him.

²⁶ *Ibid.*

²⁷ This principle is a pillar of the common law legal system, whereas in civil (continental) law, precedent performs a secondary role. Of course, in practice, civil law courts refer to earlier judgments, which is important. However, they may depart from earlier judgments the next time, and are not bound to them as common law is bound to *stare decisis*. I thank Claudia Kissling for clarifications on this point.

international law rejects horizontal consistency:²⁸ explicit exclusion of the principle of *stare decisis* is found in many treaties (which are the primary sources of international law).²⁹ To be sure, in practice, international law does develop – and to a significant extent so – by the use of precedent.³⁰ This represents one paradoxical situation which undermines consistency and integrity, although it may not undermine uniformity, for all tribunals actively participate in, and perpetuate, this fallacy.

International law also rejects vertical consistency. While the rejection of horizontal (*stare decisis*) consistency is a formal ‘positivist’ one, the abhorrence against vertical consistency (hierarchy) is reflected in circumvention. The failure to specify the purpose of appeal for the international system and the resort to an unsustainable³¹ process of annulment are one indicator. The others include the haphazard design of an appeal architecture (e.g. selection of judges, transparency, the agency delegation question) and processes (e.g. transparency, range of appealable issues, standard of review, methods of interpretation), and the general avoidance of addressing the difference between litigation and arbitration. In brief, in order to satisfy the requirement of consistency, integrity, and uniformity, drafters of international law³² must ask themselves the three following questions: appeal for what purpose?; appeal from what?; appeal under what conditions?

3 The Teleology of Finality and Appeal: *Res Judicata* and *Stare Decisis*

The law is about standards and rules governed by principles and designed to serve as instruments of control in society.³³ Control evokes the notion of hierarchy, where

²⁸ Koskeniemi addresses the theoretical postulate about the “horizontal” nature of the international legal system’ (*supra* note 11, at 166) in the sense that there is ‘no *general* order of precedence between international legal rules’ (*ibid.*). Yet he maintains that ‘[t]here has never been any doubt about the fact that some considerations in the international world are more important than others, and must be legally recognized as such – although how that sense of importance could be articulated has been the subject of lasting academic controversy. Here it is not suggested to take a position on that controversy –...’ (*ibid.*, at 167).

²⁹ See Bhala, ‘The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)’, 14 *American University Int’l L Rev* (1998–1999) 845 (hereafter: Bhala I). Koskeniemi comes close to such view (yet not identical, because he refers to norms only, e.g. not rules) when acknowledging that ‘[t]here is an important practice that gives effect to the informal sense that some norms are more important than other norms and that in cases of conflict, those important norms should be given effect to. ... [P]ractice has developed a vocabulary that gives expression to something like an informal hierarchy in international law’ (*supra* note 11). He then goes on to elaborate on this problem when discussing conflict between successive norms (in Part D), and relations of importance regarding Art. 103 of the UN Charter, *jus cogens*, and obligations *erga omnes* (in Part E).

³⁰ Bhala I, *supra* note 29; Ninatti, ‘How Do Our Judges Conceive of Democracy? The Democratic Nature of the Community Decision-making Process under Scrutiny of the European Court of Justice’, 10/03 *Jean Monnet Working Paper* (2003); ‘Private vs. Public International Justice’ and ‘Outsourcing of Justice’, *supra* note 21.

³¹ Unsustainable in the sense that the separation of substantive and procedural grounds is basically a fiction.

³² I will not identify them here as this will trigger a discussion which is beyond the scope of the article.

³³ Dworkin, *supra* note 17; M.W. Riesman, *Systems of Control in International Adjudication and Arbitration. Breakdown and Repair* (1992).

authority, which is given (or when merely formal, appropriates for itself) the power to control, has the *last* word as manifestation of itself, namely of authority. Dworkin identifies a tension underlying this order of control, consisting of finality (representing the ‘formalism’ and determinism of authority) juxtaposed with the expectation of infallibility (representing the uncertainties of communication and interpretation of the law, ‘rule-scepticism’).³⁴ Put simply, it is the human desire for reassurance through determinism and certainty which facilitates predictability, and hence control versus the human natural faculty to err. How can a justice system reconcile this strain?

A *Res Judicata*

One element of finality is provided through the principle of *res judicata*. It is this quality of a decision which ‘covers all the various possible binding effects of a judgment on subsequent litigation’.³⁵ It has two aspects: one regards the identity of the claim and operates as a direct *estoppel* barring the plaintiff from re-claiming the same against the same defendant, the judgment operating as a replacement of the cause of action (or ‘merger’).³⁶ The other aspect bars re-litigation by the same parties where the new claims are different from those previously judged, but the issue in question is the same and has been determined by the court.³⁷ *Res judicata* thus serves one main purpose, namely countering the risk of indeterminacy arising from multiple proceedings.³⁸

Two diverging rationales, which are occasionally contradictory, underlie *res judicata*: the private interest and the public good.³⁹ They mirror the private–public tension which inhibits international trade and investment law at large, and particularly the recent developments of the Law Merchant.⁴⁰ For the private interest, *res judicata* ensures that ‘the private interest not ... be vexed by more than one litigation on

³⁴ Dworkin, *supra* note 17, at 141 and Ch. 7 generally. Infallibility relates also to correctness of decision.

³⁵ Harnon, ‘Res Judicata and Identity of Actions. Law and Rationale’, 1 *Israel L Rev* (1966) 539.

³⁶ *Ibid.*, at 540.

³⁷ *Ibid.*

³⁸ For a more detailed discussion of conditions to assure *res judicata* see the doctrine of *lis alibi pendens*, which prohibits parallel proceedings while a first set of proceedings is pending, and the doctrine of *electa una via*, which is designed to bar multiple petitions by the same applicant. See Shany, *supra* note 14, and Bjorklund, *supra* note 10, at 509, 519. These doctrines are less relevant to the point I wish to make in this article and are therefore beyond its scope.

³⁹ This was reiterated by the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro*: ‘[t]wo purposes, one general, the other specific, underlie the principle of *res judicata*, internationally and nationally. First, the stability of legal relations requires that litigation come to an end. ... Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again’: *supra* note 19, at 44.

⁴⁰ To which I will attend later in this article. This tension became apparent during the latest debate of the International Commercial Arbitration Committee of the International Law Association on its Draft Resolution No. 1/2006, including Annexes 1 and 2; *The World Is Here*, the 72nd Conference of the International Law Association, 4–8 June 2006, Toronto, personal notes. Teitel, who focuses on the transformation of international law arising from the humanitarianist legal regime, observes similar conceptual complications wherein the private and the ‘collective’ (although not the institutionalized ‘public’) are pitched one against the other in what she refers to as a ‘minorities regime’ (*supra* note 11, at 378–379) and ‘cosmopolitan’ schemes (at 383).

the same matter, the purpose is to promote stability and assure the litigant that he may rely on it knowing that his rights and duties have been *finally* determined by a competent tribunal'.⁴¹ For instance, applying this rationale to the arena of international adjudication, the sentiments expressed by affected stakeholders in the softwood lumber 'saga'⁴² are telling. A recent ruling by the WTO AB, which left the debate about whether the Canadian lumber imports represented a threat of injury to the American industry unresolved,⁴³ exemplifies the problem of *res judicata* from a private interest perspective. The Canadian executive vice-president of the Free Trade Lumber Council noted in disappointment that '[t]hey [WTO AB] are basically saying: "If you are dissatisfied, come back and ask us again"'.⁴⁴ Stephen Harper, Canada's Prime Minister, obviously concerned about the industry more than international law, echoed this sentiment: 'I have told the president [Bush] in the very near future if we don't get a resolution on this issue we intend to support our industry, and support it much stronger than it has been supported in the past.'⁴⁵ Similar comments were reciprocated on the American side.

The other rationale of *res judicata* takes a public good perspective. 'As to the public interest, the general good requires an end to litigation so as to ensure effective and economic work of the courts.'⁴⁶ This position deplores the unprecedented multitude of proceedings in different fora, which cause great expense, stretch over a very lengthy period of time yet fail to deliver the sought-after finality and, hence, do not establish certainty.⁴⁷ Obviously, it is difficult to separate the concern for the public good from private frustration:

Yet, ... if the history of this dispute demonstrates anything, it is that negotiated solutions end, or are brought to an end, with the inevitable start-up of bitter litigation ... The real question is whether the available dispute resolution mechanisms can be strengthened so as to bring some order and efficient resolution to such litigation ... impose some degree of finality and certainty...⁴⁸

⁴¹ Harnon, *supra* note 35, at 543 (original emphasis).

⁴² Sosnow *et al.*, *supra* note 23. The recent specific case in the softwood lumber sequel revolved around US complaints that Canada was dumping its subsidized softwood lumber exports into the US market, thereby posing a threat of injury to the same industry in the US. The 'saga' represents a three centuries long dispute between Canada and the US, with an over two decades 'modern' incarnation, and a 'mere' decade of adjudication in the WTO and NAFTA.

⁴³ *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Recourse to Art. 21.5 of the DSU by Canada, AB-2006-01; World Trade Organization, WT/DS277/AB/RW (06-1735), 13 Apr. 2006, available at [www.worldtradelaw.net/reports/wtoab/us-lumberitc\(ab\)\(21.5\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-lumberitc(ab)(21.5).pdf). The WTO AB did not reverse the WTO panel's ruling, but at the same time also communicated its reservation from the lower body's finding by observing that 'the panel placed an "undue burden" on Canada': Hamilton, "'Canada Goofed" on Softwood Appeal to WTO', *Vancouver Sun*, 14 Apr. 2006, H1-2. The case was intricately linked to parallel proceedings in another international tribunal, the NAFTA, and one municipal court, the US Court of International Trade, and consequently represented a *res judicata* challenge.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Harnon, *supra* note 35, at 543.

⁴⁷ Sosnow *et al.*, *supra* note 23.

⁴⁸ *Ibid.*, at 140–141. The term 'litigation' is a misnomer, which I discuss later.

Res judicata is endogenous to the concept of appeal. First, to find fault with a judgment (for whichever ground – substantive or procedural), the judgment must be of a binding nature. Otherwise, why appeal and not simply disregard? At the same time however, *res judicata* tolerates dissenting opinions and also allows for staggered types of finality. Normally, in the case of a judgment with divergent opinions, the majority opinion is recognized as the *res judicata*. Also, the right of appeal *per se* represents the recognition that finality may be compromised by infallibility which may require correction. Indeed, the persistence of such inconsistencies can be tolerated precisely thanks to the staggered architecture of appeal, and only if ‘we deal with various proceedings within a single action. Since the whole process of one and the same action has not yet come to an end, the position of the court is not really undermined.’⁴⁹ In social science parlance, this suggests that *res judicata* is not an independent variable, although it ‘has long been considered as an established principle of international law’.⁵⁰ It prevails when it is the only option, where there exist only one proceeding and one court, but also where there is more than one proceeding for the same case and a corresponding institutional composition, i.e. lower and higher courts; it arises from within the teleology of municipal law and flows from the logic underpinning court adjudication, *not* ‘alternative’ dispute resolution (e.g. arbitration).⁵¹

One way of understanding *res judicata* as a building block of appeal leading to finality, is by addressing the question of ‘how much of what could have been, and yet had not been, dealt with in the first action, becomes merged or barred [from subsequent proceedings]. It involves the determination of the question when are two actions considered to be on the same matter’.⁵² In fact, most provisions governing the design of international courts and tribunals provide for finality clauses.⁵³ However, they also provide for exceptions⁵⁴ to this principle, yet without corresponding *consistent* and

⁴⁹ Harnon, *supra* note 35, at 544. The ICJ tentatively proposes a *res judicata* test: ‘[i]n the view of the Court, if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given. ... For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata* or which are necessarily entailed in the decision of those issues; secondly, any peripheral or subsidiary matters, or *obiter dicta*; and, finally, matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Art. 60 of the Statute may well require the Court to settle ‘[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force’: *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 19, at 48.

⁵⁰ Shany, *supra* note 14, at 223. Harnon uses the term ‘relative *res judicata*’: *supra* note 35, at 560.

⁵¹ I will come to discuss these points later. They refer to (a) the difference between international and municipal law, and (b) the difference between public and private law.

⁵² Harnon, *supra* note 35, at 550.

⁵³ Shany, *supra* note 14, at 225.

⁵⁴ In *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 19, the ICJ firmly adheres to this orthodoxy: ‘[f]or the Court *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations’: *supra* note 19, at 53. And any interpretation of the principle is on a case-by-case basis: *supra* note 49.

integrative institutional structures. Consequently, *res judicata* in international law is not absolute and an international judgment can be subject to annulment, revision, or setting aside for various reasons.⁵⁵ This, in turn, may become the, or may invite an additional, judgment which will be the final *res judicata*.

Both jurisprudence and discourse of international law have shied away from addressing ‘appeal’ head on.⁵⁶ Arguably, in an attempt to avoid ambiguity, a tendency has been prevailing to develop technical terms and procedures to facilitate exceptions to *res judicata* by designing special rules for special adjudicative bodies and emphasizing their uniqueness and, hence, their ‘exceptional’ nature. This has sustained a perception of ‘non-appeal’ (not to be confused with contra- or anti-appeal), a situation which is circumventing the need to collapse the various techniques into one procedural category, namely ‘appeal’.⁵⁷ Consequently, a sense of relative comfort continues to prevail about the redundancy of recourse to the *clarification* of the notion of ‘appeal’.

For instance, while the WTO DSU provides for the broad discretion whereby ‘13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel’,⁵⁸ it does not further elaborate. At the same time however, the institution itself, i.e. the WTO AB tribunal, does exactly that in its awards, and is consequently even said to be contributing to the development of international law. The ICSID has been contemplating the establishment of an appellate body and recently adopted the concept,⁵⁹ although its constituting instrument⁶⁰ already provides for procedures that

⁵⁵ Most reasons allowing an exception to *res judicata* are of a procedural nature, and it is still being debated whether ‘manifest and essential error’, i.e. a finding of misinterpretation of the law, should also be included. Shany argues that this ground for exception, which is nowhere to be found in conventional law, does also not qualify as a customary norm of law, and ‘it can hardly be argued that recourse to the substantive review of judicial errors can be viewed as a general principle of law’: *supra* note 14, at 247. The constituting document of the WTO DS states that ‘6. An appeal shall be limited to *issues of law* covered in the panel report and legal interpretations developed by the panel’: ‘Article 17. Appellate Review’, Agreement Establishing the World Trade Organization, Annex 2, Uruguay Round Agreement. Understanding on Rules and Procedures Governing the Settlement of Disputes, available at: www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (hereafter: DSU). This is indeed very general and puts Shany’s observation in question. See also Bjorklund (*supra* note 10), when comparing grounds for annulment with grounds for appeal throughout her article.

⁵⁶ I am not concerned here about matters pertaining to standard of review but with the fact of review *per se*.

⁵⁷ I will not elaborate here on the debate surrounding the interface between substantive and procedural law, which is beyond the scope of this article. It is, however, interesting to note the rhetoric employed to circumvent this dilemma, e.g. a court is said to be ‘engaging in a more *searching* analysis of the award than was contemplated by the applicable standard of review’: Bjorklund, *supra* note 10, at 501 n. 109 (emphasis added).

⁵⁸ DSU, *supra* note 55. It represents a judicial discretion the clarification of which has figured as an ongoing focus of debate.

⁵⁹ ‘Possible Improvements of the Framework for ICSID Arbitration’, 22(1) *News from ICSID* (2005) 11/16, available at: http://www.worldbank.org/icsid/news/news_22-1.pdf, and *supra* note 3.

⁶⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (as Amended and Effective 10 Apr. 2006), available at: www.worldbank.org/icsid/basicdoc/basicdoc.htm (hereafter: ICSID Convention).

cannot operate without review of the first panel award, and which *de facto* amount to an appeal on procedural grounds.⁶¹ The NAFTA Chapter 19 Review and Dispute Settlement in Antidumping and Countervailing Duty Matters⁶² also provides for a limited review, which is explicitly distinguished from appeal.⁶³ That developing the concept of appeal is bound to arise as a challenge that international law experts could not bypass was recognized already prior to the establishment of the WTO AB and NAFTA:

The choices before us are simple. One alternative is that we have no appeals at all – *in the sense of review of the merits*. International society appears to be ready to go one stage beyond that. Another is that we have the present unregulated and haphazard system – which is developing empirically without any real planning and may not be entirely satisfactory. The third is that we go the whole way and try to establish a proper appeals agreement. But if we are to do that, how is it to be structured? The solution to this last question is so fraught with difficulties that we may find that, despite its idealistic appeal, it is not a *practical alternative*.⁶⁴

B *Stare Decisis*

I am now turning the discussion to the role of precedent as the other necessary component of the concept of appeal, a principle which currently is still considered foreign to international law, consequently rendering the appeal ‘in the sense of review of the merits’⁶⁵ indeed – and formally – an ‘impractical alternative’. Appeal presumes review and review presumes measurement against existing standards. A standard is an ‘[e]xemplar or measure or weight. ... An *authoritative* or recognised exemplar of correctness, perfection, or some *definite* degree of any quality. ...

⁶¹ *Ibid.*, ‘Section 5 Interpretation, Annulment, and Revision of the Award’.

⁶² NAFTA, *supra* note 13.

⁶³ ‘Although Chapter 19 panel decisions are binding, there is one level of review of binational panel decisions that a NAFTA government may initiate in extraordinary circumstances. This is known as the Extraordinary Challenge Committee (ECC) procedure. *The challenge is not an appeal of right but a safeguard to preserve the integrity of the panel process*. If either government believes that a decision has been materially affected, by either a panel member having a serious conflict of interest, or the panel having departed from a fundamental rule of procedure or having exceeded its authority under the Agreement, either government may invoke review by a three-person, binational Extraordinary Challenge Committee, comprised of judges and former judges. ECC decisions, like Chapter 19 binational panel decisions, are binding as to the particular matter addressed’: Extraordinary Challenge Procedure, Ch. 19, Annex 1904.13, NAFTA, *ibid.* (emphasis added). NAFTA Ch. 11 on investment provides the parties with a choice of existing conventional procedures for the purpose of setting aside of an award. Thus, NAFTA members which were not parties to ICSID (then Canada and Mexico) were able to invoke the ICSID Additional Facility Rules on investment which directed them to a municipal court for the purpose of setting aside of an award, e.g. as in *United Mexican States v. Metlaclad Corp.*, 89 *British Columbia Law Review* (2001) 664. For the purpose of this article, I will contend with these examples and will not discuss the Permanent Court of Justice, International Court of Justice, other regional courts and tribunals, nor courts in matters of human rights, international criminal law, and administrative agencies. See also *supra* note 8.

⁶⁴ E. Lauterpacht cited in Bishop, ‘The Case for an Appellate Panel and its Scope of Review’, PowerPoint presentation, King & Spalding, British Institute of International and Comparative Law, 7 May 2004, at 18 (emphases added). See also Koskenniemi on lawyers’ perception concerning the fragmentation of international law into self-contained regimes and the resulting ‘loss of an overall perspective on the law’: *supra* note 11, at 11.

⁶⁵ Lauterpacht, *supra* note 64.

A commodity the value of which is *treated as invariable*, in order that it may serve as a measure of value *for all other commodities*.⁶⁶ These attributes of ‘standard’ suggest continuity, legitimacy, certainty – all qualities that congeal and acquire their value over time. They represent the accumulation of repetitive and consistent experiences, or precedents, leading to the determinative conclusion of a given standard. Indeed

it would be erroneous to believe that ‘subsequent practice’ of a tribunal that is consistent with prior practice cannot create expectations among the parties to a treaty. Such decisions, even if they do not amount to ‘subsequent practice,’ can and do create such expectations. In turn, those expectations lead to practical actions by parties to a treaty. Indeed, even that outspoken resister of *stare decisis*, the *Japan-Alcoholic Beverages* Appellate Body, admitted that adopted GATT and WTO panel reports ‘create legitimate expectations among WTO members.’ ... Who could deny that disputants in WTO actions, and indeed the other Members observing from the sidelines, typically view adjudicatory outcomes as ‘precedent,’ in the sense that these outcomes create expectations about acceptable versus prohibited trade measures.⁶⁷

If the WTO AB is to review a panel ruling based on *issues of law* addressed in the panel report, how can it do so without referring to an existing set of authoritative standards which, to be sure, represent the law?⁶⁸ And how do these standards gel into law if not through repetitive and universal experience? And how can the panel develop legal interpretations, and the WTO AB follow the instruction to review the panel’s legal interpretations,⁶⁹ or the NAFTA Chapter 19 Extraordinary Challenge Committee perform its function, if there is no standard measurement against which to interpret the law? The denial of precedent would suggest that the law is *ad hoc*, capricious, biased, fragmented, unpredictable, perhaps irrelevant because there is nothing to orient one’s actions to.⁷⁰ Consequently, the very notion of appeal, of the assessment and evaluation of a previous ruling, presumes a lineage of decisions which are interconnected precisely because of their binding or persuasive nature.⁷¹

⁶⁶ *The Shorter Oxford English Dictionary* (1968) (emphasis added).

⁶⁷ Bhala, ‘The Power of the Past: Toward *De Jure Stare Decisis* in WTO Adjudication (Part Three of a Trilogy)’, 33 *George Washington Int’l L Rev* (2000–2001) 930 (hereafter: Bhala III).

⁶⁸ I will leave the discussion of what is law to another time, but suffice it to say that even proponents of the constructivist and social approach to law ‘as a living law’ do not discard the role of precedent.

⁶⁹ ‘Notwithstanding the efforts of drafters of rules, including the Statute of the International Court of Justice, the NAFTA, and others to provide that a decision is binding only on the parties and in respect of the particular case, and has no effect as *stare decisis*, in fact counsel in an international arbitration cite every precedent they can find, and arbitrators do try to follow precedents or explain why a particular precedent is inapt or unpersuasive’: Lowenfeld, ‘Public Policy and Private Arbitrators: Who Elected Us and What Are We Supposed to Do?’, J.E.C. Brierly Memorial Lecture, McGill University, Faculty of Law, 30 Mar. 2005, at 17 (on file with the author).

⁷⁰ Koskenniemi indirectly alludes to this sentiment when arguing that ‘the principle of systematic integration goes further than merely restate the applicability of general international law in the operation of particular treaties’ (*supra* note 11, at 209) and addressing the inter-referencing of treaties (*ibid*).

⁷¹ The adherence to a doctrine is *per se* recognition of established practice, i.e. a lineage of precedents. It would be redundant to rehash the long list of arguments (including the discussion regarding institutional balance and design) raised by Bhala (*supra* notes 29 and 67) which make this point amply clear.

4 The Relationship between Municipal and International Law

The dissonance between theory and practice in public international trade and investment law, and in humanitarianist law, has its roots in the 'love-hate' relationship between municipal and international law. Without delving into the theoretical discourse,⁷² I will highlight two focal aspects of this relationship which require ironing out if the concept of appeal is to be clarified and consequently contribute to the cohesion of international law. One is of general and overarching magnitude and has to do with a 'detached perception of analogy' and the dilemma of sovereignty. The other aspect is more specific, flows from the first, and focuses on the distinction between courts and tribunals, and litigation, arbitration, and panel hearings.

A The 'Detached Perception of Analogy' and the Dilemma of Sovereignty

There is no denial that when we observe and discuss international relations and international law, our perception of the world is instructed by our experience with, and identity as citizen of, the nation state. And although we agree that the international arena is different and anarchic, we nevertheless expect it to be ordered as a system, with some measure of control for the sake of, at least, both our national (collective) and personal certainty and predictability. 'The global integration of States requires a more effective "international rule of law". This can be achieved only by rendering international law more effective and by interpreting and integrating "the national rule of law" and "the international rule of law" in a mutually consistent manner.'⁷³ The only available examples of control are derived from our smaller units of order, e.g. family, city, region, state. It is from our experience with these systems that we draw inferences regarding the desirable mode of control at the international arena. That this orientation towards the municipal – as a standard for the international – is appealing can be seen in the establishment of, for instance, the WTO AB. It reflects the desire to satisfy the need for finality also at the international level. Presumably, developments in international relations and, specifically, the interconnectedness between the international and municipal (liberally referred to as 'globalization') have been propelling this shift. Compared with previous international law-making endeavours that were shy of borrowing the term 'appeal' even if the pursuit of finality (closure) was driving them (e.g. the establishment of the PICJ and

⁷² I elaborated on this in 'Towards a Transdisciplinary Discourse', *supra* note 24.

⁷³ Hu, 'The Role of International Law in the Development of WTO Law', 7 *J Int'l Econ L* (2004) 166. According to Teitel, the present shift in international law 'complements the prevailing state-centered approach and its attention to the protection of state borders with an approach that is predicated on alternative humanitarian concerns': *supra* note 11, at 370. Nevertheless, she cautions that control may be lost in the process for 'humanitarianism walks a thin line [and] threatens to "erode the human rights discourse and value system"': at 387.

ICJ),⁷⁴ the recent decade signals a revolutionary change. Thus, while in practice we do adopt municipal concepts and transplant them into the international legal environment, we are still reticent to admit so theoretically. Such confession⁷⁵ would force us to face the inherent paradox of our identity as members (citizens) of sovereign yet distinct collective units.⁷⁶

The pursuit of reconciling the tension between the national and international is not new. International law has incorporated domestic law models only with great reluctance, half-heartedly, and therefore in an inconsistent, unclear, and uncertain manner. This has now become even more complicated, for in the contemporary globalization discourse attempts to place sovereignty within the so-called post-national international system have sometimes been interpreted as identity issues.⁷⁷ The ensuing fusion of domestic with international entailed, for instance, the conceptualization of sovereignty as a characteristic of the private individual person (both natural and legal),⁷⁸ as well as the deconstruction of state sovereignty as suggested in the discourse on neo-medievalism.⁷⁹ In the former, the alleged sovereignty of the private is stretching the traditional concept of sovereignty, potentially leading to the consideration of a collective ultra-national (humanity as collectivity) sovereignty. Extending 'sovereignty' 'downwards' to the micro level might facilitate the transplanting of municipal legal concepts

⁷⁴ 'The transposition of the appellate function to the international arena is a relatively novel development. There have been few examples of international tribunals exercising an appellate review over international judicial bodies. ... Since there is no general guidance in international law on such matters as the scope of the appellate function the nature of appellate procedures and the role of appellate judges, the practice in the WTO appellate review is particularly contributory to the development of international jurisdiction': *ibid.*, at 164–165. '[T]he WTO Appellate Body had few models on which to draw': McRae, 'What is the Future of WTO Dispute Settlement?', 7 *J Int'l Econ L* (2004) 14.

⁷⁵ For instance, that '[a] closer approximation to a domestic model would mean better transparency through opening proceedings to the public and a more coherent basis for an intervener or amicus brief process. It would also mean that the litigation process could be enhanced by the addition of alternate forms of dispute resolution, such as mediation, as an integral part of the litigation procedures. Or it could lead to the development of alternate forms of dispute resolution that could take the place of litigation': *ibid.*, at 21. It is perhaps noteworthy that the Ontario Superior Court of Justice opined that '[m]ost, if not all, international commitments entail some compromise of sovereignty': *The Council of Canadians, and Dale Clark, Deborah Bourque, and George Kuehnbaun on their own behalf and on behalf of all members of the Canadian Union of Postal Workers, and Bruce Porter and Sara Sharpe, on their own behalf and on behalf of all members of the Charter Committee on Poverty Issues v. Her Majesty in Right of Canada, as represented by the Attorney General of Canada*, Court File No: 01-CV-208141, 8 July 2005, 17. Reported as *R. v. Council of Canadians*, 2005 CanLII 28426 (Ont SC).

⁷⁶ The paradox becomes further pointed when enforcement is being sought. For instance, under the New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958 (330 UNTS, Art. III, available at: <http://faculty.smu.edu/pwinship/arb-31.htm>), the court of the enforcing country must follow a prescribed standard of review. There are, however, 'deviations', e.g. the US provides in its Federal Arbitration Act for an additional ground, namely 'manifest disregard of the law': Bjorkland, *supra* note 10, at 505.

⁷⁷ Giving rise to the notions of 'de-bordering' and 'post-nationalism'. See also Teitel's discussion of 'humanitarianism', especially regarding the shifting interpretation of extra-territorial jurisdiction: *supra* note 11.

⁷⁸ C. Cutler, *Private Power & Global Authority: Transnational Merchant Law in the Global Political Economy* (2003).

⁷⁹ Friedrichs, 'The Neomedieval Renaissance: Global Governance and International Law in the New Middle Ages', in I.F. Dekker and G.W. Wouter (eds), *Governance and International Legal Theory* (2003).

and institutions 'upwards', to the inter-national macro level. On the other hand, the neo-medieval approach, which seeks to reconcile tensions arising from the plurality of collective state and non-state actors, offers a different mixed re-conceptualization of sovereignty. Both approaches, however, are reflections of a broader reality in which the private international commercial Law Merchant (*lex mercatoria*), with sources in the Middle Ages – and the burgeoning humanitarianist regime – are *de facto* transforming international law into what some have termed transnational law.⁸⁰ These developments occur in an *ad hoc* and haphazard (and regime-specific) manner and are begging for theoretical grounding. The attraction of the municipal model of 'appeal', on the one hand,⁸¹ yet ambivalence regarding *res judicata* and *stare decisis* as guiding principles to be carried to their ultimate conclusion in matters of international appeal, on the other hand, represent a severe handicap to the integrity of the law. In the next section, I will discuss a specific case of this general tension and how it is affecting the conception of appeal in public international trade and investment law.

B Courts and Tribunals, Litigation, Arbitration, and Panel Procedure

The discourse on courts and tribunals, litigation, arbitration, and panel procedure is fraught with 'myths', even contradictory ones, which originate in a blurring of boundaries between the municipal and international realms. While municipal law distinguishes between courts and tribunals, international law labels adjudicative bodies inconsistently – sometimes as courts, sometimes as tribunals; and there is the ensuing myth in international law that courts and tribunals are the same, hence one may refer to them interchangeably as either court or tribunal. Municipal law also distinguishes between litigation and arbitration, the latter representing a special form of ADR which seeks a solution by way of relaxed adjudication, perhaps closer to equity,⁸² and which may take the form of one arbitrator presiding over the process or a panel of arbitrators doing so. International law adopted this distinction, but only as window dressing,⁸³ indeed a myth, for in reality international

⁸⁰ Which consists, at the end of the day, of the incorporation of municipal models within the international realm, e.g. alternative dispute resolution (ADR) (K.-P. Berger, *Formalisierte oder 'schleichende' Kodifizierung des nationalen Wirtschaftsrecht. Zu den methodischen und praktischen Grundlagen der lex mercatoria* (1996)) or evidentiary rules from national criminal legal systems.

⁸¹ 'Given these concerns ["some extant public scepticism about the wisdom of *ad hoc* arbitral bodies deciding matters of potential public import"], it is not surprising that calls for a standing "appellate body" for arbitration are gaining in both volume and vigour': Bjorklund, *supra* note 10, (both) at 510.

⁸² 'An arbitrator is not called upon to make detailed analysis of the legal principles canvassed before him or to review in any detail the legal authorities cited': Bingham LJ (as he then was), quoted in Helfer and Slaughter, 'What States Create International Tribunals: A Response to Professors Posner and Yoo', 93 *California L Rev* (2003) 35.

⁸³ To be sure – only partly. In municipal law, arbitration is arbitration whether the process is governed by one arbitrator or by a panel of several arbitrators. However, in international law, lawyers have been distinguishing panel proceedings from arbitration, arguably reiterating the language in the treaty provisions establishing these proceedings. Substantively, there is no essential difference. See also Gal-Or, 'NAFTA Chapter Eleven and the Implications for the FTAA: The Institutionalisation of Investor Status in Public International Law', 14 *Transnat'l Organisations* (2005) 121 (hereafter: Gal-Or (d)).

arbitration as well as panel procedures have developed as an (imperfect) form of litigation, increasingly distancing themselves from their ADR origins. Certainly, this is even more the case concerning international criminal tribunals where evidentiary rules play a paramount role. At best, this vocabulary gives rise to confusion. In municipal law, both theoretical and practical attributes distinguish judges from arbitrators although they form part of the category of adjudicators. In contrast, in international law no such theoretical distinction exists, and in practice the difference between the terms judge, arbitrator, and panellist remains obscure.⁸⁴ What is a 'member' of the WTO DS panel or AB? Of an ICSID panel? Of a NAFTA Extraordinary Challenge Committee? A judge? An arbitrator? A panellist? What does panellist mean? Granted, reflecting tensions in the current evolution of international law, the question nevertheless remains: does such clarification matter at all? Or is the outcome a myth on authority, devoid of a meaning of what this adjudicative authority actually represents?

In order to function as an appeal instance, appellate bodies, and the role of those serving on them, must be clearly defined. In the following, I will address several issues as examples⁸⁵ of the questions that require clarification before an authoritative claim of finality can be made by any of these bodies. For instance, if guidance is to be taken from municipal law, then one qualifier to be established addresses the architecture of the legal system: appeal from what instance? In the municipal system,⁸⁶ appeal is predicated on a hierarchy of courts in a monolithic legal system. That legal system applies a process that has an internal 'code', is uniform and consistent throughout the hierarchical echelon, providing for rules that integrate the system from the lowest, and up to the highest, adjudicatory instance. The rules are explicit and detailed – a fact which has often rendered the system cumbersome, the proceedings lengthy and expensive. Indeed, these failings were exactly the obstacles to be avoided by an international trade and investment system governed by an economic rationale and needy of a legal order. It required a legal order guaranteeing efficiency – time- and money-wise – in the DS processes, and which would concurrently also accommodate the limitation arising from the principle of state sovereignty. Therefore, the drafters of recent international DS mechanisms looked at the municipal ADR model, and not court litigation

⁸⁴ See Vagts, 'The International Legal Profession: A Need for More Governance?', 90 *AJIL* 250.

⁸⁵ I am providing here several examples only because an abundant analysis of the problem, and various issues it gives rise to, is easily retrievable in the literature: e.g. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 *AJIL* (2004) 247; Kennedy, 'Parallel Proceedings at the WTO and under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?' (2006) (unpublished, on file with the author).

⁸⁶ For the sake of the argument, and because it is beyond the scope of this article, I am leaving aside the question of which type of system – civil or common law. For instance, regarding the WTO system it has been noted that '[s]ince the WTO system is a self-contained system of rules codified in the covered agreements, it resembles a civil law code. To the extent that panels and the Appellate Body look beyond the specific rules of the covered agreements to principles of public international law, their process is more akin to that of a common law court seeking to ascertain the content of common law': McRae, *supra* note 74, at 8.

system, as a template for adoption.⁸⁷ Consequently, also for the purpose of appeal, the litigation model was side-stepped in favour of an alternative, non-existent in municipal ADR, hence yet untested system.⁸⁸

To be sure, in the municipal ADR system which provides for staggered levels of finality (e.g. within administrative adjudicatory systems), the ultimate authority for finality still remains within the court system (e.g. contesting the jurisdiction of an arbitral tribunal). International law drafters, however, have adopted only part of the municipal system and inserted it within a new appeal formula.⁸⁹ Thus, they preserved the 'lower' level of the municipal ADR system (e.g. so-called panels for arbitration procedures as well as other ADR mechanisms),⁹⁰ recognized the need in an appellate 'higher' instance, but reluctant to adopt the court litigation prescription, created a new hybrid adjudicative instance. These appellate 'bodies' (not courts) are expected to enjoy the same authority as the municipal final court instance, although they have not been conferred upon the same faculties.⁹¹

That a dispute resolution mechanism tailored to satisfy private party needs could be reformed to meet public party needs, and that a municipal law approach transplanted to the international level could achieve the same justice outcome as in the municipal arena, is in itself infused in a paradox. This, however, is not to say that the endeavour had failed. On the contrary, it should be assessed as representing a developmental stage in a process fraught by trial and error, requiring fine-tuning and polishing.⁹² The various adjustments to, for instance, the WTO AB, NAFTA Chapter Eleven, and ICSID

⁸⁷ It should be noted that the ADR system is rooted in the logic of private contract, and administrative, law, which form an integral part of the municipal system. This is not the case in international law, where until recently a relatively clear demarcation separated the private from the public realm of law. The distinction between contract and treaty (concession agreement and bilateral investment treaties (BITs)) is important in this context, however beyond the scope of this article. See Waelde, "The 'Umbrella' (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent", *BIICL Paper* (2004) (on file with the author).

⁸⁸ Another myth consists in attributing a different meaning to terms that largely denote the same thing: alternative dispute resolution, alternate dispute resolution, and 'simply' dispute resolution (dropping the 'alternative') which intends (among other things) also to distinguish the approach when employed in the international, as compared with the municipal, system.

⁸⁹ Another aspect of finality relates to enforcement, where courts are endowed with powers to enforce the arbitral award.

⁹⁰ 'In many respects the international model of dispute settlement has been one of alternative forms of dispute settlement, involving "good office", conciliation and mediation, and DSU Article 5 provides for such processes. [and yet it summarises the idea that the WTO, unlike other models, does not make it clear that its DR is "alternative"']. The place of alternative forms of dispute settlement within the WTO dispute settlement process is unclear. ... In this regard, domestic law experience in forms of dispute resolution developed as an alternative or supplement to litigation needs careful consideration': McRae, *supra* note 74, at 9–10.

⁹¹ Bjorklund acknowledges this concern as central to the investor–state arbitration system suggesting that 'the possibility of appeal, of which most losing parties would be likely to avail themselves, would put an end to any advantage still retained by arbitration': *supra* note 10, at 513.

⁹² 'Should there, then be an appellate tribunal for investor–state or similar arbitrations, along the lines of the Appellate Body established pursuant to the Understanding on Dispute Settlement of the World Trade Organisation? There is a good deal to be said for such a suggestion ... for a closed system, such as the three-member NAFTA, creating a standing appellate tribunal would be easier': Lowenfeld, *supra* note

rules⁹³ evidence sincere attempts towards reconciling differences and disentangling the paradox created.

5 Issues to be Reconciled within the New International Appeal Mechanism⁹⁴

The new international appeal mechanism must be premised on the recognition that although, as widely recognized, ‘moral’ authority⁹⁵ in international relations rests on foundations different from those governing municipal affairs, the human quest for justice remains the same. Because sovereignty in international relations coupled with the absence of a concept of international citizenship represents a challenge to the task of building an international final authority, it is important to continue the discourse on the judicialization of international relations. Has international law gone too far? Which is more appropriate for the international arena – diplomatic negotiation or adjudication?⁹⁶ Were the consensus to tilt in favour of adjudication, it would then become imperative to develop a system governed by the same standards of fairness as those in municipal law. At the end of the day, it is not only national collectivities but the groups and individuals of which they are composed who are the beneficiaries of the justice system. For them, justice boils down to one basic notion of fairness.⁹⁷

In the following section, I am listing several issues critical to cementing the international appeal mechanism.

- Vertical consistency – *res judicata*. One overarching issue relates to the structure of the international adjudicatory environment. As seen in the softwood lumber dispute, two competing treaties – the global WTO and the regional NAFTA – allow

69, at 23–24. And yet, ‘[a]s an arbitrator, I would like to be able, with my co-arbitrators, to decide the controversy before us, without finding out a year later that what we had carefully worked out in crafting our award was overturned by a higher instance that almost certainly had not given as much attention to the case as my fellow arbitrators and I did. ... But in the end, I am stuck with the question ...: Who elected me? Who elected us? Who elected them?’: *ibid.*, at 25.

⁹³ Regarding the WTO AB – enhanced transparency, *amicus curiae*; regarding the NAFTA Chapter Eleven – the joint interpretative statement of the Commission (Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, available at www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp; regarding ICSID see *supra* note 3).

⁹⁴ See Koskenniemi regarding the purpose of legal interpretation and reasoning, *supra* note 11 at 24, 25. While the report’s second conclusion cautions against rising expectations regarding coherence and coordination – ‘no homogenous, hierarchical meta-system is realistically available to do away with such problems’ (*ibid.*, at 249), the future work of the Study Group to be based on the Vienna Convention on the Law of Treaties (available at: <http://web.archive.org/web/20050208040137/http://www.un.org/law/ilc/texts/treatfra.htm>), and the emphasis on the further conceptualization of regimes and general international law, may prove remedial and reformative.

⁹⁵ In the sense of reflecting norms which encourage voluntary compliance.

⁹⁶ This discussion is beyond the scope of the article. See, for instance, Steinberg, *supra* note 85.

⁹⁷ Franck, *supra* note 21; ‘Private vs. Public International Justice’ and ‘Outsourcing of Justice’, *supra* note 21.

for multiple proceedings within their closed systems as well as between the two systems.⁹⁸ The outcome contradicts the expectation for justice for it falls foul of the promise of ADR proceedings to deliver closure, certainty, and efficiency. Moreover, the current state of international trade and investment law sends the parties back to the municipal system for clarification purposes (US International Trade Court) and enforcement of awards.⁹⁹ Nevertheless, because treaties had already adjusted ADR provisions to meet international requirements, e.g. specifications limiting the contractual scope of the ‘alternative’ adjudication agreement (jurisdiction),¹⁰⁰ it is not inconceivable to consider corrections to treaties addressing, for instance, choice of forum and type of forum.

In some ways, a choice of forum clause might appear to be problematic, given that WTO tribunals only examine international law, while NAFTA tribunals examine domestic law^[101]. ... It certainly makes more sense for parties to an agreement like NAFTA (or the numerous other multilateral and bilateral trade agreements which Canada and other countries continue to pursue) to choose to empower one tribunal to resolve all trade-related disputes between the parties.¹⁰²

Arguably, in the long run, incorporating the principle of *lis alibi pendens* (postulating succession and not paralleling of proceedings) and *electa una via* (regarding choice of jurisdiction) will move the legal trade and investment DS regime (as well as other legal regimes) a fraction closer to meeting the onus of the principle of *res judicata*.¹⁰³ It may contribute to the establishment of a *de facto* hierarchy of adjudicative bodies, based on the types of disputes they are empowered to handle.¹⁰⁴ This would be a step forward towards an eventual legalization (constitutionalization?) of such order.

- Horizontal consistency – *stare decisis*. Another factor in revamping the international legal system relates to the need to reform the type of forum. That ‘there is a distinct

⁹⁸ Other notable examples of parallel and conflicting jurisdictions but which apply to investor–state DS are the *Amco Asia* and *CME* cases thoroughly analysed by Bjorklund, *supra* note 10.

⁹⁹ E.g., Sosnow *et al.*, *supra* note 23.

¹⁰⁰ For instance, an essential difference is that in international law the parties to a panel proceeding are bound by the terms of the treaty governing DS. They do not re-negotiate a new ‘arbitration’ agreement with every new dispute, as is often the case in municipal law.

¹⁰¹ Which represents yet another problem, namely the empowering of international tribunals to examine national law.

¹⁰² Sosnow *et al.*, *supra* note 23, at 138.

¹⁰³ Different tribunals require different adjustments. For instance, the relationship between the WTO AB negative or reverse consensus rule (barring rejection of decision) and the possibility for overturning WTO AB decisions (by rendering the consensus obsolete due to amendments to treaty provisions regarding which the tribunal expressed itself, or by issuing a majority ‘authoritative interpretation’ of the provision in accordance with Art. IX.2 of the WTO agreement) (McRae, *supra* note 74) represent yet another area which will require *res judicata* relevant correction.

¹⁰⁴ An analogy may be the federal court system. ‘Dividing departments of law to match that sort of opinion [compartmentalization] promotes predictability and guards against sudden official reinterpretations that uproot large areas of law, and it does this in a way that promotes a deeper aim of integrity [and] allow ordinary people as well as hard-pressed judges to interpret law within practical boundaries that seem natural and intuitive’: Dworkin, *supra* note 17, at 252. Shany makes some relevant suggestions under ‘increased judicial co-operation’: *supra* note 14, at 278–281). ICSID appellate body drafters were aiming at exclusivity of this body: Bjorklund, *supra* note 10.

need to place greater precedent value on NAFTA decisions ... [to discourage] unnecessary litigation by permitting issues to be tried and re-tried by the same parties on the same facts and legal issues'¹⁰⁵ implies a retreat from ADR in favour of court litigation, teleology, and an end to public international law's denial of *stare decisis*. ADR's constitutive principle dictates that whether arbitration or other method (e.g. facilitation, negotiation, mediation) – each set of proceedings in any particular case represents an independent unit in itself and bears no consequences for other cases; none of these various proceedings constitutes a precedent and is without prejudice regarding any other proceeding. The privacy of the proceeding stipulated confidentiality as a major condition to assure the success of such a DS approach. Consequently, it has been extremely difficult to access records of private – and often also public, or public-private¹⁰⁶ – ADR awards and settlements. Incorporating the principle of precedent within international DS procedures will therefore require further adaptation to this aspect of court-style litigation as well.

- Access – *locus standi*. Because international DS bodies have already been operating in a quasi-litigation fashion, calls for broader access to (not just for states and third parties but also NSAs, and not just as observers but also as participants¹⁰⁷), and transparency of, proceedings, and clarification regarding third party status, have been mounting. These were reciprocated by some clarifications (*de facto* amendments) to provisions in existing treaties and 'access friendly' jurisprudence.¹⁰⁸ But what is more significant is that they have been incorporated in subsequent agreements. Bilateral trade agreements (BTAs) and BITs as well as regional treaties have been incorporating provisions regarding access and transparency, and the draft FTAA represents perhaps the most progressive example.¹⁰⁹
- Selection of adjudicators and governance of tribunals. A crucial condition for qualification as an authoritative adjudicatory forum (including at the appellate instance) for ADR-premised tribunals attaches to the provisions governing the selection of adjudicators. Again, because the authority of any appeal process – and its promise of finality – depends on the integrity of the entire system, this process must include all levels of hierarchy within the same DS apparatus.¹¹⁰ The search for a type of tribunal that would produce the most effective judicial outcomes has propelled a

¹⁰⁵ Sosnow *et al.*, *supra* note 23, at 139.

¹⁰⁶ E.g. in investment disputes.

¹⁰⁷ 'WTO dispute settlement contrasts with domestic dispute settlement processes where the dividing line between public access to pleadings and oral proceedings and the right to intervene and make submissions is clear': McRae, *supra* note 74, at 12.

¹⁰⁸ Particularly regarding submission of *amicus curiae* briefs.

¹⁰⁹ Gal-Or (d), *supra* note 83.

¹¹⁰ It therefore comes as no surprise that the EU and Canada have made suggestions with regard to the creation of a WTO standing body of professional panellists: 'Private vs. Public International Justice' and 'Outsourcing of Justice', *supra* note 21.

literature on the design of courts and tribunals,¹¹¹ distinguishing between dependent and independent, complete dependent and constrained dependent, tribunals. For a judicial decision to be considered effective and fair, and hence enjoy enhanced chances to be also accepted as final, the institutional design must secure impartiality. It will therefore set standards addressing, among other things, the judges'¹¹² 'moral commitment' to both international law and the community it represents,¹¹³ and their professional skills in applying the law; it will instruct the judges of the standard of review to be applied,¹¹⁴ determine their tenure, and so on.¹¹⁵ As repeatedly stressed in the literature, the judicial outcome¹¹⁶ depends also on the practical adherence by the parties to their agreement's design requirements,¹¹⁷ which is a question of politics, not of law, and to the comportment of the tribunal members¹¹⁸ – which is a question of both politics and law. While it may well be that institutional design of international courts and tribunals must not provide for strong review structures,¹¹⁹ it should, however, allow for adjustments. Signatories should be encouraged to,

¹¹¹ 'Effective' in the context of this article is interpreted as authoritatively final. Dependent tribunals are '*ad hoc* tribunals staffed by judges closely controlled by governments through the power of reappointment or threat of retaliation', whereas independent tribunals are 'staffed by judges appointed on terms similar to those in the domestic courts': Helfer and Slaughter, *supra* note 82, at 5–6. The softwood lumber dispute brings several of these distinctions – and their presumed benefits – into question, e.g. the argument that bilateral disputes are more suited for dependent international adjudication: *ibid.*, at 42, 43. For lack of space, I will not comment on this question here.

¹¹² Or arbitrators, panellists.

¹¹³ Helfer and Slaughter refer among others to Robert O. Keohane's classification of dependence: *supra* note 82, at 9–10.

¹¹⁴ See Raustiala, 'Form and Substance in International Agreements', 99 *AJIL* (2005).

¹¹⁵ 'The most familiar type of review structure is a court. Third-party adjudication strikes many lawyers as an essential component of a legal system. Yet the international legal system is distinguished by the rarity of courts and the weakness of those that exist. In practice, most agreements neither create courts nor employ sanctions as enforcement tools. The dispute settlement clause in many of the agreements that do contain it has never been invoked. In addition, international courts clearly lack the authority and coercive bite of domestic courts. Yet the number of international courts is rising. ... No matter which theoretical approach one favours [to explain choice of structure], the empirical impact of different structures should be understood. Yet the dearth of research on this topic makes any such claims tentative': *ibid.*, at 605–606.

¹¹⁶ I refer here to the quality of the judicial decision which, among other things, serves also to induce compliance, and which should not be confused with actual compliance and enforcement.

¹¹⁷ 'Consider the procedures by which states appoint judges and tribunal members. Often these appointment rules differ radically from the formal appointment rules specified in the agreement establishing the court or tribunal. The Appellate Body provides a notable example': Helfer and Slaughter, *supra* note 82, at 49. However, the deviation may be intended to enhance independence: *ibid.* See also Steinberg, *supra* note 85.

¹¹⁸ C.L. Ostberg and M. Wetstein, *Attitudinal Conflict in the Post-Charter Canadian Supreme Court* (on file with the author).

¹¹⁹ 'In general, the analysis here suggests that concerns about reputation, credibility, and uncertainty often lead states to negotiate international commitments that may be legally binding but are shallow and lack strong review structures. As a result, compliance with these commitments may be high, but their impact on actual behaviour is low': Raustiala, *supra* note 114, at 609. While Raustiala deplors the 'overly deep contract' (at 613) of the WTO, I locate the major problem in the fuzziness of the contract.

over time, fill in the above-mentioned standards by way of joint interpretations and clarifications by the parties, and based on their satisfaction with the tribunal's jurisprudence.¹²⁰

- Conflict of interest. A source of pressing concern is the disturbing re-occurrence of conflict of interest which falls foul of the imperative of legitimacy, independence, impartiality, accountability, and transparency¹²¹ underlying any public adjudicative body and process. Conflict of interest and credibility arise in investment disputes adjudicated before private tribunals,¹²² as well as in the context of public investment and trade DS adjudication.¹²³ In comparison, the municipal court system, after which international DS apparatuses tend to pattern themselves, stipulates that judges be excluded from counselling and counsel barred from judging; the judiciary is separated from the executive and legislative branches of authority. Indeed, the WTO AB has addressed this conflict of interest aspect by taking leadership and adopting a full-time position model coupled with a requirement for qualifications based on recognized competence and selecting from a pool of candidates which ranges beyond the club of international trade lawyers and practitioners.¹²⁴ In brief, the closer international appeal designs follow the municipal appeal models, the greater the attention and adherence to clear and acceptable standards governing conflict of interest.

6 Conclusion

‘The undesirable phenomenon of ambiguity rising from the multiple use of the same term could be avoided by a new and separate terminology for each and every

¹²⁰ The lack of democratic legitimacy is, of course, an underlying subject of concern which is raised in matters ranging from the appointment of judges to the controversy regarding whether judges interpret or also create law. The American approach of elections of judges is not the sole option and yardstick for democracy. See Pauwelyn, ‘The Transformation of World Trade’, 104 *Michigan L Rev* (2005) 1, for a detailed discussion of these issues including legitimacy and Steinberg, *supra* note 85, for the role of power politics in international DS.

¹²¹ Principles listed in Mann *et al.*, ‘Comments on ICSID Discussion Paper, “Possible Improvements of the Framework for ICSID Arbitration”’, International Institute for Sustainable Development (IISD), Dec. 2004, available at www.iisd.org.

¹²² Howard Mann reports about a 2004 conflict of interest case heard by the Dutch District Court in The Hague relating to the doubling of functions of a person – once as arbitrator in an investor–state case, the other as counsel in another case addressing relating legal issues. According to Mann, ‘[t]he Dutch case is clearly just the first known instance of many such challenges to come’: ‘The Emperor’s Clothes Come Off: A Comment on *Republic of Ghana v. Telekom Malaysia Berhard*, and the Problem of Arbitrator Conflict of Interest’, *TDM* 2004, available at: twwalde@aol.com or www.howradmann.ca, at 5. Similarly, ‘I think the distrust of arbitrators disclosed in the episode of the NAFTA “clarification” may be well more widespread than we – i.e. the international arbitration community – want to admit’: Lowenfeld, *supra* note 69, at 16, which raises also issues regarding conflict of interest: *ibid.*, at 17–20.

¹²³ Mann *et al.*, *supra* note 114, at 13.

¹²⁴ *Ibid.* See also New Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 Apr. 2006, *supra* note 3.

context.¹²⁵ In other words, the undesirable phenomenon of ambiguity flowing from the use of a new and separate terminology for each appeal-like variation and every generally similar context (e.g. annulment, setting aside, etc.), could be avoided by admitting to an overarching term, namely appeal. The innovation in the establishment of the WTO AB suggests that *finality* in the settlement of international trade and investment disputes is being considered possible both in international law and within the contemporary international relations. Since its inception over 12 years ago, and in the course of creating a rich jurisprudence, the WTO AB and other appellate bodies that followed suit have been increasingly emulating the model of domestic *appellate courts*.¹²⁶ Yet, they have still some distance to cover before reaching the goal of finality, assuming this is their purpose.

In this article, I undertook to discuss the dissonance between theory and practice, and within theory itself, which renders the international law concept of 'appeal' a misnomer. It feeds on the myth that the DS mechanisms are designed and capable of securing finality of disputes heard by them, only to be dispelled by the reality of parallel and competing jurisdictions. Undertaking a deductive approach, I first tackled the teleology of finality from a theoretical angle, and then studied how finality was served by the prevalent appeal process. Finality provides for closure of a case by definitively disposing of the case for good. It serves (and is served by) the larger goal of any legal system, namely consistency, which in turn is the condition upon which the system's credibility, and hence legitimacy, are predicated.

Two principles were identified as necessary for finality: *res judicata* (already recognized in international law as a general principle), which relates to vertical consistency, and *stare decisis* (not yet recognized in international law) representing horizontal consistency. In contrast with municipal law, where they form the bedrock of the law's integrity within a uniform closed system of which final appeal is the highest authoritative instance, the ambivalent application in international law requires explanation. I argued that the cause of inconclusiveness was to be found in international law's mixing and merging of two municipal models based on two different teleologies: court litigation and ADR. To support this argument, I listed several examples of issues arising from design (international legislation) and adjudication. I also showed that both institutional design and adjudicative practice were tilted toward an increased 'municipalization' of international law, with the WTO AB leading the trend.

Currently, the international legal system has evolved in an inconclusive fashion, replete with partial overlaps of substantive and procedural rules and bodies competing for 'supremacy'. A holistic approach to international law, safe from the pitfalls of discontinuities generated by *ad hoc* and isolated refinements to the law, calls for a discussion of the role of *finality* in public international law, and must precede, at least accompany, legislative treaty design and the jurisprudential development of the procedural aspects of appeal.

¹²⁵ Harnon, *supra* note 35, at 552.

¹²⁶ See Bjorklund for an analysis of the pros and cons of an appellate body in investor-state disputes: *supra* note 10.