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THE EUROPEAN COMMISSION PROPOSAL FOR AN INVESTMENT COURT SYSTEM: OUT WITH THE OLD, IN WITH THE NEW?

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ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR



Céline Lévesque is a CIGI senior fellow as well as dean and full professor at the Faculty of Law, Civil Law Section, University of Ottawa, where her research focuses on international investment law.

Céline has taught courses on international investment law as well as public international law at the University of Ottawa. She has written extensively in the field of international investment law, including many publications on NAFTA Chapter 11 (Investment) and on Canadian international investment treaty practice. Céline assumed the position of dean in July 2014, for a five-year term. She has previously served as vice-dean (academic) of the Civil Law Section.

In 2008-2009, Céline was a scholar-in-residence at the Trade Law Bureau of the Canadian Department of Foreign Affairs and International Trade. In that capacity, she contributed to the defence of NAFTA Chapter 11 claims and to bilateral investment treaty negotiations. Prior to joining academia, she worked at the World Bank in Washington, DC, from 1995 to 1998, in a group focused on private participation in infrastructure. She was involved in projects dealing with public-private partnerships in the water and energy sectors, especially in Western Africa. In this role, Céline participated in missions in Guinea, Ivory Coast, Mauritania and Senegal.

ACRONYMS AND ABBREVIATIONS

BITs	bilateral investment treaties
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
DSB	Dispute Settlement Body
ECHR	European Convention on Human Rights
EFILA	European Federation for Investment Law and Arbitration
EU-Vietnam FTA	European Union-Vietnam Free Trade Agreement
FTA	free trade agreement
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
ISDS	investor-state dispute settlement
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

EXECUTIVE SUMMARY

The European Commission has recently taken a leadership role in reforming the traditional investor-state dispute settlement (ISDS) regime included in economic agreements, in part in response to pressure from the European Parliament and growing civil society criticisms of the regime. At the core of these efforts is the proposal to create a system of “investment courts,” characterized by state nomination of decision makers benefiting from tenure and by the establishment of appellate-level tribunals. A proposal for such a “court” was made to the United States in the context of negotiating the Transatlantic Trade and Investment Partnership (TTIP) and was accepted by Canada in the context of the Comprehensive Economic and Trade Agreement (CETA) and by Vietnam in the EU-Vietnam Free Trade Agreement (EU-Vietnam FTA¹). The European Commission has gone to great lengths to contrast this “new, modernised system” with the “old, traditional form of dispute resolution”² between investors and states. In the long term, the European Commission’s goal is to replace individual courts with a truly multilateral investment court.

This paper demonstrates that not as much of the new system is really new, and much remains of the old (although improved in many respects). As to what really is new — especially the method of appointment, tenure and conduct of tribunal members, as well as the creation of appellate-level tribunals — the paper analyzes compatibility with current international arbitration institutions and rules that will still be relied upon. The paper addresses interactions with domestic courts (on set-asides and enforcement of awards), with the International Centre for Settlement of Investment Disputes (ICSID) and New York conventions as well as with the Court of Justice of the European Union. The paper concludes that many objections levelled at the new system do not appear to withstand analysis, while some compatibility questions remain and may only find an answer once the system is put to the test, especially at the time of enforcement of awards. Ultimately, the weakest area of the European Commission proposal, as well as recent agreements that have adopted it, is the transition plan to a permanent, multilateral solution.*

INTRODUCTION

In September 2015, in the context of negotiating TTIP with the United States, the European Commission released its internal draft proposal for an investment court system.³ With minimal changes, the proposal was officially submitted to the United States government in November.⁴ It later became apparent that the proposal was also submitted to Canada, in the context of CETA, as elements of the proposal made their way into the final text released in late February 2016.⁵ This was the case even though the negotiations had already been officially concluded in 2014. The proposal was also accepted by the Vietnamese government, in the context of the negotiation of the EU-Vietnam FTA.

For TTIP, the proposed investment court system would establish a tribunal of first instance and an appeal tribunal. Fifteen judges would be appointed, by the treaty parties, to the first instance tribunal for terms of six years, renewable once. The case assignments, made by the president of the tribunal, would be done on a rotation basis. The permanent appeal tribunal would be composed of six members, also appointed by the parties to TTIP for six-year, renewable terms.⁶ The systems accepted by Vietnam and Canada differ slightly, but not in the fundamentals.

1 EU-Vietnam Free Trade Agreement, agreed text — Trade in Services, Investment and E-commerce, Resolution of Investment Disputes, published on 1 February 2016, online: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf> [EU-Vietnam FTA].

2 “‘Today, we’re delivering on our promise — to propose a new, modernised system of investment courts, subject to democratic principles and public scrutiny,’ said Trade Commissioner Cecilia Malmström. ‘What has clearly come out of the debate is that the old, traditional form of dispute resolution suffers from a fundamental lack of trust.’” European Commission, Press Release, “Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations” (16 September 2015), online: <http://europa.eu/rapid/press-release_IP-15-5651_en.htm> [EC Press Release, 16 September 2015].

* The author would like to give special thanks to David Di Sante for his research assistance.

3 Commission draft text, TTIP — Investment, Resolution of Investment Disputes and Investment Court System, 16 September 2015, online: <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> [TTIP, September 2015 draft text].

4 Commission, TTIP proposal — Investment, Resolution of Investment Disputes and Investment Court System, published on 12 November 2015, online: <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> [TTIP proposal]. In October 2015, the United States, through the United States Trade Representative (USTR), reportedly communicated its wariness of the proposal, but there appears to have been no official response. See Krista Hughes & Philip Blenkinsop, “U.S. Wary of EU Proposal for Investment Court in Trade Pact”, *Reuters* (29 October 2015), online: <www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029> [Hughes & Blenkinsop].

5 Final CETA text, published on 29 February 2016, online: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf [Final CETA text].

6 TTIP proposal, *supra* note 4, arts 9(5) and 10(5) for first instance judges and appeal tribunal members, respectively. For more detail on the tenures, see the section below entitled “The Tenures and Qualification of Tribunal Members and Costs.”

The idea had been developing in Europe for some time. The proposal provides a response to the growing criticisms toward the ISDS procedures typically included in bilateral investment treaties (BITs) as well as in the investment chapters of free trade and other economic integration agreements.⁷ In May 2015, the Commission released a “concept paper” that included the idea of moving toward an “investment court.”⁸ Yet, in the short term, only incremental steps were provided for, such as the establishment of rosters for arbitrators under the different agreements.⁹ The European Parliament, however, appears to have adopted the idea of a court as a cure for the many perceived ills of the current system. As a result, the incremental approach favoured by the Commission did not prevail. The possibility of agreeing on medium- to long-term solutions,¹⁰ while going ahead with an “improved” ISDS in the short term, did not pass muster. Instead, in July 2015, the European Parliament adopted a resolution on TTIP that included a mandate to replace ISDS with a new system that was more “court-like”: more transparent, involving “independent professional judges” nominated by public authorities and equipped with an appellate mechanism.¹¹

In the span of a few months, the European Commission had answered the call of the Parliament, but in a way that raised many issues, in particular, the nature of the “new” system and its interactions with other instruments and institutions currently in use in ISDS. Indeed, many questions of interactions arise, including with domestic courts (as a matter of set-aside and enforcement of awards), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and the Court of Justice of the European Union (CJEU).

The first part of this paper analyzes the differences between the new system proposed by the European Union and the current ISDS system. The second part of the paper addresses issues of interactions with other regimes and rules. In conclusion, the paper considers some of the transition issues toward a permanent, multilateral solution.

DIFFERENCES BETWEEN THE PROPOSED INVESTMENT COURT SYSTEM AND TRADITIONAL ISDS

The analysis of the proposal reveals that many features of the current ISDS regime remain under the umbrella of the new investment court system, while others, especially those regarding the method of appointment, conduct and tenure of “judges,” differ. This observation raises fundamental questions regarding the exercise of adjudicative functions in the international realm, including what key characteristics permit a process to be labelled “judicial” as opposed to being “arbitration.”¹²

At some level, one might ask whether the nomenclature matters. EU Commissioner Cecilia Malmström has said that “a very different animal” is needed.¹³ There are many known models of dispute settlement

7 Herein referred to as international investment agreements (IIAs) for the sake of simplicity. For a detailed account of the recent evolution of EU investment policy, see the paper written in this series by August Reinisch, “The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court,” CIGI, Investor-State Arbitration Series, Paper No 2 – March 2016, online: <www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf> [Reinisch]. See also European Federation for Investment Law and Arbitration, “Task Force Paper regarding the proposed International Court System” (ICS), draft dated 1-2-2016, online: <http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICs_proposal_1-2-2016.pdf> at 6–11 [EFILA Task Force Paper].

8 European Commission, “Investment in TTIP and beyond — the path for reform”, 6 May 2015, online: <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> [EC, Path for reform].

9 *Ibid* at 7. Some commentators, such as Gus Van Harten, were very critical of the Commission’s concept paper, noting, among other things, that “it did not put in place the usual institutional safeguards such as secure tenure, a set salary, an objective method of case assignment, and prohibitions on double-dipping as a lawyer and arbitrator.” See Gus Van Harten, “A Parade of Reforms: The European Commission’s Latest Proposal for ISDS”, (2015) Osgoode Legal Studies Research Paper Series, Paper 102, online: <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1101&context=olsrps>> at 5. Many of these aspects have since been included in the proposal for an investment court system.

10 European Commission, Cecilia Malmström speech, “Discussion on Investment in TTIP at the meeting of the International Trade Committee of the European Parliament”, 18 March 2015, online: <http://europa.eu/rapid/press-release_SPEECH-15-4624_en.htm> [Malmström speech]; see also Cecilia Malmström, “Investments in TTIP and beyond—towards an International Investment Court” (5 May 2015), European Commission (blog) online: <http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-tip-and-beyond-towards-international-investment-court_en>.

11 European Parliament, *Resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, online: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN> at para 2(d)(xv).

12 See e.g. the statement made in EFILA Task Force Paper, *supra* note 7 at 11: “The innovative proposal of the European Commission marks a clear rupture with the classic system of ISDS which commonly relies on treaty-based arbitrations and abandons altogether the use of arbitral tribunals in favour of semi-permanent quasi-judicial bodies.”

13 Malmström speech, *supra* note 10.

systems that are best described as “mixed.” They involve both public and private parties, and vary in their characteristics.¹⁴ The Iran-US Claims Tribunal is a good example of this.¹⁵ International arbitration has also long taken place between states as well as between private parties, or between both public and private parties with some variations.¹⁶ Maybe the new system for the resolution of investment disputes proposed by the European Commission is simply *sui generis*.¹⁷

At another level, however, terms do matter: some international treaties specifically provide for the execution and enforcement of arbitral awards, the New York Convention being the most important.¹⁸ Domestic or international court decisions do not benefit from the same level of recognition when it comes to enforcement time.¹⁹ As a result, it is not surprising that the TTIP proposal as well as agreements with Vietnam and Canada specify that awards rendered by the planned tribunals are meant to qualify as arbitral awards for the purpose of the New York Convention²⁰ and the ICSID Convention.²¹

In addition, even the terms “court” and “judges” that appeared in the TTIP proposal have vanished in the Canada-EU CETA and EU-Vietnam FTA descriptions of the new system. In any event, the word “court” is used in only two headings of the TTIP proposal and the title “judges” designates members of the tribunal of first instance only (not for the appeal tribunal). Nonetheless, it is noticeable that these terms have disappeared, being replaced by the more neutral expression of “resolution of investment disputes” in section titles and “tribunal” and “tribunal members” elsewhere.²²

Since one of the most fundamental departures from the current ISDS model provided in the proposal is the removal of unilateral (or party) nomination of arbitrators, the question becomes: can international arbitration exist without it? In more practical terms, do the New York and ICSID Conventions apply to “awards” rendered under such a system?

In order to address such issues, the analysis below first provides a summary of the features or elements that do not differ from the current ISDS, followed by new ones.

Elements of the Current ISDS System that Remain

The TTIP proposal as well as the agreements with Canada and Vietnam similarly provide that claims can be submitted for adjudication under the arbitration rules of: the ICSID Convention; the ICSID Additional Facility Rules; the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or any other rules agreed by the disputing parties.²³

The proposal and concluded agreements further provide that the consent offered in advance by the respondent state (or the European Union) as well as the investor at the time of submitting the claim satisfy the requirements of “(a) Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties; and, (b) Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an ‘agreement in writing’.”²⁴

The use of existing arbitration institutions and rules as well as the reliance on international conventions for the enforcement of arbitral awards would seem to indicate that the mechanism is still fundamentally

14 See Stephen J Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge: Grotius Publications Limited, 1990) at 385.

15 Hazel Fox, “States and the Undertaking to Arbitrate” (1988) 37 Int’l & Comp LQ 1 at 3; *supra* note 14 at 275–277.

16 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966 [ICSID Convention] was specifically created to provide a forum for the resolution of investment disputes between investors and States. See Antonio R Parra, *The History of ICSID* (Oxford: Oxford University Press, 2012).

17 Reinisch, *supra* note 7, at 25, calls the tribunals “hybrids between courts and arbitral tribunals.”

18 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 39 (entered into force 7 June 1959) [*New York Convention*].

19 See the Hague Convention on Private International Law, *Convention on Choice of Court Agreements*, 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015), to which only the European Union, its member states (except Denmark) and Mexico are currently states parties (Singapore ratified the treaty in June 2016, and will become a state party as of October 2016); Hague Convention on Private International Law, *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, 1 February 1971, 1144 UNTS at 249 (entered into force 20 August 1979), to which Albania, Cyprus, Kuwait, the Netherlands and Portugal are states parties.

20 *New York Convention*, *supra* note 18.

21 *ICSID Convention*, *supra* note 16.

22 Final CETA text, *supra* note 5 at section F; EU-Vietnam FTA, *supra* note 1 at section 3.

23 TTIP proposal, *supra* note 4, art 6(2); Final CETA text, *supra* note 5, art 8.23.2; EU-Vietnam FTA, *supra* note 1, art 7(2).

24 TTIP proposal, *supra* note 4, art 7(2); Final CETA text, *supra* note 5, art 8.25.2; EU-Vietnam FTA, *supra* note 1, art 10(4).

an arbitration one. This conclusion appears to be supported by the provision that proceedings would still be administered by ad hoc secretariats.²⁵

In the TTIP proposal, the following provisions regarding the conduct of proceedings appear to integrate best treaty practices as well as codify prevailing trends in ISDS awards, including relating to the following topics:

- parallel claims (article 14);
- anti-circumvention (article 15);
- preliminary objections (article 16);
- claims unfounded as a matter of law (article 17);
- transparency (article 18);
- interim measures of protection (article 19);
- discontinuance (article 20);
- security for costs (article 21);
- non-disputing party participation (article 22);
- intervention by third parties (article 23);²⁶
- expert reports (article 24);
- insurance and guarantee compensation (article 25); and
- consolidation (article 27).^{27, 28}

Finally, regarding awards, the usual remedies of ISDS are maintained: monetary compensation and restitution (with the choice of monetary compensation in lieu of restitution left to the state).²⁹ The explicit proviso that “[t]he Tribunal may not order the repeal, cessation or modification of the treatment concerned”³⁰ confirms that the system is consistent and aligned with traditional arbitration. The possibility of appeal has an impact on the vocabulary used, as the proposal refers to “provisional awards,” which become final after the appeal or after 90 days in cases where there is no appeal.³¹

25 Neither the TTIP proposal nor the EU-Vietnam FTA chooses between the Permanent Court of Arbitration (PCA) and ICSID, as both are included in the bracketed text. See TTIP proposal, *supra* note 4, arts 9(16) and 10(15) and EU-Vietnam FTA, *supra* note 1, arts 12(18) and 13(18). It should be noted, however, that the PCA cannot administer ICSID cases. CETA overcomes this difficulty by selecting only ICSID; see Final CETA text, *supra* note 5, art 8.27.16. ICSID can and does administer cases under its Convention’s rules, the Additional Facility rules as well as UNCITRAL arbitration rules. As described further below, however, the tribunal of first instance would also be managed by a president and vice-president responsible for organisational issues. See TTIP proposal, *supra* note 4, art 9(8). See also for the appeal tribunal, TTIP proposal, *ibid*, art 10(6).

26 In this regard, the TTIP proposal seems to go further than other treaties have by providing for a right to receive procedural documents, attend the hearing and make oral statements (also at the appeal level). TTIP proposal, *ibid*, art 23(3) and (4).

27 It should be noted, however, that “mass-claims” are not admissible under the TTIP proposal: “Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible.” See TTIP proposal, *ibid*, art 6(5). See EU-Vietnam FTA, *supra* note 1, art 7(6). See also Final CETA text, *supra* note 5, annex 8-B which deals with claims that relate to restructuring of debt.

28 The EU-Vietnam FTA covers the same topics (except for one), but not always in the identical language. CETA mostly covers the same, but two provisions are notably absent — regarding anti-circumvention and security for costs — both of which are provided in the TTIP proposal “for greater certainty.”

29 TTIP proposal, *supra* note 4, art 28(1); Final CETA text, *supra* note 5, art 8.39(1); EU-Vietnam FTA, *supra* note 1, art 27(1).

30 TTIP proposal, *supra* note 4, art 28(1) *in fine*; EU-Vietnam FTA, *supra* note 1, art 27(1) *in fine*.

31 TTIP proposal, *supra* note 4, art 28.

Differences from the Current ISDS System

Turning to differences between the proposal and current ISDS practices, the main ones concern: the method of appointment, tenure and conduct of judges, and the creation of an appeal tribunal. The issue of timeliness of awards is also briefly discussed.

Removal of Unilateral Nomination of Tribunal Members

As noted above, one key difference in the proposal compared to the dominant practice in ISDS is the removal of party autonomy in the choice of adjudicators. For both the tribunal of first instance and the appeal tribunal, the TTIP proposal and the agreements with Canada and Vietnam provide that treaty parties would make appointments through a committee.³² In the case of the TTIP proposal, of the 15 judges of the tribunal of first instance, “[f]ive of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries.”³³ Similarly, “[t]he Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries.”³⁴ The Vietnam agreement includes the same system but with just nine members of the first instance tribunal.³⁵ The agreement also includes the possibility for the parties to propose nationals of another state to sit as one of their nationals.³⁶ As in TTIP, the CETA first instance tribunal would comprise 15 members, divided equally among Canada, EU member states and third-country nationals. CETA also includes the provision that one party can propose nationals of another state to sit as one of its own.³⁷ As for the appellate tribunal, the CETA Joint Committee will decide on the number of members to be appointed.³⁸

Thus, the first question: can a process qualify as “arbitration” even though investors/claimants do not unilaterally nominate arbitrators?

Based on the EU TTIP proposal, Sophie Nappert has argued that the European Union was walking away from international arbitration.³⁹ Her analysis relied, in part, on criteria outlined by the Advisory Committee of Jurists in the context of the establishment of the Permanent Court of International Justice (1920), which included the nomination of the arbitrators as a distinguishing feature of arbitration as opposed to adjudication. Nappert emphasizes the value of freedom inherent in arbitration, a process that rests “on the ability given to the parties of choosing their decision-makers if they so wish.”⁴⁰

Yet, a few examples point the other way. Article I(2) of the New York Convention specifically envisages the role of arbitral institutions in the nomination of arbitrators. Indeed, enforceable under the convention are “not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”⁴¹ This wording leaves “no doubt that awards rendered both in ad hoc proceedings and in institutional arbitration proceedings fall within the scope of the Convention.”⁴²

In 2010, Jan Paulsson suggested that parties to a dispute no longer name arbitrators, but that institutions do so. In this context, he stated that no right exists to name one’s arbitrator.⁴³ Critics were quick to pounce, but, save one exception, no authority appears to be cited as to the mandatory character — as opposed to a factor of attraction — of unilateral arbitrator appointment. Instead, many commentators

32 TTIP proposal, *ibid*, art 9(2) for the tribunal of first instance and art 10(3) for the appeal tribunal. See also Final CETA text, *supra* note 5, art 8.27.2 and .3; EU-Vietnam FTA, *supra* note 1, arts 12(2) and 13(3).

33 TTIP proposal, *supra* note 4, art 9(2).

34 *Ibid*, art 10(2).

35 EU-Vietnam FTA, *supra* note 1, arts 12 and 13.

36 *Ibid*, art 12(2) footnote 25 (first instance tribunal) and art 13(3) footnote 26 (appeal tribunal).

37 Final CETA text, *supra* note 5, art 8.27.2 and footnote 9 regarding third-party nationals in lieu of nationals.

38 *Ibid*, art 8.28.3.

39 Sophie Nappert, “Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism” (2015 EFILA Inaugural Lecture delivered in London, 26 November 2015), online: <http://efila.org/wp-content/uploads/2015/11/Annual_lecture_Sophie_Nappert_full_text.pdf> [Nappert].

40 *Ibid*.

41 *New York Convention*, *supra* note 18, art I(2).

42 Reinmar Wolff, ed, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary* (Munich: CH Beck, 2012) at 53 [NY Convention Commentary] citing Daniel Girsberger & Nathalie Voser, *International Arbitration in Switzerland* (Zürich: Schulthess, 2008) at para 1150; see also John Savage & Emmanuel Gaillard, eds, *Fouchard, Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at para 54 [Savage & Gaillard].

43 Jan Paulsson, “Moral Hazard in International Dispute Resolution” (2010) 25(2) ICSID Review: Foreign Investment LJ 339.

describe arbitration as an alternative to state courts, deriving its authority from an agreement between the parties and ensuring sufficient guarantees of independence and impartiality, without specific mention of unilateral party appointment being made.⁴⁴ A notable exception is provided by Charles Brower and Charles Rosenberg, who argue that unilateral nomination has become “an established principle of law.”⁴⁵ In support, they offer a long list of treaties (going back more than 200 years) that provide for this right, in addition to all of today’s major international arbitration rules, the UNCITRAL Model Law and many of the world’s domestic arbitration laws.⁴⁶ For them, the right of the parties to choose arbitrators is an important element of the perceived legitimacy of international arbitration.⁴⁷ The 1992 French Cour de Cassation *Dutco* decision would, at first glance, also appear to support the proposition that unilateral appointment of arbitrators is fundamental to the principle of equality of the parties.⁴⁸ However, the context was very different in the *Dutco* case, which involved a multi-party arbitration where the claimant nominated its own arbitrator, whereas the two respondents were ordered by the International Chamber of Commerce (ICC) Court of Arbitration to jointly nominate one arbitrator, as per the ICC Arbitration Rules.⁴⁹ Critics have noted that while the *Dutco* case requires that “all parties should have the same rights with regard to the appointment of arbitrators,” it does not go as far as suggesting that all parties have a right to appoint “their arbitrator.”⁵⁰

The Iran-US Claims Tribunal appears to provide a relevant precedent. Investors did not nominate the decision makers, called “judges,” but the process relied on the UNCITRAL arbitration rules. Both the United States and Iran respectively nominated three nationals as members to the tribunal.⁵¹ Together, these six members appointed the remaining three members from third-party states, including the president of the tribunal.⁵² Inconsistent decisions were rendered early on, namely in the United Kingdom and the United States, regarding the issue of whether the tribunal’s decisions could be enforced under the New York Convention. Indeed, the English High Court⁵³ held that the convention could not apply to an Iran-US Claims Tribunal award, by reason of non-compliance with Dutch procedural law, because of the lack of “an agreement in writing signed by both parties.”⁵⁴ Taking a contrary view, two American decisions⁵⁵ enforced awards rendered in favour of Iran under the convention.⁵⁶ However, investment treaties have resolved this obstacle by including deemed consent; the EU TTIP proposal, as well as agreements with Vietnam and Canada, have followed suit.⁵⁷ Although of a different nature, another example is provided by ICSID annulment committees. The ad hoc committee members are selected by the chairman of the ICSID Administrative Council, from a list of arbitrators named by member states.⁵⁸ Yet, the committees are very much part of the arbitral process.

As for the impact on the applicability of the New York Convention, it will be addressed further below under regime interactions.

44 See for example, the definition of “arbitral tribunal” provided in the commentary to article I(2) of the NY Convention in NY Convention Commentary, *supra* note 42 at 36 and footnote 41. In Savage & Gaillard, *supra* note 42 at para 7, the authors borrow the concept of arbitration from the traditional French definition, which describes arbitration as “the settlement of a question [...] entrusted to one or more persons, who derive their power from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement”; Richard H Kreindler & Thomas Kopp, “International Commercial Arbitration” in Rüdiger Wolfrum, ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) at para 2, distinguishes arbitration from litigation “insofar as a private person or persons chosen by the parties or, as the case may be, the institution or court of appropriate jurisdiction will determine the outcome of the dispute in contrast to a judge.”

45 Charles N Brower & Charles B Rosenberg, “The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators are Untrustworthy is Wrongheaded” (2013) 29 *Arb Intl* at 2 [Brower & Rosenberg, “Nightingale”]. See also Charles N Brower, Michael Pulos & Charles B Rosenberg, “So Is There Anything Really Wrong With International Arbitration As We Know It?” in Arthur W Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Leiden: Martinus Nijhoff, 2012), at 7.

46 Brower & Rosenberg, “Nightingale,” *supra* note 45 at 2.

47 *Ibid* at 1.

48 *Sociétés BKMI et Siemens c Société Dutco*, [1992] Cour de cassation, First Civil Chamber, 89-18708 89-18726; Savage & Gaillard, *supra* note 42 at para 792.

49 Julia Mair, “Equal Treatment of Parties in the Nomination Process of Arbitrators in Multi-Party Arbitration and Consolidated Proceedings” (2007) 12 *Austrian Rev Intl & Eur L* 59 at 64 [Mair]; Savage & Gaillard, *supra* note 42.

50 Mair, *supra* note 49 at 65–66; Savage & Gaillard, *supra* note 42.

51 Charles N Brower, “Lessons to be Drawn from the Iran-U.S. Claims Tribunal” (1992) *J Intl Arb* at 53.

52 Mohsen Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (The Hague: Kluwer Law International, 1999) at 73.

53 *Dallal v Bank Mellat*, [1986] 1 All E.R. 239.

54 NY Convention Commentary, *supra* note 42 at 54.

55 *Iran v Gould* 887 F. 2d 1357 (9th Cir. 1989); *Iran Aircraft Industries v AVCO Corp.* 980 F.2d 141 (2d Cir. 1992).

56 NY Convention Commentary, *supra* note 42 at 54–55.

57 TTIP proposal, *supra* note 4, art 7(2)(b); Final CETA text, *supra* note 5, art 8.25.2(b); EU-Vietnam FTA, *supra* note 1, art 10(4)(b).

58 *ICSID Convention*, *supra* note 16, art 52(3).

The Tenures and Qualification of Tribunal Members and Costs

Another departure from the current ISDS system is the provision that judges would have set tenures. In the TTIP proposal, eight of the 15 tribunal of first instance judges would be appointed for a six-year term, renewable once, whereas the remaining seven judges, to be determined by lot, would be offered an extended nine-year term.⁵⁹ As for the appeal tribunal, the TTIP proposal fixes the term for three out of the six members to six years, renewable once. The remaining three members, to be determined by lot, would hold a nine-year term.⁶⁰ All would receive retainer fees to ensure their availability.⁶¹

The agreement with Canada provides slightly shorter terms, of five years, renewable once, for eight of the 15 members of the tribunal. The remaining seven members will be given an extended six-year term.⁶² The members of the tribunal will also receive a monthly retainer fee, to be determined by the CETA Joint Committee.⁶³ The term length and remuneration of the appeal tribunal members has not been included in the agreement, as these issues are to be decided by the CETA Joint Committee.⁶⁴

Finally, the EU-Vietnam FTA provides for even shorter appointments, as four of the nine members of the tribunal will sit for a four-year term, renewable once. The other five members, determined by lot, will be offered extended six-year terms.⁶⁵ As for the appeal tribunal, three of the six members shall be appointed for a four-year term, renewable once. The remaining three members will hold a six-year term.⁶⁶ Members of the tribunal and appeal tribunal are to be paid a monthly retainer fee to be fixed by decision of the Trade Committee.⁶⁷

The reading guide to the TTIP proposal emphasizes the permanent as opposed to ad hoc nature of the system, bringing it closer to the functioning of judicial bodies: “As in domestic or international tribunals, the disputing parties would not choose their judges. Three judges would be assigned randomly to each case, but always one judge from the EU, one judge from the US and one judge from a third country who would also be the Chairman. A randomised system would insulate the judges from any perceived risk of interference from the disputing parties.”⁶⁸

The European Union is walking a fine line, attempting to establish a “permanent” system for the resolution of investment disputes, with tenured members, while implicitly recognizing that the volume of cases may not, for many years, justify the full-time employment of 15 first instance tribunal members in the case of the TTIP proposal and the Canada-EU CETA, and nine members for the EU-Vietnam FTA.⁶⁹ How costs are to be shared over time is not entirely clear on the reading of the proposal and recent agreements. All the texts provide for a two-stage process that involves, during the first stage:

- The state parties paying a retainer of a set amount each month to ensure availability of first instance tribunal members.⁷⁰
- The parties to the dispute, investor/claimant and respondent, paying the costs of the proceedings.⁷¹ The “cost follows the event” rule applies to both the cost of the proceedings as well as parties’ representation costs, unless the tribunal determines that it is unreasonable in the circumstances (although for the cost of proceedings, this would occur only in exceptional circumstances).⁷²

59 TTIP proposal, *supra* note 4, art 9(5).

60 *Ibid*, art 10(5).

61 First instance tribunal: The monthly retainer fee for judges is to be fixed by the committee; however, the European Union has suggested one equivalent to approximately one-third of the retainer fee for WTO Appellate Body members, around €2,000 per month (*ibid*, art 9(12)). Appeal: The monthly retainer fee for appeal tribunal members is to be fixed by the Committee; however the EU has suggested one similar to the retainer fee for WTO Appellate Body members, around €7,000 per month (*ibid*, art 10(12)).

62 Final CETA text, *supra* note 5, art 8.27.5.

63 *Ibid*, art 8.27.12.

64 *Ibid*, art 8.28.7.

65 EU-Vietnam FTA, *supra* note 1, art 12(5).

66 *Ibid*, art 13(5).

67 *Ibid*, arts 12(14) and 13(14), respectively.

68 EC, Commission, Reading guide, “Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)” 16 September 2015, online: <http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm>.

69 TTIP proposal, *supra* note 4, art 9(15); Final CETA text, *supra* note 5, art 8.27.15; EU-Vietnam FTA, *supra* note 1, art 12(17).

70 TTIP proposal, *supra* note 4, art 9(12) and (13); EU-Vietnam FTA, *supra* note 1, art 12(14) and (15); Final CETA text, *supra* note 5, art 8.27.12 and 8.27.13.

71 Articles 9(14) and (16) of the TTIP proposal appear to contradict each other on the payment of fees related to the proceedings.

72 TTIP proposal, *supra* note 4, art 28(4); EU-Vietnam FTA, *supra* note 1, art 27 (4); Final CETA text, *supra* note 5, art 8.39.5.

- The state parties paying the retainers and the costs of proceedings for the appellate tribunal.

And as a second stage, assuming the volume of cases justifies it, the treaty parties could decide to move to a permanent salary, but the texts are unclear as to who would pay the salary. Would the parties to an individual dispute still be attributed a share of the salaries and costs on a “cost follow the event” basis? The TTIP proposal only provides that: “Upon a decision by the [...] Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary. In such an event, the Judges shall serve on a full-time basis and the [...] Committee shall fix their remuneration and related organisational matters. In that event, the Judges shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal.”⁷³

The question of cost aside, the implication is that until the volume of cases justifies it, the tribunal members would not be prevented from holding other occupations, other than acting as counsel in investment protection disputes which is clearly prohibited.⁷⁴ Two remarks flow from this. First, it appears to be the first time that an investment treaty prohibits the controversial “double-hat” practice that sees some practitioners acting simultaneously as counsel and arbitrators in different cases.⁷⁵ Second, such a system will favour arbitrators, who are already established “players” and can afford to act only as arbitrators, as well as retired judges and academics.⁷⁶

The qualifications asked of tribunal members appear to confirm that reading. The basic qualifications also resemble those for judges of the International Court of Justice (ICJ)⁷⁷ and the CJEU.⁷⁸ The TTIP proposal provides that: “The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.”⁷⁹ The wording in the Canada and Vietnam agreements is identical for the qualifications asked of the respective tribunal members.⁸⁰ For appeal tribunal members under the TTIP proposal and the Vietnam agreement, the difference rests with the added qualification of being able to be appointed to the “highest judicial offices.”⁸¹ Under CETA, no distinction is currently made between qualifications for tribunal members and appellate tribunal members.⁸²

Commentators have raised the issue that state parties only nominate tribunal members who are pro-state.⁸³ The TTIP proposal’s provision to the effect that judges shall be independent does not directly address this issue: “The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute.”⁸⁴ However, if the states were to “stack” (so to speak) the tribunal system with only state-leaning individuals, one may question the point of including an investment protection dispute

73 TTIP proposal, *supra* note 4, art 9(15).

74 *Ibid*, art 11 (1) *in fine*; Final CETA text, *supra* note 5, art 8.30.1 *in fine*; EU-Vietnam FTA, *supra* note 1, art 14(1) *in fine*.

75 Günther J Horvath & Roberta Berzero, “Arbitrator & Counsel: the Double-Hat Dilemma” (2013) 10:4 Transnational Dispute Management 1; Jean E Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015) at 411.

76 See EFILA Task Force Paper, *supra* note 7 at 3: “The pool of TFI [tribunal of first instance] and AT [appeal tribunal] judges would seem to be limited to academics, (former) judges and (former) Government officials. That may not be sufficient to guarantee the practical experience and expertise needed and/or independence from the State.” Reinisch, *supra* note 7 at 25, notes, however, that an increased number of academics will not be feasible “in case the tribunal is converted into a permanent tribunal.”

77 United Nations, *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1031 (entered into force 24 October 1945), part 2. This article provides that: “The Court shall be composed of a body of independent judges [...] who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”

78 *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007 art 253, OJ C 326 (entered into force 26 October 2012). This article states that: “The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence.”

79 TTIP proposal, *supra* note 4, art 9(4).

80 Final CETA text, *supra* note 5, art 8.27.4 and EU-Vietnam FTA, *supra* note 1, art 12(4).

81 TTIP proposal, *supra* note 4, art 10(7) and EU-Vietnam FTA, *supra* note 1, art 13(7).

82 Final CETA text, *supra* note 5, art 8.28.4 refers back to article 8.27.4 (qualifications for first instance tribunal members).

83 EFILA Task Force Paper, *supra* note 7 at 15; Louise Woods, “Fit for Purpose? The EU’s Investment Court System” (23 March 2016), Kluwer Arbitration Blog, online: <<http://kluwarbitrationblog.com/2016/03/23/to-be-decided/>>.

84 TTIP proposal, *supra* note 4, art 11(1).

settlement process in such agreements at all. In fact, Canada, the United States and many European countries have by now realized that the system protects both their “defensive” and “offensive” interests.⁸⁵ Therefore, competence and neutrality should be of paramount importance.⁸⁶

The randomness planned for the assignment of individual judges to each division of three also militates in favour of neutrality. The process, in all three texts, provides that “[w]ithin 90 days of the submission of a claim [...] the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.”⁸⁷

Finally, a code of conduct is provided in annex II to both the TTIP proposal and the EU-Vietnam FTA. It generally provides that all members be independent and impartial, and shall avoid both direct and indirect conflicts of interest.⁸⁸ Members must avoid the appearance of bias and impropriety, and shall not be influenced by self-interest or outside pressure,⁸⁹ nor incur any obligation that would appear to interfere with the proper performance of their duties.⁹⁰ The code of conduct extends to former members as well, as they must avoid actions that could create the appearance that they were biased while sitting.⁹¹ As for CETA, the text does not include a code of conduct yet for the members of the tribunal and appellate tribunal. However, the Committee on Services and Investment is tasked with adopting one upon entry into force of the agreement.⁹²

Nonetheless, one weakness of the TTIP proposal and the EU-Vietnam FTA has been cured in the text of the Canada-EU CETA. The TTIP proposal⁹³ and the Vietnam agreement⁹⁴ provide that decisions on allegations of conflicts of interest would be taken by the president of the tribunal of first instance or the appeal tribunal, depending on which tribunal is affected by the alleged conflict.⁹⁵ This was rightly criticized as problematic, as tenured colleagues continue to sit together for many years.⁹⁶ In the CETA, the president of the ICJ will rule on such challenges.⁹⁷

Appeal Tribunal

The other major difference from the current ISDS is the proposed establishment of an appeal tribunal. The idea is not new, but it is the first time that international investment agreements (IIAs) include provisions establishing an appellate mechanism as opposed to negotiating to agree on one.⁹⁸

85 See Lord Goldsmith, QC PC, “Opportunities and Challenges Presented by Australia’s New Free Trade Agreements” (keynote address delivered at the 3rd Chartered Institute of Arbitration International Arbitration Conference, Sydney, 24 November 2015), online: < www.ciarb.net.au/wp-content/uploads/2015/12/3rd-International-Arbitration-Conference-Keynote.pdf> at 20–21 [Lord Goldsmith]. He states: “But in appointing to a standing court rather than an ad hoc tribunal, the states need to balance their interests as future defendants with the interests of their own business and industry in effective investor protection. Having a third country judge as chair may also assist in preventing a pro-state bias.”

86 Another argument posits that tribunal members wanting to be reappointed will attempt to please the states. Recent controversies at the WTO regarding the blocking by the US government of an Appellate Body member’s renewal certainly give pause as to the independence of such bodies. See WTO news, Dispute Settlement, “WTO Members Debate Appointment/Reappointment of Appellate Body Members”, 23 May 2016, online: < www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm>; see also Gregory Shaffer, “Will the US Undermine the World Trade Organization?” *The World Post* (23 May 2016), online: <www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html>. The German Magistrates Association has also raised issues regarding the independence of the proposed TTIP ICS: see “Opinion on the Establishment of an Investment Tribunal in TTIP—the Proposal from the European Commission on 16.09.2015 and 11.12.2015 (sic)” (February 2016), online: <http://ttip2016.eu/files/content/docs/Full%20documents/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf>.

87 TTIP proposal, *supra* note 4, art 9(7); EU-Vietnam FTA, *supra* note 1, art 12(7); Final CETA text, *supra* note 5, art 8.27.7.

88 TTIP proposal, *supra* note 4, and EU-Vietnam FTA, *supra* note 1, Code of Conduct, Common art 2.

89 TTIP proposal, *supra* note 4, and EU-Vietnam FTA, *supra* note 1, Code of Conduct, Common art 5(1).

90 TTIP proposal, *supra* note 4, and EU-Vietnam FTA, *supra* note 1, Code of Conduct, Common art 5(2).

91 TTIP proposal, *supra* note 4, and EU-Vietnam FTA, *supra* note 1, Code of Conduct, Common art 6.

92 Final CETA text, *supra* note 5, art 8.44.2

93 TTIP proposal, *supra* note 4, art 11(2).

94 EU-Vietnam FTA, *supra* note 1, art 14(2).

95 This system is, in some ways, worse than the one that exists under the ICSID Convention, *supra* note 16, which provides at article 58 that: “The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be.” See also ICSID Arbitration Rules, effective 10 April 2006, online: <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap01.htm> at Rule 9(4).

96 See Nappert, *supra* note 39, who notes: “It is striking, for a document that claims to bend over backwards to get away from ISDS as we know it, that it imports probably one of ISDS’ most problematic practices in the ICSID context.” See also EFILA Task Force Paper, *supra* note 7 at 16.

97 Final CETA text, *supra* note 5, art 8.30.2 and 8.30.3.

98 CETA 2014 Consolidated text—Investment, published on 26 September 2014, online: <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> [CETA 2014 Consolidated Text] art X.42 (1)(c) — which provides for a “forum for the Parties to consult” as to “whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements.”

In the United States, as early as 2002, Congress included in the treaty negotiation objectives that it provided to the Executive branch the provision for “an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements.”⁹⁹ Thus, the idea found its way into the 2004 US model BIT¹⁰⁰ as well as FTAs¹⁰¹ signed by the United States, which provide for two possibilities: a bilateral or a multilateral appellate mechanism.¹⁰² On one reading, these provisions imply that the United States favours a multilateral appellate mechanism, but, cognizant of the difficulties involved and the time required, it provided for a “plan B.” The bilateral solution could then be temporary, should a multilateral solution arise. However, almost 15 years on, the United States and its partners have not established any bilateral mechanisms.

Meanwhile, the developments occurring in the United States were echoed at ICSID. In a discussion paper circulated by the ICSID Secretariat in October 2004, entitled “Possible Improvements of the Framework for ICSID Arbitration,” the desirability of establishing an appellate mechanism was considered.¹⁰³ The impetus was clear: According to the Secretariat, “[b]y mid-2005, as many as 20 countries may have signed treaties with provisions on an appeal mechanism for awards rendered in investor-to-State arbitrations under the treaties. Most of these countries are also Contracting States of the ICSID Convention.”¹⁰⁴ The resulting diagnosis was also clear: “It would in this context seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. Efficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms.”¹⁰⁵

The implementation of any such ICSID appellate mechanism was also considered.¹⁰⁶ An annex to the paper presented possible features of an appeals facility, including membership (nomination, nationality, expertise and term), grounds for appeal, decisions, fees and expenses, bonding requirements and Secretariat support. The World Trade Organization (WTO) Appellate Body inspired some of the features.¹⁰⁷ In the end, after some consultations, the proposal was judged premature and not acted upon.¹⁰⁸

More than 10 years later, it would appear the time for appeals has finally come (although maybe not just yet for the United States, judging from the text of the Trans-Pacific Partnership [TPP]).¹⁰⁹ As mentioned above, the TTIP proposal would establish a permanent appeal tribunal composed of six members, appointed by the parties for fixed terms.¹¹⁰ The TTIP proposal provides the following grounds for appeal: “(a) that the Tribunal has erred in the interpretation or application of the applicable law; (b)

99 See Bipartisan Trade Promotion Authority Act, 2002, Pub.L. 107–210 (107th Cong., 2nd Sess.), Division B, Title XXI, at sec. 2102 (b)(3)(G) [TPA]. The TPA was formerly known as “fast-track.”

100 US Model BIT 2004, annex D, entitled “Possibility of a Bilateral Appellate Mechanism” provides: “Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.” Online: <https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf> [US Model BIT 2004].

101 A more detailed mandate for the establishment of an appellate mechanism can be found in the FTA that the US signed with five Central American countries and the Dominican Republic in 2004. See USTR, “CAFTA-DR Final Text,” annex 10-F on Appellate Body or Similar Mechanism, online: <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> [US-CAFTA-DR]. It is discussed at length in David A Gantz, “An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges” (2006) 39 Vand J Transnat’l L 39 at 56–57.

102 Both the US model BIT (2004) and the US-CAFTA-DR also provide for the possibility of the establishment of a multilateral appellate mechanism. US Model BIT 2004, *supra* note 100, art 28(10). To the same effect, see US-CAFTA-DR, *supra* note 101, art 10.20(10).

103 ICSID, “Possible Improvements of the Framework for ICSID Arbitration,” ICSID Secretariat Discussion Paper, 22 October 2004, online: <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>> at 14ff [ICSID Improvement Paper].

104 *Ibid* at para 20.

105 *Ibid* at para 23.

106 *Ibid* at annex.

107 See *ibid* at annex, for example, notes 4 and 8.

108 ICSID, Working Paper of the ICSID Secretariat, “Suggested Changes to the ICSID Rules and Regulations”, 12 May 2005, online: <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>> at para 4.

109 TPP art 9.23(11) does not foresee that the TPP parties take the lead, but rather contemplates that they might join such a system. It states: “In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future *under other institutional arrangements*, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism” (emphasis added). Trans-Pacific Partnership Full Text — Investment, published on 5 November 2015, online: <<https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>> [TPP Full Text]. See Hughes & Blenkinsop, *supra* note 4, who quote reported statements by USTR Michael Froman: “It’s not obvious to me why you would want to give companies a second bite of the apple.”

110 The term in the TTIP proposal, *supra* note 4, art 10(5), is six years (which is extended to nine years for certain members), while in the EU-Vietnam FTA, *supra* note 1, art 13(5), the term is four years (which is extended to six years for certain members).

that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b)."¹¹¹

In cases where the appeal is well founded, the TTIP proposal provides that “the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part.”¹¹² It also provides that an appeal may be dismissed “on an expedited basis where it is clear that the appeal is manifestly unfounded.”¹¹³

The pre-scrubbed version of CETA (text published as of September 2014) included a provision that foresaw consultations on “whether, and if so, under what conditions, an appellate mechanism could be created.”¹¹⁴ However, the scrubbed version includes a fully formed commitment to create an appellate tribunal, while some administrative and organizational matters are left for the CETA Joint Committee to decide (including the number of members, their remuneration and other costs issues).¹¹⁵

Further, the TTIP proposal and agreements with Canada and Vietnam all foresee a future transition to a multilateral dispute settlement mechanism. For instance, the TTIP provides that “Upon the entry into force between the Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease to apply. The [] Committee may adopt a decision specifying any necessary transitional arrangements.”¹¹⁶ The agreements with both Vietnam and Canada include language that mandates parties to seek such multilateral arrangements.¹¹⁷

Much ink has been spilled on the value of appeals for investment arbitration.¹¹⁸ The issue is often presented as the opposition of the values of finality and correctness.¹¹⁹ For the purpose of this section of the paper, focusing on divergence between traditional ISDS and the new EU proposed system, it is worth noting that nothing about appeals is antithetical to arbitration.¹²⁰ Other arbitral institutions, such as the European Court of Arbitration, the Court of Arbitration for Sport, the American Arbitration Association and the International Centre for Dispute Resolution, all provide for the possibility of appeals.¹²¹

In general, an appeal tribunal will *in principle* be able to correct errors of law and ensure consistency of decisions *within* the agreement. However, the existence of an appeal tribunal for each agreement has

111 TTIP proposal, *supra* note 4, art 29(1). Interaction with ICSID Annulment is discussed in the second part of this paper.

112 *Ibid*, art 29(2).

113 *Ibid*; see also EU-Vietnam, *supra* note 1, art 28(2).

114 CETA 2014 Consolidated text, *supra* note 98, online: <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> art X.42 (1) (c). CETA parties appear to have changed their mind on limiting the appeal to “points of law.”

115 Final CETA text, *supra* note 5, art 8.28.7. It should be noted that until the CETA Joint Committee has adopted a decision on the organization and functioning of the appellate tribunal, it will still be possible for parties to have awards set-aside in domestic courts or annulled under the ICSID Convention. Read together CETA articles 8.28.9 (b) and 8.41(3). See more below in the second part of this paper.

116 TTIP proposal, *supra* note 4, art 12; EU-Vietnam FTA, *supra* note 1, art 15; Final CETA text, *supra* note 5, art 8.29.

117 Final CETA text, *supra* note 5, art 8.29 and EU-Vietnam FTA, *supra* note 1, art 15.

118 See for instance, Karl P Sauvart, *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008); Gabriel Bottini, “Reform of the Investor-State Arbitration Regime: The Appeal Proposal” in Jean E. Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015); Susan D Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions” (2005) 73(4) *Fordham L Rev* 1521.

119 See e.g. Christoph Schreuer, “Revising the System of Review for Investment Awards” (2009) *British Inst Intl & Comp L*, online: <www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf> at 2; Debra P Steger, “Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism” in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013); Donald McRae, “The WTO Appellate Body: A Model for an ICSID Appeals Facility?” (2010) 1 *J Intl Dispute Settlement* 371; Bart Legum, “Visualizing an Appellate System” in Federico Ortino et al, eds, *Investment Treaty Law: Current Issues* (London: British Institute of International and Comparative Law, 2006).

120 *Contra* Nappert, *supra* note 39, who states, regarding article 30 of the TTIP proposal: “The proposed appeal mechanism is not consonant with arbitration as contemplated by the NYC, and Article 30 cannot unilaterally change that fact.”

121 See EFILA Task Force Paper, *supra* note 7 at 38–40; American Arbitration Association, *Optional Appellate Arbitration Rules*, 1 November 2013, online: <www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTAGE2016218>. Some domestic arbitration statutes also provide for the possibility of appeals, e.g., the *Arbitration Act 1996* (UK), c 23, s 69, allows for appeal to courts on points of law.

the potential to undermine the attainment of more consistency in international investment law as a whole.¹²²

It would also seem to present particular problems for the European Union, as different appeal tribunals could diverge on key interpretation issues. One could imagine that, to promote consistency, the European Union would nominate the same members to different tribunals. However, this would be unfair to other treaty parties as it would give the European members undue influence and could affect the members' independence. Moreover, other treaty parties may be unwilling to consent to the appointment to their own appeal tribunal of certain members appointed by the European Union to another tribunal.

Timeliness in the Resolution of Investment Disputes

A last difference between the current ISDS system and the new EU-promoted system is the *planned* timeliness in the resolution of investment disputes. The TTIP proposal provides that first instance tribunal decisions shall be resolved within 18 months of the date of submission of the claim, failing which the tribunal must issue a decision specifying the reasons for the delay.¹²³ As for the appeal tribunal, it must issue decisions within a 180-day limit, which may be extended to 270 days if the appeal tribunal considers that it cannot meet the initial deadline.¹²⁴ The EU-Vietnam FTA provides identical deadlines for decisions to be issued by both the tribunal and appeal tribunal,¹²⁵ whereas CETA specifies that an award from the first instance tribunal shall be issued within 24 months.¹²⁶ The time frame for awards issued by the appellate tribunal has yet to be specified under CETA.

In imposing such deadlines, the European Commission is trying to ensure that an appellate mechanism does not lead to delays in proceedings.¹²⁷ However, since the average duration of ISDS proceedings is currently three to four years,¹²⁸ and cases that go to the annulment or set-aside phases often take a few more years, these deadlines seem extremely ambitious.¹²⁹ It has to be remembered that unlike WTO cases, ISDS cases often involve significant document discovery. There are also limits on the capacity of respondent states to defend many cases at once. If adhered to, these timelines would change current litigation practices, hopefully for the better.

INTERACTIONS WITH OTHER REGIMES AND JURISDICTIONS

At one level, it appears the European Union is attempting to create another “self-contained” or “autonomous” regime like the ICSID regime. However, as a matter of enforcement, insulation does not provide efficiency for the parties to the TTIP, the Canada-EU CETA or the EU-Vietnam FTA, and therefore reliance on other international conventions remains. Many questions of interactions with other regimes and jurisdictions thus arise, including domestic courts, the ICSID and New York Conventions and the CJEU.

Interactions with Domestic Courts on Set-Aside

At first sight, one of the most surprising aspects of the European Union's new proposed system is the removal of all roles for domestic courts in the set-aside of awards. For instance, TTIP proposed article 30(1), concerning the enforcement of awards, excludes all remedies, other than the appeal provided for in the draft agreement: “Final awards issued pursuant to this Section by the Tribunal shall be binding

122 For an analysis of impediments, see EFILA Task Force Paper, *supra* note 7 at 53–58. Other issues are raised, for instance by Lord Goldsmith, *supra* note 85, who states: “A more practical concern with regard to the Appeal Tribunal is that there are only two members that are nationals of a third country. They will each chair approximately 50% of the cases in appeal. In addition, these two members will, on the basis of a two-year rotation, be President and Vice-President of the Appeal Tribunal, in which role they will, among other things, establish the composition of the panel hearing an appeal. This places a lot of responsibility on these two individuals and the European Commission may want to reconsider the initial number of, in any event, the members of the Appeal Tribunal.”

123 TTIP proposal, *supra* note 4, art 28(6).

124 *Ibid*, art 29(3).

125 EU-Vietnam FTA, *supra* note 1, arts 27(6) and 28(5), respectively.

126 Final CETA text, *supra* note 5, art 8.39.7.

127 EC Path for reform, *supra* note 8 at 8.

128 European Commission, Fact Sheet, “Why the New EU Proposal for an Investment Court System in TTIP is Beneficial to both States and Investors”, 12 November 2015, online: <http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm>; EFILA Task Force, *supra* note 7 at 56–57.

129 Reinisch, *supra* note 7, at 26, also raises the question of “[w]hether this acceleration idea, inspired again by the WTO's [DSU], will work in practice needs to be seen.”

between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.”¹³⁰

This provision affirms the autonomous character of the new regime and matches the EU discourse of creating a “public justice system – just like those we’re familiar with in our own countries, and the international courts which Europe has so actively promoted in the past.”¹³¹ Thus, it appears the European Union considers that its proposal is “court-like” enough to dispense with the possibility of review of awards by domestic courts.

However, as demonstrated in the first part of this paper, since the process is still very much one of arbitration, the removal of any role for domestic courts in the set-aside of awards appears to be dissonant with claims of increased public accountability made by the European Commission.¹³² Further, the result of this provision is the removal of certain grounds of set-aside provided under the UNCITRAL Model Law,¹³³ including that the award is in conflict with the public policy of the state.¹³⁴ Specifically, the procedural and jurisdictional grounds of appeal are now aligned with those provided for annulment in the ICSID Convention (in addition to errors of law and fact).¹³⁵ Finally, the removal of any role for domestic courts in the set-aside of awards also raises questions as to the possible reaction of a third-country domestic court at the time of enforcement of the awards (discussed below).

It is noteworthy that the Canada-EU CETA retains the possibility of set-aside (and annulments) of awards until the CETA Joint Committee adopts a decision on the functioning of the appellate tribunal. While the text does not make this obvious, reading articles 8.28(9) (under “Appellate Tribunal”) and 8.41 (“Enforcement of Awards”) together leads to this conclusion.¹³⁶ While it is wise in practice to plan for delay or lack of action, the provision opens the door to different types of review proceedings to occur in parallel for the first few years of the new mechanism being in place.

Interactions with the ICSID Convention

It should be recalled at this juncture that the European Union is not a member of the ICSID Convention and cannot be until an amendment to the ICSID Convention provides that an entity other than a state can be a party.¹³⁷ Yet, under EU mixed agreements,¹³⁸ the ICSID Convention could still be relied upon by EU member states and other parties.

As for enforcement in state parties, the EU TTIP proposal provides that: “Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.”¹³⁹ This language recalls the almost identical provision in the ICSID Convention.¹⁴⁰ But, of course, it only binds the parties to the TTIP, which significantly limits the possibilities for enforcement as compared to having access to the jurisdictions of the 153 ICSID members.¹⁴¹ Interestingly, the Canada-EU CETA does not include this formulation, opting for the basic provision: “1. An award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case. 2. Subject to paragraph 3, a disputing party shall recognise and comply with an award without delay.”¹⁴²

130 TTIP proposal, *supra* note 4, art 30(1). See also EU-Vietnam FTA, *supra* note 1, art 31(1).

131 Cecilia Malmström, “Proposing an Investment Court System” (16 September 2015), European Commission (blog), online: <https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en>.

132 EC Press Release, 16 September 2015, *supra* note 2.

133 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008) online: <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

134 *Ibid.*, art 34 (2)(b)(ii). See below for a discussion of enforcement under the New York Convention regarding the same ground.

135 *ICSID Convention*, *supra* note 16, art 52(1).

136 For the rest of this paper, the analysis will be done on the basis that the appellate tribunal is established under CETA.

137 *ICSID Convention*, *supra* note 16, art 67.

138 European Commission, “Decision of 30.10.2014 requesting an opinion of the Court of Justice pursuant to article 218(11) TFEU on the competence of the Union to sign and conclude a Free Trade Agreement with Singapore”, C(2014) 8218 final, online: <www.statewatch.org/news/2015/feb/eu-com-fta-cjeu-com-8218-14.pdf> [EU-Singapore FTA Advisory Opinion]. In the recently released Final CETA text, *supra* note 5, the names of the EU member states appear in brackets, which would indicate that a final decision has not been made as to the mixed character of the agreement.

139 TTIP proposal, *supra* note 4, art 30(2). The EU-Vietnam FTA also provides for this: EU-Vietnam FTA, *supra* note 1, art 31(2).

140 *ICSID Convention*, *supra* note 16, art 54(1).

141 See Reinisch, *supra* note 7 at 26–27.

142 Final CETA text, *supra* note 5, art 8.41.1 and .2.

Returning to an issue raised in the first part of this paper, the question arises as to whether the courts (or relevant authorities) of the parties to the ICSID Convention will accept that an award rendered under these new systems for the resolution of investment disputes is an “award rendered pursuant to this Convention” that deserves enforcement as if it were a final judgment of the state.¹⁴³ The November 2015 TTIP proposal, as well as the agreements with Canada and Vietnam, attempt to make this fact clear.¹⁴⁴ For example, the TTIP proposal provides that: “For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).”¹⁴⁵

Yet, at least two further questions arise in this regard: Is the removal of unilateral appointment of tribunal members compatible with the ICSID Convention? Is the “displacement” of the annulment process in the TTIP compatible with the ICSID Convention?

As to the first question, ICSID Convention article 37(2)(b) provides that: “(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal *shall* consist of three arbitrators, *one arbitrator appointed by each party* and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.”¹⁴⁶ Before concluding that the EU-proposed system is clearly incompatible with the convention, however, one may ask whether the fact that an investor has voluntarily accepted to submit its claim under a treaty providing for a different method of appointment of the Tribunal does not fall under the beginning of the provision — that is, “Where the parties do not agree upon [...] the method of their appointment.”¹⁴⁷ In other words, it is only where the parties do not agree to another method that article 37(2)(b) applies. If one is not convinced by this argument, the Vienna Convention on the Law of Treaties¹⁴⁸ (VCLT) offers another.

But before turning to it, it is worth raising the second question: Taking the TTIP as an example, could the United States and EU member states “displace” the annulment proceeding provided for under article 52 of the ICSID Convention?

The exclusivity of remedies under the Convention provided at article 53(1) would, at first glance, seem to prevent such an outcome: “The award shall be binding on the parties and shall not be subject to any *appeal or to any other remedy* except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”¹⁴⁹

However, VCLT article 41 (agreements to modify multilateral treaties between certain of the parties only) and article 30 (application of successive treaties relating to the same subject matter) could potentially

143 *ICSID Convention*, *supra* note 16, art 54(1).

144 The September EU draft text only referred to the issue of “consent” and did not make the link to enforcement under the New York Convention clear. Article 7 provided that: “2. The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of: (a) Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties.”

145 TTIP proposal, *supra* note 4, art 30(6). See equivalent formulation in Final CETA text, *supra* note 5, art 8.41.6 and EU-Vietnam FTA, *supra* note 1, art 31(8). In cases where Vietnam is the respondent, the EU-Vietnam FTA suspends the application of the enforcement of awards provisions under article 31(1) and (2) for a period of five years after the agreement has entered into force. These provisions prescribe that “final awards are binding between the parties and in respect of that particular case without possibility of appeal, review, set aside, annulment, or any other remedy,” and require that parties “recognize awards rendered pursuant to the Agreement as binding and enforce the pecuniary obligation within its territory, as if it were a final judgement of a court in that Party.” Instead, the New York Convention will govern the recognition and enforcement of final awards in cases where Vietnam is the respondent, for the first five years of the agreement. See EU-Vietnam FTA, *supra* note 1, art 31(3) and (4).

146 *ICSID Convention*, *supra* note 16, art 37(2)(b), emphasis added.

147 *Ibid.* On a slightly different point, it should be remembered that some investment agreements already allow parties to diverge from some of the prescriptions of the ICSID Convention, for instance regarding the nationality of arbitrators. ICSID Convention article 39 provides that: “The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute.” Yet, under the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA], for example, it is routinely the case that the investor will name a national of its home country as an arbitrator and the state will do the same by appointing one of its nationals. This is allowed by NAFTA article 1125 (Agreement to Appointment of Arbitrators) which provides that: “For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 1124(3) or on a ground other than nationality: (a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules” (emphasis added).

148 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1115 UNTS 331, art 41 (entered into force 27 January 1980) [VCLT].

149 *ICSID Convention*, *supra* note 16, art 53(1), emphasis added.

allow the appeal to replace the ICSID annulment process, and these articles could also answer the removal of unilateral nomination of tribunal members.¹⁵⁰ First, VCLT article 41 provides that:

- (1). Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) The possibility of such a modification is provided for by the treaty [not the case here]; or
 - (b) The modification in question is not prohibited by the treaty and:
 - (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.¹⁵¹

The key question appears to be whether the alleged derogations are “incompatible with the effective execution of the object and purpose” of the ICSID Convention as a whole. For the annulment, at one level, the answer would appear to be negative, since the grounds for appeal provided in the EU proposal include all the ICSID annulment grounds. However, at another level, the decisions would not be rendered by the annulment committees designed under the ICSID system, whose members are in practice chosen by the secretary-general from lists of members appointed by state parties to ICSID.¹⁵²

In relation to the unilateral appointment of arbitrators, it is hard to see how removal would affect the convention as a whole. For instance, looking at the preamble, the removal does not depart from the idea of “[a]ttaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire,” nor from the repeated fundamental value of consent, that is “[r]ecognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with.”¹⁵³

Another possibility may be offered by VCLT article 30, which addresses the application of successive treaties relating to the same subject matter. In the case of the TTIP, where the parties to the agreement do not include all the parties to the ICSID Convention, the convention would apply between EU members and the United States “only to the extent that its provisions are compatible with those”¹⁵⁴ of the TTIP. The same principle would apply to the Canada-EU CETA.

All things considered, as for enforcement in third-party countries, only time will tell whether the courts (or relevant authorities) of the parties to the ICSID Convention will accept that an award rendered under these new systems for the resolution of investment disputes is an “ICSID award,” with attending benefits under the convention.

150 This was explicitly considered in the ICSID Improvement Paper, *supra* note 103. Page 2 of the annex states: “In accordance with the general treaty law rules reflected in Article 41 of the VCLT, the treaty with the submission to the Appeals Facility might also modify the ICSID Convention to the extent required, as between the States parties to that treaty, provided that the modification was not prohibited by the ICSID Convention, did not affect the enjoyment of rights and performance of obligations of the other Contracting States under the ICSID Convention and was compatible with the overall object and purpose of the ICSID Convention. The modification would have to be notified to the other Contracting States before the conclusion of the modifying treaty” (internal notes omitted).

151 *VCLT*, *supra* note 148, art 41.

152 *ICSID Convention*, *supra* note 16, art 52(3).

153 *Ibid* at Preamble. Doubts have, however, been expressed by Lord Goldsmith, in his keynote address, *supra* note 85. He posits that: “It may be alleged that an ICSID award could only be issued by a tribunal whose members have been appointed by the parties to dispute on an equal footing. Arguably the modification of ICSID to use in a dispute settlement system with an appellate mechanism falls foul of the Vienna Convention provision.”

154 *VCLT*, *supra* note 148, art 30(3).

Interactions with the New York Convention

For proceedings that would take place under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules, for instance (e.g., under the TTIP between the European Union itself and US investors or under CETA between EU member states and Canadian investors), the TTIP and CETA texts also maintain reliance on the New York Convention. While the September 2015 EU draft text only provided that consent to arbitration under the TTIP would be covered under “agreements in writing” at article II(2) of the New York Convention,¹⁵⁵ the November 2015 TTIP proposal clarifies, in the article on enforcement, that: “For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.”¹⁵⁶ The Canada-EU CETA and the EU-Vietnam FTA include provisions to the same effect.¹⁵⁷

Despite the will expressed in those investment agreements and the TTIP proposal, a few questions arise. What is the impact of the European Union not being a contracting party to the New York Convention? What are the chances that a third-party court might refuse recognition and enforcement on the basis that the decisions are not “arbitral awards” under the convention?¹⁵⁸ What are the chances that such a court refuses on the basis that no opportunity for set-aside in a domestic court was possible?

First, the fact that the European Union is not a party to the New York Convention does not seem fatal. Article 1 of the New York Convention contemplates the recognition and enforcement of awards made in the territory of non-contracting states.¹⁵⁹ This reflects the goal of “universality” of the Convention, as it adopts a “universal approach and scope of application.”¹⁶⁰ For contracting parties to the Convention that made the reciprocity reservation (which are approximately two-thirds¹⁶¹), the requirement for recognition and enforcement will be that the award was made in the territory of another contracting state.¹⁶² In any event, states may enforce the awards rendered by the new tribunals as a matter of international comity.¹⁶³

Second, it does not appear likely that a domestic court would refuse recognition and enforcement on the basis that the decisions are not “arbitral awards” under the convention. At a practical level, one has to begin by asking who would raise the objection at the time of enforcement. Because of the nature of investor-state dispute resolution, investors would be the ones enforcing the awards they had obtained against a state, so they would not be the ones objecting (if an investor were unhappy with the award, it would contest the decision on appeal). The respondent state (or the European Union), as a party to the agreement, would not be well placed to challenge the nature of the award, since it has agreed to these specific rules.¹⁶⁴

Would the court itself object? This is not likely, as article V(2) of the New York Convention limits the grounds the court may raise *ex officio* to refuse enforcement to arbitrability and the public policy exception (which has generally been interpreted restrictively).¹⁶⁵

155 See TTIP, September 2015 draft text, *supra* note 3, art 7(2)(b).

156 TTIP proposal, *supra* note 4, art 30(5).

157 Final CETA text, *supra* note 5, art 8.41.5 and EU-Vietnam FTA, *supra* note 1, art 31(7).

158 See Nappert, *supra* note 39, who states: “A valid argument can be made that, as the process as currently contemplated is not arbitration, the decisions rendered by the Tribunal are not arbitration awards — no matter what label is put on them — and therefore not covered by the New York Convention.”

159 See *New York Convention*, *supra* note 18, art I(1) and (3).

160 NY Convention Commentary, *supra* note 42 at 56, citing Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Boston: Kluwer Law and Taxation, 1981) at 12.

161 Albert Jan van den Berg, “The New-York Convention of 1958: An Overview” in Emmanuel Gaillard, Domenico Di Pietro & Nanou Leleu-Knobil, eds, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (London: Cameron May, 2008), online: <www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf>.

162 *New York Convention*, *supra* note 18, art I(3); NY Convention Commentary, *supra* note 42 at 56.

163 See *Dallal v Bank Mellat*, *supra* note 53. In this case, as mentioned above, the court, *in dicta*, held that by reason of non-compliance with Dutch procedural law, the New York Convention could not apply to Iran-US Claims Tribunal awards. However, out of respect for international comity, it did recognize the decision of the tribunal and treated it as fully competent.

164 One may question whether this reasoning holds in the hypothesis that the agreements signed by the European Union are not mixed, but this point will be left to another day.

165 *New York Convention*, *supra* note 18, art V(2); NY Convention Commentary, *supra* note 42 at 243 and 405; Dirk Otto & Omaia Elwan, “Article V (2)” in Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (The Hague: Kluwer Law International, 2010) at 348 and 365.

Third, the question remains, however, as to whether the removal of any set-aside possibility in domestic courts would endanger the balance achieved between the autonomy of arbitration and the duty of control by states at the time of enforcement.¹⁶⁶ Would a third-party state court consider the removal to be “contrary to the public policy of that country”?

Interactions with the CJEU

A full discussion of interactions with the jurisdiction of the CJEU is well beyond the scope of this paper, but the issues are worth raising in broad strokes.

Much debate has followed the recent CJEU decision regarding the EU accession to the European Convention on Human Rights (ECHR).¹⁶⁷ In *Opinion 2/13*,¹⁶⁸ the CJEU held that the European Union’s accession to the ECHR was contrary to EU constitutional law, because, among other things, the accession would allow the European Court of Human Rights to interpret and apply EU law and to act as a forum for disputes between EU member states, thereby encroaching the CJEU’s exclusive jurisdiction to deal with such matters.¹⁶⁹ Even prior to the opinion, CJEU jurisprudence¹⁷⁰ had led some commentators to question whether the ISDS mechanisms included in EU IIA negotiations were compatible with EU law.¹⁷¹ However, as Stephan Schill recently argued, as long as only international investment treaties and not EU law is being interpreted, the investment court system may not conflict with the jurisdiction of the CJEU.¹⁷²

Nonetheless, the interpretation of domestic law (even as a “fact”) by the proposed investment court system remains contentious.¹⁷³ The European Commission has taken great pains¹⁷⁴ to exclude the interpretation of EU law from the jurisdiction of its proposed tribunals.¹⁷⁵ This, in part, results from

166 See e.g. Savage & Gaillard, *supra* note 42 at para 1558: “The existence of judicial control is the corollary of the policy found in legal systems favorable to arbitration whereby the courts are prevented from interfering during the arbitral process.”

167 Adam Lazowski & Ramses Wessel, “When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR” (2015) 16 German L J 179; Christoph Krenn, “Autonomy and Effectiveness as Common Concerns: a path to ECHR accession after Opinion 2/13” (2015) 16 German Law Journal 147; Eleanor Spaventa, “A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13” (2015) 22 Maastricht J Eur & Comp L 35.

168 CJEU, Opinion 2/13 of 18 December 2014, online: <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=38700>>.

169 Stephan W Schill, “Editorial: Opinion 2/13—The End for Dispute Settlement in EU Trade and Investment Agreements” (2015) J World Invest & Trade at 379–384 [Schill, “The End for Dispute Settlement”].

170 ECJ, Opinion 1/91 [1991] ECR I-6079, online: <http://eur-lex.europa.eu/resource.html?uri=cellar:efe0bbc1-9bd7-4058-9b08-bfcbdf60d43f.0002.06/DOC_1&format=PDF>; ECJ, *Mox Plant* Judgment of 30 May 2006, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0459&from=EN>>; CJEU, Opinion 1/09 of 8 March 2011, online: <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=80233&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=39236>>; CJEU, *European Schools* Judgment, 14 June 2011, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0196&from=EN>>.

171 Schill, “The End for Dispute Settlement”, *supra* note 169 at 383 and footnote 14, where Schill cites, among others, the following commentators: Markus Burgstaller, “Investor-State Arbitration in EU International Investment Agreements with Third States” (2012) LIEI 39 at 221; Steffen Hindelang, “The Autonomy of the European Legal Order: EU Constitutional Limits to Investor-State Arbitration on the Basis of Future Investment-related Agreements” in Marc Bungenberg & Christoph Hermann, eds, *Common Commercial Policy of the EU after Lisbon* (New York: Springer, 2013) 187 at 196; Nikos Lavranos, “Designing an International Investor-to-State Arbitration System After Opinion 1/09” in Marc Bungenberg & Christoph Hermann, eds, *Common Commercial Policy of the EU after Lisbon* (New York: Springer, 2013) 199; Stephan W Schill, “Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements” in Marc Bungenberg, August Reinisch & Christian Tietje, eds, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Oxford: Nomos/Hart Publishing, 2013) 37.

172 Schill, “The End for Dispute Settlement,” *supra* note 169.

173 See, for instance, EFILA Task Force Paper, *supra* note 7 at 18–20.

174 Based on the TTIP September 2015 draft text (*supra* note 3), Reinisch, *supra* note 7 at 28, underlines that “a number of specific provisions indicate the European Commission’s awareness of the sensitivities of the court.” He adds: “By removing EU Law from investment court scrutiny, the European Commission obviously intends to make the latter EU-compatible. Whether the CJEU will concur remains to be seen.”

175 See TTIP proposal, *supra* note 4, art 13:

“(3) For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.

(4) For greater certainty, the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.”

See different formulation at Final CETA Text, *supra* note 5, art 8.31. Notably, CETA does not explicitly state that “the domestic law of the Parties shall not be part of the applicable law.” It has also ensured that the European Union determine the respondent in the particular dispute. See TTIP proposal, *supra* note 4, art 5(3); Final CETA Text, *supra* note 5, art 8.21.3; EU-Vietnam FTA, *supra* note 1, art 6(2). It should be noted that under CETA, the European Union’s default of notifying the investor within 50 days of delivering its notice requesting such determination results in the EU member state being the respondent if the measures identified in the notice are exclusively measures of the member state, or if the measures include measures of the EU, the EU shall be the respondent, under art 8.21.4 CETA. The TTIP proposal (*supra* note 4) and the EU-Vietnam FTA (*supra* note 1) contain no provisions that provide for default to notify the investor of the respondent determination made by the European Union.

the *Micula* award, in which an ICSID tribunal found that although EU law was not directly applicable to Romania in its obligations vis à vis Sweden, it concluded that EU law formed part of the “factual matrix” that may be relevant in interpreting whether Romania respected its fair and equitable treatment obligation under the applicable BIT.¹⁷⁶ This promises to remain a problematic issue as the resolution of investment disputes often requires the determination of rights under domestic law, such as whether a property right exists in order to decide on an expropriation claim.¹⁷⁷

In 2014, the CJEU was asked to render an advisory opinion on who has the competence to sign and ratify the FTA with Singapore.¹⁷⁸ It remains to be seen whether the CJEU might take this opportunity to give its opinion on the compatibility of traditional ISDS with the jurisdiction of the CJEU. It is also unclear whether the enhanced public dimension of an investment court system makes the likelihood of conflict higher, lower or is irrelevant.

CONCLUSION

In September 2015, at the time of release of the proposal for an investment court system, Trade Commissioner Cecilia Malmström stated: “Today, we’re delivering on our promise — to propose a new, modernised system of investment courts, subject to democratic principles and public scrutiny.” She added, “What has clearly come out of the debate is that the old, traditional form of dispute resolution suffers from a fundamental lack of trust. However, EU investors are the most frequent users of the existing model, which individual EU countries have developed over time. This means that Europe must take the responsibility to reform and modernise it. We must take the global lead on the path to reform.”¹⁷⁹ These few sentences encapsulate one of the challenges faced by the Commission: to convince stakeholders that the “new” system of “courts” displaces the “old,” without turning its back on a heritage that has served European investors well.

As the first part of this paper demonstrated, not as much of the “new” system is really “new” and much remains of the “old” (although improved in many respects). As to what really is new — especially the method of appointment, tenure and conduct of tribunal members, as well as the creation of an appeal tribunal — questions were raised as to compatibility with current international arbitration institutions and rules. As discussed in the second part of this paper, many objections do not appear to withstand analysis, while some questions remain and may only find an answer once the system is put to the test, especially at the time of enforcement of awards.

The weakest area of the proposal at this point, as well as recent agreements that have adopted it, is the transition plan to a permanent, multilateral solution. In their joint statement upon the release of the final CETA text, Trade Commissioner Malmström and Canadian International Trade Minister Chrystia Freeland affirmed that the final text reflects the parties’ desire to work with “trading partners to pursue the establishment of a multilateral investment tribunal, a project to which the EU and Canada are firmly committed.”¹⁸⁰ This statement is in line with others made by the European Commission over the last few months. For example, at the time of the public release of the TTIP draft text in September 2015, the European Commission noted the following plan in a press release: “Finally, in parallel to the TTIP negotiations, the Commission will start work, together with other countries, on setting up a permanent International Investment Court. The objective is that over time the International Investment Court would replace all investment dispute resolution mechanisms provided in EU agreements, EU Member States’ agreements with third countries and in trade and investment treaties concluded between non-EU countries. This would

176 *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20; Devika Agarwal & Ignacio Tortorola, eds, “Case Law Report, *Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20) – Annulment Proceeding*,” School of International Arbitration, online: <www.transnational-dispute-management.com/downloads/002016_case_report_micula_v_romania_annulment_proceeding.pdf>.

177 See e.g. Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009), Rule 4: “The law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state, including its rules of private international law,” at 52; Ursula Kriebaum & Christoph Schreuer, “The Concept of Property in Human Rights Law and International Investment Law” in Stephan Breitenmoser et al, eds, *Liber amicorum Luzius Wildhaber: Human Rights, Democracy and the Rule of Law* (Zürich: Dike-Verl, 2007) at 743–762.

178 EU-Singapore FTA Advisory Opinion, *supra* note 138.

179 EC Press Release, 16 September 2015, *supra* note 2.

180 European Commission, Statement, “Joint Statement: Canada-EU Comprehensive Economic Trade Agreement (CETA)” 29 February 2016, online: <http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm>.

further increase the efficiency, consistency and legitimacy of the international investment dispute resolution system.”¹⁸¹

However, it is not clear how or when this would happen. The gradual replacement of the 1,400 or so BITs that EU member states are party to certainly does not offer a clear path. Further, since the United States, Canada and Vietnam are also signatories to the TPP, which foresees the possibility that an appellate mechanism be instituted under some other arrangements,¹⁸² it is possible that only the appellate tribunal will materialize. More globally, only time will tell whether the EU leadership will prevail over US leadership,¹⁸³ which would result in an improved ISDS system but not to the extent advocated by the EU. As to a possible transition to a multilateral system, Schill asks a relevant question: will the EU proposal be a stepping stone or a stumbling block for multilateralizing international investment law?¹⁸⁴

If states, starting from scratch, wanted to establish rules for the protection of investment and to create a dispute resolution system to implement those rules, they would certainly not choose a system like the one we will see evolve over the next decade or so. While it is not everyone’s dream to have a unique multilateral agreement on investment and a single dispute resolution body (including appeals), the potential for such an outcome any time soon appears unrealistic. The WTO has inspired some of the new features of the system proposed by the European Union and was recently mentioned by commentators as a possible “home” for investment protection disputes (beyond what is already possible under the General Agreement on Trade in Services or Trade-Related Aspects of Intellectual Property Rights, for example), but that would also involve dramatic changes. Putting aside issues of membership, here are a few issues that arise: the state-to-state nature of the Dispute Settlement Body (DSB) process; the primary goal of securing the withdrawal of the offending measures and the prospective nature of the remedy;¹⁸⁵ and the composition of the DSB.¹⁸⁶ Considering how little success the WTO has had recently with multilateral rounds of negotiations, and its past unwillingness to add more investment disciplines to its undertakings, it is hard to imagine such an outcome any time soon.

The most realistic and timely option, to prevent the multiplication of appellate bodies, may be the adoption of an additional protocol to the ICSID Convention, which would offer an appellate facility to willing parties that referred to it in their treaties. As described above, ICSID already analyzed the issues a decade ago and is said to be doing so again. Reliance on article 41 VCLT, also raised above, could offer a means for interested parties to achieve their goals without undermining the convention.

181 EC Press Release, 16 September 2015, *supra* note 2.

182 TPP Full Text, *supra* note 109, art 9.23(11).

183 See Stephan Schill, “The TTIP Negotiations: US versus EU Leadership in Global Investment Governance” (4 March 2016) Kluwer Arbitration Blog, online: <<http://kluwerarbitrationblog.com/2016/03/05/the-ttip-negotiations-us-versus-eu-leadership-in-global-investment-governance/>>.

184 Stephan Schill, “The European Commission’s Proposal of an ‘Investment Court System’ for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?” *ASIL Insights* (22 April 2016), at 20: 9, online: <<http://kluwerarbitrationblog.com/2016/03/05/the-ttip-negotiations-us-versus-eu-leadership-in-global-investment-governance/>>.

185 *WTO Dispute Settlement Understanding*, 33 ILM 1226 (1994). Article 3(7) provides: “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.”

186 See Joost Pauwelyn, “The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus” (2015) 109 *AJIL* 761, as well as the *AJIL* Unbound Symposium on this article introduced by Donald McRae, and including commentaries from, among others, Freya Baetens, Gabrielle Marceau, Robert Howse, Giorgio Sacerdoti and Catherine Rogers, as well as the Pauwelyn rejoinder. Each of the individual symposium entries listed above can be found online: <www.asil.org/blogs/ajil-unbound>. See also recent controversy regarding the reappointment of Appellate Body members, *supra* note 86.

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