

TASK FORCE PAPER regarding the proposed International Court System (ICS)

Draft dated 1-2-2016

Contributors:

Koorosh Ameli, International Arbitrator, The Hague

Ilias Bantekas, Brunel University London

Horia Ciurtin Managing Editor of the EFILAblog

Filippo Fontanelli, Edinburgh Law School

Nikos Lavranos, Secretary General of EFILA, Brussels

Mauro Rubino-Sammartano, Avvocato, LawFed Studio Legale e Tributario BRSA, Milano

Emma Spiteri Gonzi

EFILA stands ready to constructively engage with all relevant policy makers and stakeholders in order to ensure that any investor-state dispute settlement mechanism that is included in TTIP (or any other EU investment treaty) is practical for users and provides an efficient and effective tool for resolving disputes as fast and cheap as possible. EFILA welcomes comments regarding this analysis. Please send your comments to Nikos Lavranos, Secretary-General of EFILA, n.lavranos@efila.org

EFILA wishes to acknowledge and thank Filippo Fontanelli of the Edinburgh Law School for hosting a Roundtable on 13 November 2015 with several external investment law and arbitration experts to discuss a draft version of this paper.

EXECUTIVE SUMMARY	3
INTRODUCTION.....	5
CHAPTER I: Towards the proposal for an “International Court System” (ICS)	6
1. The debate within the EU, building up to the September draft proposal	6
a. The January 2015 consultation and the May 2015 EC concept paper.....	6
b. The Lange Report to the EU Parliament.....	8
2. The call by some Trade Ministers for a permanent investment court	10
3. The EC’s proposal of an Investment Court System (ICS).....	11
a. The structure of the proposed ICS	11
b. Procedural aspects of the ICS	14
4. Initial comments on the international court system (ICS) proposal	20
CHAPTER II: The <i>status quo</i> in the investment regime	22
1. The notion of finality.....	22
2. Review of investment awards – the status quo.....	23
a. Awards Rendered under ICSID Convention.....	24
(i) History and Principles.....	24
(ii) Exceptions to Finality	25
(iii) Annulment Arbitral Practice: Misuse and Reconstruction	30
(iv) The Practice of ICSID Annulment at a glance	33
b. Rendered outside the ICSID Convention.....	34
3. Suggested reforms and infra-arbitration appeal.....	37
a. PCA: To Review or Not to Review	38
b. An Instance of Intra-Arbitration Appeal: the European Court of Arbitration	38
c. ICSID: In Search of an Appeal Facility.....	41
CHAPTER III: The viability of taking the WTO system as the main model.....	43
1. The AB within the Dispute Settlement Mechanism	43
2. Advantages of using the WTO AB model as template for reforming the ISDS.....	47
a. Full appeal.....	47
b. Increased legal coherence.....	48
c. A clearer division of labour	49
d. A permanent membership of the AT	49
e. Rules on conflict of interest.....	50
f. Proceedings free of charge	51
g. Increased transparency and participation.....	52
3. Impediments to the transplant	53
a. Sufficient expertise and professionalism of arbitrators.....	53
b. Difficulty to establish a multi-treaty mandate	54
c. Downsides of a strict system of professional incompatibility	55
d. Length and cost of proceedings	56
4. Conclusions	58
IV. GENERAL CONCLUSIONS.....	59

EXECUTIVE SUMMARY

This paper has been written by several authors, including individuals who are not affiliated with EFILA. The aim has been to ensure that different perspectives and expertise is reflected in the analysis. The main aim of the paper is to present an in-depth analysis of the European Commission’s proposal for an “investment court system (ICS)” in the context of the existing investment regime as well as comparing it with the WTO dispute settlement system.

1. The paper concludes that the ICS proposal is, first and foremost, a bold move to appease the EP and the public opinion in many EU Member States, which are critical against TTIP generally, and in particular against including any type of ISDS. The ICS proposal attempts to make the inclusion of an investor-state dispute settlement mechanism in TTIP politically acceptable, while at the same time trying to address the perceived shortcomings of the existing ISDS.
2. The paper notes that – in contrast to the public perception – mechanisms for limited review of investment arbitration awards are already in place, such as the ICSID annulment mechanism and the setting aside procedure for non-ICSID awards by national courts. These mechanisms – while not perfect – provide useful corrective tools.
3. The analysis of the WTO dispute settlement mechanism illustrates that caution should be exercised in simply transplanting it to investor-state disputes. The reason is that WTO law is structurally different from investment law, serves different purposes and has different users.
4. Generally, it can be concluded that the ICS proposal clearly breaks with the current party-appointed, ad-hoc ISDS as provided for in practically all BITs and FTAs. The main result is that it deprives claimants of any role in the appointment of the judges, while giving the respondent States the exclusive authority to do so, albeit in advance of a particular case. The appointment of the judges by the Contracting Parties raises several problems, which the ICS proposal does not sufficiently address.
5. The pre-selection of the TFI and AT judges by the Contracting Parties carries the inherent risk of selecting “pro-State” individuals, in particular since they are paid by the States (or rather their tax payers) alone. Apart from this danger, it remains doubtful whether a sufficient number of appropriately qualified individuals with the necessary expertise can be found. This is particularly true since many professionals currently working in arbitration may be excluded on the basis that they could be considered to be biased. The pool of TFI and AT judges would seem to be limited to academics, (former) judges and (former) Governmental officials. That might not be sufficient to guarantee the practical experience and expertise needed and/or independence from the State.
6. The standard of impartiality and independence of the judges is highly subjective, and their independence on a practical level is not assured by the proposed text. Also, the system of challenging TFI judges and AT members can be further criticised for envisaging that the

presiding judge will decide the challenge against one of his own colleagues on the bench, rather a decision being made by an independent outside authority.

7. The system of determination of Respondent (in the case of the EU or Member States), in particular the binding nature of that determination, which is done by the EU and its Member States alone, creates significant disadvantages for the claimant and does not allow the ICS tribunals to correct any wrong determinations. This could result in cases being effectively thrown out because of a wrong determination of the Respondent.
8. Since the ICSID Convention is not applicable to the EU, the recognition and enforcement of ICS decisions remains limited to the EU and the US. The proposal also fails to clarify the difficulties related to the New York Convention 1958.
9. The ICS proposal does not address the difficult legal situation between the CJEU and other international courts and tribunals. There is no reason to believe that the CJEU would be more positive towards the ICS as compared to its outright rejection of the European Court of Human Rights when it comes to the potential interpretation or application of EU law. Also, the CJEU's consistent rejection of any direct effect of WTO AB panel reports – even those that have been approved by the DSB and after the implementation deadline has lapsed – raises doubts as to the legal effects of ICS decisions within the European legal order.
10. In sum, the suggested creation of a two-tier (semi)permanent court system would give the Contracting Parties a significantly stronger role in the whole dispute settlement process – potentially at the expense of both the investor/claimant and the authority of the ICS. In particular, the appeal possibility carries the risk of burdening small and medium investors by increasing the potential length of the proceedings and costs.
11. While the US position towards the ICS proposal remains unclear for the time being, it also remains unclear how the ICS proposal could be multilateralized. Indeed, the perceived shortcomings of the current ISDS system is based on the fact that more than 3,000 BITs/FTAs are in place, which have been concluded by practically all countries in the world. The ICS proposal – limited to TTIP and perhaps extended to CETA – does not change that. The way the UNCITRAL Transparency Rules of 2014 are incrementally applied by way of an opt-in system established by a separate international treaty could be a possible way forward.
12. As the TTIP negotiations between the US and the EU are now focusing on the ICS proposal, this is a perfect moment to further improve the proposal by addressing the matters identified in this analysis.
13. Finally, the US and the EU should also consider whether it would not be more preferable to modify and improve existing systems, such as turning the ICSID annulment procedure into a full appeal mechanism.

INTRODUCTION

This Task Force has been established to respond with an in-depth analysis to the European Commission's proposal for an investment court system (ICS), which envisages a two-tier court system with a permanent Appeal Tribunal that would adjudicate investment disputes.

The aim is to analyse, beyond the usual superficial public debate, the pros and cons of this proposal and to compare it with other systems that are currently existing – in and outside the field of international investment law.

The idea of creating some sort of an appeal mechanism for investment arbitration is not new, although more concrete proposals are a recent phenomenon. The draft text of the Free Trade Agreement between the EU and Canada (CETA) already includes the possibility of considering the establishment of an appeal mechanism. Also, the US model BIT text of 2012 contains a similar reference.

Since the ICS proposal appears to be inspired by the features of the WTO dispute settlement system, it is appropriate to review that system and consider which lessons, if any, can be learned for the ICS. It may also be helpful to look at other international legal fields, which have established court systems.

Accordingly, the structure of the analysis is as follows.

Chapter 1 analyses not only the ICS proposal as such, but also the process that preceded the proposal. This is important in order to understand the political context in which this proposal is embedded. It critiques certain aspects of the ICS proposal and raises a number of issues which the Task Force considers should be addressed in developing the ICS proposal further.

Chapter 2 provides an extensive overview of the already existing forms of appeal and annulment of investment awards. It also highlights the reform efforts in this regard by the PCA and the ICSID Secretariat. This overview provides a detailed picture of the status quo (including both the mechanisms and methods of operation), from which the ICS proposal departs. This analysis also draws critical attention to features or elements of the current system of ISDS which could be addressed in developing the ICS proposal.

Chapter 3 turns towards the WTO dispute settlement system by first explaining the features of the appeal system and then by examining to what extent this system could successfully be transplanted into the ICS and the limitations in so-doing.

Finally, Chapter 4 wraps up this analysis by providing some general conclusions as to matters which require consideration by the Contracting Parties in developing the ICS proposal further. In particular, the issues highlighted concern the methods of selection of the judges (and the implications of a move towards a system whereby the Respondent maintains, but the Claimant is deprived of, a role), the size of the pool of candidates for the two-tiered system, the relationship between the ICS and the CJEU and how the ICS will operate in the wider context of resolution of investor-state disputes under other instruments.

CHAPTER I: Towards the proposal for an “International Court System” (ICS)

This chapter aims at providing a first appreciation of the European Commission’s proposal for an “International Court System” (ICS). In order to adequately understand the proposal, the first part presents an account of the debate taking place in the European Union, particularly in connection with the TTIP negotiations and the establishment of an appellate system leading towards a sort of permanent judicial institution. The second part discusses the proposal as it was published by the European Commission in November 2015¹ in which the creation of a semi-permanent Tribunal of First Instance (TFI) and Appellate Tribunal (AT) for investment disputes is proposed.

1. The debate within the EU, building up to the September draft proposal

a. The January 2015 consultation and the May 2015 EC concept paper

The possibility to reform the ISDS mechanism and move in the direction of a permanent system with an appeal body had already been raised during the public consultations regarding TTIP held by the European Commission in 2014. The results of the public consultation, which was opened between March and July 2014, were released in January 2015.² The European Commission sought to collect feedback on several proposed innovations to the investment arbitration system, which the EU was considering in order to increase its perceived legitimacy and effectiveness. Most respondents³ had expressed “no clear view either in favour or against” the establishment of an appellate mechanism.⁴ The putative advantages of the reform (more consistency and legal certainty) were contrasted with the possible drawbacks (increased costs and time of disputes, weakening of the awards’ finality).

Respondents agreed that the appropriateness of a mechanism of appeals would depend on its specific features. One of the prominent issues of controversy was the institutional affiliation and structure of the proposed system: a multilateral solution, maybe even a permanent International Court, as opposed to a regional system, or even the establishment of a mechanism for each investment treaty. Another matter of contention was the mandate of the appellate jurisdiction, that is, whether it should cover both questions of law and facts or just the legal determinations of the award.

On 7 May 2015, the European Commissioner for Trade Cecilia Malmström sent a concept paper (“CP”) to the European Parliament and to the Council.⁵ The document was intended by the

¹ See for the text of the ICS proposal of 12 November 2015, which was transmitted to the US, at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

² Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement, Brussels 13 January 2015, Document SWD(2015) 3 final, at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf, see Question 12, 24 ff.

³ Almost 150,000 replies were submitted, which included submissions by for example by the European Federation for Investment Law and Arbitration (EFILA), the ECT Secretariat, the PCA, the SCC and ICSID. In addition, also NGOs, individuals, law firms and potential investors submitted their views.

⁴ Ibid, 24.

⁵ The text of the Concept Paper is available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

Commissioner to address the concerns about ISDS, raised in connection with the process of the TTIP negotiation and during the TTIP consultation of 2014. The CP was expressed to indicate the reform path endorsed by the European Commission with respect to ISDS and its transformation “from *ad hoc* arbitration towards an Investment Court”.

The CP explained at the outset that, in the Commission’s opinion, a reform of the current ISDS system is critical to ensure its fairness and independency. The CP asserted that lack of these features is “[a] major part”⁶ of the current challenge that investment arbitration poses to the Member States’ ability to pursue public policies.⁷ One of the points of reform concerns the possibility of introducing an appellate mechanism in order to increase the consistency and predictability of the system. Already in CETA, the EU and Canada included the option of considering the possible establishment of an appeals mechanism, acknowledging its benefits.⁸

The CP identified four main avenues of reform, including the establishment of a permanent appellate jurisdiction.⁹ The CP interpreted the results of the public consultation as indicating “broad [...] support...from both business and NGOs”¹⁰ in favour of an appellate mechanism, somewhat disregarding the nuances of the responses received. The European Commission emphasised the advantages of an appellate review: it would provide a corrective mechanism to review “wrong”¹¹ decisions and contribute to legal certainty. It went as far as stating that “the right of appeal must be part of any functioning judicial or quasi-judicial system”.¹²

The CP notes that CETA, the EU-Singapore FTA and other treaties being negotiated include *rendez-vous* clauses committing the Contracting Parties to consider the establishment of appellate mechanisms. Besides this, no appellate mechanism for international investment disputes is currently in place. Investment awards are only subject to the annulment regimes regulated by the applicable ISDS rules (ICSID or UNCITRAL-based domestic laws) as discussed in the subsequent chapter. Meanwhile, in December 2015 the European Commission announced that in the EU-Vietnam FTA the ICS proposal has been included, although the text of that FTA has not yet been published.¹³

⁶ CP, 1.

⁷ The CP specified (ibid. 2-3) that other aspects of this challenge have been considered and led to certain adjustments in the text of the CETA and the Singapore-EU FTA. These include the express declaration of the right to regulate; the redefinition of the standards of FET and indirect expropriation; the prevention of “forum shopping” techniques; the increased transparency of the arbitration (by incorporation of the new UNCITRAL rules); the possibility the treaty-members issue authoritative interpretation of treaty clauses; the inclusion of ethical guidelines for arbitrators; the possibility to dismiss unfounded claims through an expedite procedure; the enforcement of the “loser pays principle”; the prohibition of parallel proceedings in domestic courts; the concerted efforts towards an appeals mechanism.

⁸ Article X.42, para 1(c).

⁹ The other points being: i) the protection of regulatory autonomy; ii) the establishment and functioning of arbitration tribunals and iii) the interplay between domestic courts and ISDS.

¹⁰ CP, 8.

¹¹ Ibid.

¹² Ibid.

¹³ See Press release of the European Commission, available at:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409>. See also: M. Daly and J. Ahmad, The EU-Vietnam FTA:

What does it all mean? What does it mean for the future?, Kluwer Arbitration Blog, 14 December 2015, available at:

The suggestions contained in the CP were deliberately brief and did not purport to represent the final position of the Commission at that time but did reflect the substance of the proposal to be put to the EP and Council for further discussion. It was proposed to endow TTIP with a bilateral appellate mechanism competent to review errors of law and “manifest errors in the assessment of facts”.¹⁴ To provide an idea of the system proposed, the CP mentions the WTO Appellate Body (AB). The TTIP appellate body, which would count on a secretariat, would have 7 members (2 from the EU, 2 from the US, 3 non-nationals) with similar credentials to the judges of the ICJ or the members of the WTO AB.

The CP traces the way forward, specifying that the bilateral approach should only serve as stepping stone towards the operation of a multilateral system. In particular, different treaties should indicate the same “appellate mechanism with tenured judges”, possibly on the basis of an “opt-in system”.¹⁵ The first step, according to the CP, would be the creation of a fixed list of arbitrators, to be followed by the establishment of “an actual permanent investment court”,¹⁶ competent to hear appeals with respect to different treaty regimes.

b. The Lange Report to the EU Parliament

On 1 June 2015, Rapporteur Bernd Lange, on behalf of the Committee on International Trade (INTA) of the European Parliament, published a Report with the suggested EP’s recommendations to the Commission on the TTIP deal (“the Report”).¹⁷ The comprehensive Report addressed the broader significance of the TTIP, the commitments of the parties regarding market access and regulatory trade barriers, and various specific rules that should be contained in the final text. After noting that TTIP would contain an innovative regime of investment protection, the Report elaborated on the Commission’s mandate regarding the ISDS. It encouraged the Commission:

- to build on the Concept Paper presented by Commissioner Malmström to INTA Committee on May 7, 2015 and the ongoing discussions in the Trade Ministers’ Council and to use them as a basis for negotiations with the US on a new and effective system of investment protection, as they provide very welcome proposals for reform and improvement,
- ...
- to propose a permanent solution for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured and the jurisdiction of courts of the EU and of the Member States is respected,

<http://kluwerarbitrationblog.com/2015/12/14/the-eu-vietnam-fta-what-does-it-all-mean-what-does-it-mean-for-the-future/>.

¹⁴ Ibid, 9. This would include “an incorrect factual treatment of domestic law as interpreted by domestic courts”.

¹⁵ Ibid, 11.

¹⁶ Ibid.

¹⁷ Report of 1 June 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)

(2014/2228(INI)) at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0175+0+DOC+XML+V0//EN&language=en>.

- to consider whether, in the medium term, a public International Investment Court could be the most appropriate means to address investment disputes.¹⁸

In short, on the basis of the outcome of the consultation, the Lange Report recommended to the European Commission to break away from what it termed the “private arbitration” system that is commonplace in treaty-based protection of foreign investments. Two points of note are the establishment of the appellate system, which at this stage is treated as a non-negotiable item, and the requirement that ISDS is carried out by publicly appointed professional judges. A future permanent Investment Court is suggested as the ideal a medium term solution.

It is worth noting that the consent of the European Parliament is necessary for TTIP to enter into force, and that the European Parliament has expressly taken upon itself the task to “guarantee that only a good agreement will be adopted” also “given the weak public acceptance of the agreement under negotiation”.¹⁹ This implies that the Parliament’s recommendations must be taken seriously, lest the negotiation might collapse or stall indefinitely, and that the Parliament is keen to channel the views of the European public on certain matters of contention, which include the design of ISDS.

The Committee on Legal Affairs, in its Opinion on a previous version of the EP’s recommendations,²⁰ provided the strongest input against ISDS, which led to the final text analysed above. It firmly argued that “there is no need for any private ... ISDS mechanisms in this agreement”.²¹ It further recommended that the responses of the public, the 97% of which opposed ISDS in TTIP, should be taken into account and affect the negotiations. It repeatedly stressed the importance of avoiding any form of ISDS and that any dispute settlement would not in any case prevail over domestic laws. On the other hand, it seems that the final Report does not uphold the proposal of the Committee on Constitutional Affairs,²² who went as far as stating “the fact that a state-to-state dispute settlement system and the use of national courts are the most appropriate tools for addressing investment disputes”.²³

The plenary of the European Parliament adopted the Report in July 2015.²⁴ The final text relating to ISDS, amended pursuant to a proposal by rapporteur Lange,²⁵ reads as follows:

¹⁸ Ibid, Paragraph 1(d)(xv), at 18.

¹⁹ Ibid, 21.

²⁰ Ibid, 73, Opinion of the Committee on Legal Affairs for the Committee on International Trade on Recommendations to the European Commission on the Negotiations for the TTIP (2014/2228(INI)) of 4 May 2015, rapporteur Dietmar Köster. It was passed with a majority of 12/11.

²¹ Ibid. A similar concern was voiced by the Committee on Petitions, see *ibid*, 92, point 24.

²² Ibid, 83, Opinion of the Committee on Constitutional Affairs for the Committee on International Trade on Recommendations to the European Commission on the negotiations for the TTIP (2014/2228(INI)) of 16 April 2015, rapporteur Esteban González Pons.

²³ Ibid, 84, point (vi).

²⁴ 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) (2014/2228(INI)).

²⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2bAMD%2bA8-2015-0175%2b117-117%2bDOC%2bPDF%2bV0%2F%2FEN>.

[the Commission is recommended] to ensure that foreign investors are treated in a non-discriminatory fashion while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.²⁶

The discussion leading to the European Parliament’s vote featured repeated matter-of-fact rejections of the current system of ISDS, characterising it as an outdated model.²⁷ The spokesperson of the Socialist & Democrats observed that “the vast majority of this Parliament, and indeed the Commission, now accept that the old-style ISDS is dead and unacceptable”.²⁸ The Conservative party’s representative noted that “the outdated ISDS mechanism ..., frankly, has no fans left”.²⁹ A representative of the European United Left criticised the text on ISDS for being unrealistic, and claimed that the US would not accept a public court to replace ISDS.³⁰

2. The call by some Trade Ministers for a permanent investment court

It is important to mention that the critique against ISDS has not been limited to the European Parliament and the European Commission but has been on the rise in a number of EU Member States, notably in what used to be pro-ISDS countries like Germany, the Netherlands and France.³¹

In Germany, Social Democrat Trade Minister Gabriel has been speaking out against ISDS, in particular after Germany became a first time Respondent in the *Vattenfall* case.

Also, Social Democrat Trade Minister Ploumen of the Netherlands, who has been under heavy pressure from domestic anti-ISDS groups, called upon the European Commission to develop reform proposals.

Similarly, the French Trade Minister Fekl went even as far as threatening to block the adoption of TTIP, if it would include old style ISDS.

All this pressure culminated in the common call by those Trade Ministers for a permanent investment court.³²

²⁶ Point 2(d)(xv).

²⁷ Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (debate), minutes of 7 July 2015, <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20150707&secondRef=ITEM-004&language=EN>. See for instance the declarations of Jeppe Kofod, Marian Harkin.

²⁸ Ibid, declaration of David Martin.

²⁹ Ibid, declaration of Emma McClarkin.

³⁰ Ibid, declaration of Lola Sánchez Caldentey.

³¹ See for recent percentages of (dis)approval of TTIP in the EU Member States: I. Dreyer, EU public opinion support for TTIP falling, biggest drop in the Netherlands & CEE, Borderlex, 7 January 2016, available at: <http://www.borderlex.eu/blog-eu-public-opinion-support-ttip-falling-biggest-fall-netherlands-cee/>.

³² The paper dated 6 March 2015, available at: <http://www.tweedekamer.nl/kamerstukken/detail?id=2015D08417>.

This shows that there is also a clear shift visible in several Member States against the old style ISDS. Thus, the need for significant reforms of the ISDS seems to be the generally accepted view. However, it should also be pointed out that other Member States in fact remain in support of ISDS (in the form of investor-state arbitration with appropriate checks and balances) in TTIP, such as for example the UK Government.

In this context, it should be noted that Member States may take some comfort by the fact that the CJEU will soon deliver its opinion on whether or not the EU-Singapore FTA is a “mixed” agreement, which would require ratification by all Member States.³³ While that Opinion is not binding with regard to TTIP, it is in the light of the similarities between the EU-Singapore FTA and TTIP, applicable in analogy. Accordingly, if the CJEU would conclude that EU FTAs are “mixed” agreements, this would enable the Parliaments of the Member States to vote on TTIP as well. In other words, if ratification of TTIP by the Member States is required, the investment chapter and the dispute settlement mechanism therein will have to be acceptable to all Member States.

In any case, the pressure on the European Commission imposed by several important Member States to come up with concrete reform proposals regarding ISDS, which go beyond those already included in CETA, was increasing. Consequently, several months later the European Commission presented its draft proposal for what it coined an “Investment Court System” (ICS).

3. The EC’s proposal of an Investment Court System (ICS)

On 16 September 2015, the European Commission released its draft text of the investment chapter, which contained the provisions for the creation of the ICS, to be included in TTIP.³⁴ The draft text is a direct evolution of the Concept Paper of May 2015 and is in line with the instructions issued by the European Parliament in July of that year and also takes into account the criticism against ISDS that echoed by several Trade Ministers of EU Member States (see above).

On 12 November 2015, the European Commission adopted the final version³⁵ of its proposal for an ICS, which only slightly deviates from its September 2015 draft version. The final version has been officially transmitted to the US for the purpose of negotiations.

a. The structure of the proposed ICS

The proposal envisages a two-tier investment court system, inspired in large part by the WTO Dispute Settlement System. 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.

³³ See for details: <http://eulawradar.com/case-a-215-the-eu-singapore-free-trade-agreement-a-mixed-agreement/>.

³⁴ http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

³⁵ http://europa.eu/rapid/press-release_IP-15-6059_en.htm.

If amicable resolution proves impossible,³⁶ and without prejudice to the possibility that the parties have recourse to mediation,³⁷ an investor seeking to bring a claim under the TTIP may request consultations.³⁸ After six months from such a request, the unsatisfied investor can submit a claim³⁹ to the Tribunal of First Instance (TFI), which is to be assisted by a permanent Secretariat funded by the EU and the US.⁴⁰ The Tribunal can order the claimant to post security for the costs of proceedings.⁴¹

The Tribunal of First Instance shall be composed of fifteen judges, five of each Party and five third party nationals,⁴² among whom Presidents and Vice-Presidents are appointed.⁴³ Their qualifications must be sufficient for appointment to judicial office in their respective countries (which is different from saying that they must be judges). Alternatively, they can be “jurists of recognised competence”. They must also have demonstrated expertise in public international law.⁴⁴ Appointed judges serve for six years and their appointments can be renewed once. To ensure a staggered renewal of the Tribunal, seven of the initial judges shall exceptionally serve for nine years instead.⁴⁵

The judges of the TFI, just like WTO AB members, shall be “available at all times and on short notice, and shall stay abreast of dispute settlement activities”.⁴⁶ In consideration for their availability, they shall receive a “monthly retainer fee” which the EC suggests being of “around €2,000”,⁴⁷ unless the Committee (of EU and US representatives) decides to employ these judges on a full-time basis and pay them a salary. In that event, judges could engage in any other occupation only pursuant to an exceptional permission granted by the Tribunal’s President.⁴⁸ This means that until the Committee so decides, the appointed judges can continue to engage in other occupation as far as it does not create any conflicts with their TFI appointment. Accordingly, the TFI is – at least initially – not a permanent body employing full-time judges, but is rather of semi-permanent nature. Indeed, judges may sit as arbitrators on other investor-state disputes outside the ICS system but cannot act as counsel.⁴⁹

Much like the WTO AB, the TFI shall hear cases in three-member divisions, chaired by the third-country judge, unless the parties to the case agree to let the case be heard by a sole judge. The

³⁶ Article 2 of Section 3, sub-section 2 (alternative dispute resolution and consultations) ICS proposal. The language is ambiguous. Although it does not seem to create an obligation (“Any dispute should, as far as possible, be settled amicably through negotiations or mediation [...]”), the conditional mode might indicate an obligation of means.

³⁷ Article 3 ICS proposal.

³⁸ Article 4 ICS proposal.

³⁹ Article 6 ICS proposal.

⁴⁰ Article 9(16) ICS proposal. The proposal mentions both the ICSID and PCA Secretariat.

⁴¹ Article 21(1) ICS proposal.

⁴² Article 9(2) ICS proposal. The number can be revised by the Committee of the parties to the TTIP, see *ibid*, para (3).

⁴³ Article 9(8) ICS proposal.

⁴⁴ Article 9(4) ICS proposal. The clause lists some “desirable” credentials, including specific expertise in international investment and international trade law and the resolution of disputes arising in those two fields.

⁴⁵ Article 9(5) ICS proposal.

⁴⁶ Article 9(11) ICS proposal. Compare this clause with Article 17(3) of the DSU.

⁴⁷ Article 9(12) ICS proposal.

⁴⁸ Article 9(15) ICS proposal.

⁴⁹ Article 11 ICS proposal.

President of the TFI appoints the division and its judges “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunities to all Judges to serve”.⁵⁰

The TFI shall issue its “provisional award” (as it is termed in the proposal) within 18 months of the submission of the claim, or issue a decision motivating the delay.⁵¹ There is no reference to the maximum possible length of proceedings, in contrast to the appeal procedure (see below). This means that, if the TFI issues a reasoned decision to that effect, it can decide to prolong the proceedings without restrictions. Non-appealed awards become final after 90 days.

The Appeal Tribunal (AT) is composed of six members (2 US, 2 EU and 2 third country judges) and shall hear appeals against the Tribunal’s provisional awards.⁵² The judges’ modalities of appointment and length of service are comparable to those of the TFI.⁵³ The only perceptible difference is that AT’s members must qualify for appointment to the “highest” judicial offices in their countries (or be a “jurist of recognised competence”, like the TFI’s judges).⁵⁴

The AT is intended to work in three-member divisions, chaired by a non-national and identified through a randomised rotation system moderated by the President. AT members shall be always on call and receive a retainer fee that the EC suggests to be of €7,000 per month, taking as explicit baseline the amount received by WTO AB members.⁵⁵ Interestingly, as is the case with TFI judges, AT members will only be permanently employed if the TTIP Contracting Parties so decide by a specific decision of the Committee. Hence, also AT members will be able to engage in other occupations, which are not in conflict with their AT appointment.

The statutory grounds of appeal are very comprehensive. They include errors in the interpretation and application of the applicable law, manifest errors in the appreciation of facts, including the appreciation of relevant domestic law, and the grounds listed in Article 52 of the ICSID Convention.⁵⁶ Accordingly, the scope of review of the AT is envisaged to be very broad by encompassing also “manifest errors in the appreciation of facts”, and thus is not limited to points of law.

The AT can reject the appeal (rendering the award final) or uphold it, thus modifying or reversing any finding of the Tribunal.⁵⁷ Appeals should be completed in 180 days and, even in case of delays,

⁵⁰ Article 9(7) ICS proposal. This clause is obviously worded after Article 6(2) of the Working procedures for appellate review of the WTO AB (WT/AB/WP/6 of 16 August 2010).

⁵¹ Article 28(5) ICS proposal.

⁵² Article 10 ICS proposal.

⁵³ Article 10(3 to 7) ICS proposal.

⁵⁴ Article 10(6) ICS proposal.

⁵⁵ Article 10(8 to 12) ICS proposal.

⁵⁶ Article 29(1) ICS proposal. Manifestly unfounded appeals can be dismissed of through an expedited procedure under Article 29(2) ICS proposal.

⁵⁷ Article 29(2) ICS proposal.

shall not last for more than 270 days.⁵⁸ The appellant shall provide security for the costs of the appellate proceedings and for any amount awarded against it in the provisional award.⁵⁹

If the AT modifies or reverses the provisional award of the Tribunal then the Tribunal shall, after hearing the disputing parties if appropriate, revise its provisional award to reflect the findings and conclusions of the AT. The provisional award will become final 90 days after its issuance. The TFI shall be bound by the findings made by the AT. The TFI shall issue its revised award within 90 days of receiving the report of the AT.⁶⁰

The TFI can only award monetary damages or order restitution of property, but in the latter case the award must indicate the amount that the respondent can opt to pay in lieu of property.⁶¹ Punitive damages are expressly excluded.

Final awards of the TFI⁶² are not subject to any review mechanism, international or municipal.⁶³ The Parties commit to recognise them and enforce the pecuniary obligations they entail “as if [they] were a final judgement of a court in that Party”,⁶⁴ in line with the regime of ICSID awards. More specifically, it is expressly stated that “for the purposes of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958], 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.”⁶⁵ In addition, it is noted that “for greater certainty [...] a final award issued pursuant to this section shall qualify as an award under the ICSID Convention.”⁶⁶

b. Procedural aspects of the ICS

The proposal for the ICS contains several noteworthy procedural aspects, which will be highlighted in the following section.

Selection of judges

One of the major innovations compared to the existing ISDS system is the pre-selection of the judges by the Contracting Parties alone. One of the hallmarks of the current ISDS system is party autonomy as to the free choice of the arbitrator by the investor/claimant and the State. The complete removal of this feature is significant. Under the ICS proposal investors/claimants will have no involvement in

⁵⁸ Article 29(3) ICS proposal.

⁵⁹ Article 29(4) ICS proposal.

⁶⁰ Article 28(7) ICS proposal.

⁶¹ Article 28(1) ICS proposal.

⁶² Article 30 ICS proposal mentions also “final awards issued ... [by] the Appeal Tribunal”, but it is unclear what this formula indicates, given that the Appeal Tribunal appears to have only the power to either dismiss an appeal or prepare a “report” (Article 28(6)) or “decision” (Article 29(2)) modifying or reversing the award, which precludes the issuing of the final award by the Tribunal.

⁶³ Article 30(1) ICS proposal.

⁶⁴ Article 30(2) ICS proposal. Except for the unusual spelling of “judgment”, the clause is a *verbatim* replica of Article 54(1) of the ICSID Convention.

⁶⁵ Article 30(5) ICS proposal.

⁶⁶ Article 30(6) ICS proposal.

the selection of the judges and AT members, while the appointment will be made by the EU, the Member States and the US.

However, whilst the judges (and AT members) are required to possess certain qualifications, nonetheless the appointment of those judges will (or at least may) be a political decision. It is expected that the Contracting Parties will have regard to the fact that they will be potentially Respondents when appointing the judges and AT members and appoint those who, whilst independent, may be considered more likely to be sympathetic to the State Respondent's position. It is therefore arguable that the ICS could be (or be perceived on its face to be) weighted in favour of the Respondent. Even a perceived risk of a biased system could undermine the authority of the ICS.

However, the Member States may consider it important that their investors actually get a fair trial at the ICS and therefore may be inclined to avoid appointing persons who are perceived to be too much "pro-State" biased.

Indeed, in order to increase the authority of the ICS and to avoid a "pro-State" biased perception of it, it would be important to select the judges and AT members in a more transparent manner, for example by way of consultations with stakeholders. This could increase the authority of the ICS and help minimise the risk of a perception of, or actual, "pro-State" bias. Further, if the system is designed to support investments by US investors into Europe, it is in the interests of the EU that US investors consider that the protections offered in the investment chapter can be adequately enforced in an unbiased system.

Qualification and ethics of the judges

Another set of aspects concerns the qualification of the judges, ethics, gender and age.

As regards the qualification of judges, the question arises whether there is a qualitative difference between the judges selected for the TFI and the members of the Appeal Tribunal? *Prima facie*, there is a formal difference because AT members must have the qualification for highest courts as opposed to any court, but the other qualification of being a "jurist of recognised competence" is applicable to both levels. This could be interpreted as nullifying any difference between the quality of the judges and the AT members. However, it could be understood that the term "jurist of recognised competence" implies a minimum standard. In any case, the question arises whether AT members are "better" or will be able to deliver "better" decisions as compared to TFI judges.

Also, it should be noted that there are huge differences within the EU Member States regarding the qualifications for judicial offices. In some Member States, freshly graduated lawyers can qualify for judicial offices, whereas in others additional training and qualifications are required. Even more differences arise when the qualifications of US judges and third state judges are taken into account. Thus, the question arises whether these criteria are sufficient to generate the composition of a balanced and adequately competent bench. Indeed, those who meet the criteria may not be sufficiently versed in public international law and international investment law and dispute settlement, since these issues are rarely brought before national court judges. The proposal does not address these issues but leaves it totally to the Contracting Parties.

One of the notable additions, which was only added in the final version of the proposal, concerns the ethics and jobs of “governmental officials”.

Whereas Article 11(1) of the ICS proposal states that:

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.⁶ They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law.

Footnote number 6, which was added in the final text, can be understood to undermine the requirement of independence of the judges from any government when it states

For greater certainty, this does not imply that persons who are government officials or receive an income from the government, but who are otherwise independent of the government, are ineligible.

The premise of this footnote may be practically unworkable. To allow government paid officials, employees or consultants to become TFI or AT judges could undermine the requirements of non-affiliation with any government and independence, in particular because their existing loyalty towards the government which pays them cannot be ignored. In fact, this footnote opens up the door for appointments of “pro-State” judges or at least judges who may not be in an unfettered position to render decisions against their employer. Notably, this provision is in contrast with the unambiguous requirement for WTO Appellate Body members who shall be “unaffiliated with any government” (Art. 17(3) DSU).

The proposal also contains the possibility of challenging judges for alleged conflicts of interest. Such challenges will be decided by the respective Presidents of the TFI and AT. No appeal against these decisions is possible. It is undoubtedly questionable whether there is sufficient distance and neutrality ensured if the respective President alone decides such delicate issues. The reasons for challenge on the grounds of want of impartiality or independence are wholly subjective. Further, the interpretation of whether the challenge against a colleague on the bench is sustainable falls to a President drawn from the same pool as, and with identical qualities to, the challenged judge. For these reasons, it would be appropriate and necessary to let an external independent body/judge to decide on the validity of challenges against TFI judges and AT members.

Also, the proposal lacks any provisions for equal distribution of gender of judges in both Tribunals. There is an ongoing focus on diversity (of all types) in international bodies and tribunals (see, for

example, the GQUAL Campaign⁶⁷) and one of the critiques of the current system has been that in many cases only white males are selected as arbitrators. A provision which would direct the Contracting Parties to ensure that a proper gender balance is achieved when making the selection of the judges would have been helpful.

Finally, the proposal also does not mention any age limit for the judges when there are appointed. While there is no retirement age limit for example for WTO Appellate Body members or ICJ judges, there is one for the European Court of Human Rights (70 years) as well as in many domestic jurisdictions. In order to achieve also diversity in terms of age and experience, it may be helpful to take this element into account when making the selection of the TFI and AT judges.

Each of the above points is individually important, but taken together they represent more than the sum of their parts. The ICS proposal requires further scrutiny to address these concerns to develop a system which inspires confidence for its competence and political independence.

Determination of Respondent (EU or MS)

Another particular aspect concerns the procedure for determining the Respondent in case of a dispute brought by an American investor against the EU and/or a Member State.

Assuming that both the EU and all Member States will sign and ratify TTIP as a mixed agreement, the question arises how to determine the correct Respondent in a given case.

According to Article 5 of the proposal, an American claimant must send a request for the determination of the Respondent to the EU, and if the disputed treatment originates from a Member State that request must also be sent to the Member State concerned.

Within 60 days the EU will inform the claimant as to whether the EU or the Member States will act as Respondent. Subsequently, the claimant must submit a notice of submission of a claim against the Respondent as determined by the EU.

The important point though is that according to Article 11(6) of the proposal, the TFI and AT are bound by the EU's determination of the Respondent. This system raises a number of potential difficulties for the claimant and the tribunals.

First, no reference is made to Regulation 912/2014⁶⁸, which contains the details regarding the requirements and the internal process of the determination of the Respondent between a body, institution or agency of the EU and its Member States in respect of claims brought by non-EU investors for harm done to their investment in a EU Member State. This Regulation also determines who will be financially responsible for any awards issued against the EU and/or a Member State.

⁶⁷ See: www.gqualcampaign.org/home.

⁶⁸ Regulation (EU) No 912/2014 of the EP and of the Council, 23 July 2014, establishing a framework for managing responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the EU is party, available at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0912&from=EN>.

The Regulation 912/2014 provides for the following system. The simplified rule is that if the disputed measure was taken by the EU, the EU will act as Respondent and be financially responsible. By contrast, if the disputed measure was taken by the Member State alone, that Member State should act as Respondent and be financially responsible. However, the more problematic situation is when the disputed measure has been adopted by the Member State in the context of implementing EU legislation. In such cases, it can be difficult to make a clear determination whether the EU or the Member State is actually responsible for the adoption of the disputed measure. A wrong determination of the Respondent is thus possible, which can have fatal effects for the case.

Indeed, it is possible that the wrong determination of the Respondent may lead the TFI/AT to find that there was a breach and therefore compensation should be awarded, but because the claim has been brought against the wrong Respondent through no fault of the claimant, the Respondent cannot be held liable. Such a situation could very well arise because the TFI and AT are bound by that determination of the Respondent and cannot correct it.

Another consequence of the right of determining the Respondent unilaterally and in a binding manner could be that the EU can limit the enforcement of any awards against it, if the EU is able to decide the Respondent-status without limit. If the EU is selected as Respondent, the ICSID Convention cannot be applied – at least as long as the ICSID Convention is not amended, which makes enforcement of awards much more complicated than if a Member State would be selected. Whilst the EU may be unlikely to put itself forward as the Respondent if the alleged breach is factually unrelated to EU actions, is it questionable whether the system should allow itself to determine the Respondent without any external control by the TFI/AT.

Applicable law and scope of review

The ICS proposal would benefit from further clarification regarding what is to be understood as “applicable law” and, related to that language, the scope of review by the AT.

Article 13(2) of the proposal alone is not problematic. Article 13(2) defines “applicable law” as encompassing the TTIP provisions and other rules of international law applicable between the Parties. The TFI and AT shall interpret the TTIP provisions in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties.

Article 13(3) of the proposal continues by stating that “for greater certainty” the “domestic law” of the Parties shall *not* be part of the “applicable law”. However, and at the same time, the same provision states that

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. [emphasis added]

The first question is what does “domestic law” mean for the EU and its Member States? Does it also include EU law provisions – and if so, both primary and secondary EU law? This is important because the TFI is apparently allowed to interpret “domestic law” as a “matter of fact”. If “domestic law”

includes EU law, this would mean that the TFI would be in a position to interpret and apply EU law (including the jurisprudence of the CJEU) as a “matter of fact”.

However, as the CJEU has made clear in its Opinion 2/13⁶⁹ regarding the powers of the European Court of Human Rights and in its Opinion 1/09⁷⁰ regarding the powers of the Patent Court, it does not accept that another international court or tribunal would be in a position to interpret and apply EU law in a binding manner.⁷¹

Being clearly aware of this position, the proposal tries to accommodate the CJEU by stating in Article 13(4) of the proposal that

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.

However, the question is whether this will be sufficiently acceptable to the CJEU considering the powers of the TFI and AT to interpret and apply EU law (even only as a “matter of fact”) – should the CJEU be put in a position to express its views on this particular point.

These doubts are further amplified by the extensive scope of review envisaged for the AT. According to Article 29(1) of the proposal the grounds for appeal are:

- (a) that the Tribunal has erred in the interpretation or application of the applicable law;
- (b) 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 ICSID Convention, in so far as they are not covered by (a) and (b).

Thus, ground (b) would place the AT in a position to review any “manifest errors” of the TFI regarding the “appreciation of the facts, including the appreciation of relevant domestic law”. Arguably, the appreciation of the facts, including relevant domestic law, encompasses also EU law as far as the EU and its Member States are concerned. Accordingly, the AT would be able to review to what extent the TFI misunderstood EU law. Again, this would be highly unlikely to be acceptable to the CJEU.

However, in light of the fact that any determination as to domestic law, by the TFI and AT is not supposed to be binding upon the courts or the authorities of either Party (Article 13(4) ICS proposal),

⁶⁹ *Opinion 2/13* on the accession of the EU to the ECHR, 18 December 2014, ECLI:EU:C:2014:2454.

⁷⁰ *Opinion 1/09* on the Patent Court, 8 March 2011, ECLI:EU:C:2011:123.

⁷¹ See for an early analysis which concluded that this would not be acceptable to the CJEU, N. Lavranos, Is an International Investor-State Arbitration System possible under the auspices of the ECJ?, in: N. Jansen Calamita, D. Earnest, M. Burgstaller (eds.), *The Future of ICSID and the place of Investment Treaties in International Law, BIICL, Current Issues in Investment Treaty Law*, Vol. IV, London 2013, 129-148.

the question arises what would be the legal and political value of any decisions of the TFI and AT? And what does this mean in terms of enforcement in the EU and its Member States of any such decisions based on a determination as to domestic law as a matter of fact? Could the domestic courts of EU Member States refuse the recognition and enforcement of any such decisions by claiming they are not binding on them or that they are in violation of EU law and thus against the *ordre public*? The ICS proposal fails to clarify these important issues.

Binding interpretation with retroactive effect

Another interesting new procedural tool, which is worth mentioning is the possibility which Article 13(5) of the proposal gives to the Contracting Parties of adopting binding interpretations regarding the investment protection and ICS provisions of TTIP. This procedural tool in itself is not new as the NAFTA example⁷² shows. But the interesting aspect in TTIP is that the Contracting Parties can also determine the specific date of the binding effect of such interpretative decisions. Since there is no bar to fixing that date in the past, it is possible that the Contracting Parties may apply such decisions with retroactive effect. Indeed, this has been confirmed in discussions with the European Commission.⁷³

As a result, the Contracting Parties of TTIP – which at the same time are also potential Respondents – can effectively intervene in on-going disputes by adopting binding interpretations with retroactive effect which can alter the outcome of those disputes. Such retroactive intervention is not reconcilable with the most fundamental Rule of Law principles.

4. Initial comments on the international court system (ICS) proposal

At this juncture, it is important to clarify that the perception that an appellate system is necessary might derive, at least in part, from over-compensation and institutional displacement. In other words, the perceived inconsistency of arbitral jurisprudence has prompted the EU’s efforts to shape the TTIP in such a way as to avoid the issue. This is a plausible reaction, but the efforts are misplaced insofar as a) they cannot address the issue beyond TTIP (at least, as long as TTIP is not multilateralized) and b) TTIP will have radically different features from the more than 3,000 existing BITs whose interpretation produced hermeneutic contradictions, and many of the differences are designed precisely to prevent such interpretive confusions. In other words, an appellate system could be very useful in regimes other than TTIP (which are beyond the reach of the current negotiation), and might be relatively unnecessary in TTIP where the risk of inconsistent interpretation is reduced.

Looking at past and continuing controversies might not help predicting future ones with much accuracy. However, it is possible to look at the design of the TTIP norms on investment (taking also CETA as a plausible proxy) and appreciate how the causes that led to the most cited instances of

⁷² See the NAFTA FTC Notes of Interpretation of July, 2001, available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

⁷³ This was confirmed when this particular point was discussed between the European Commission and the Member States in the TPC.

diverging interpretations of the text of BITs have been removed. The language is now amended and clarified to anticipate and avoid certain recurrent controversies and provide clearer solutions to recurrent legal issues. TTIP, much like CETA, builds on the NAFTA model and adds upon it,⁷⁴ providing that:

- The rules of the investment chapter are without prejudice to the host State's regulatory autonomy in achieving its public policy goals⁷⁵;
- MFN clauses do not extend to dispute settlement provisions of other treaties⁷⁶;
- Umbrella clauses are removed⁷⁷ or limited in scope;
- The relevance of legitimate expectations is narrowly circumscribed to specific representations made by State officials and specifically relied upon by the investor⁷⁸;
- The possibility that regulatory measures are regarded as expropriatory is remote⁷⁹;
- The language of the FET clause, directly or through exhaustive lists, makes it abundantly clear that only customary standards are included⁸⁰;
- The expression 'full protection and security' is expressly referred only to physical security⁸¹;
- The host State reserves the right to deny treaty benefits to certain categories of investors⁸² and to deny access to arbitration with regard to investments made through wrongdoing.⁸³

These modified clauses (compared to the short and broadly defined counterparts commonly found in the older EU Member States' BITs) aim precisely to steer the outcome of possible disputes and avoid the divergent case-law that emerged from the application of vaguer versions of those provisions.

Whereas an appellate system may represent a safeguard against future cases of controversial interpretation of treaty norms, it is fair to say that virtually all treaty clauses that have caused incompatible constructions so far have been modified in CETA, with the specific goal of preventing unpredictable interpretation. In other words, the largest part of the confusion that is invoked as a reason to set up an appellate review was in fact already removed through *ad hoc* trouble-shooting

⁷⁴ Filippo Fontanelli and Giuseppe Bianco, 'Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States' (2014) 50 *Stan. J Int'l L.* 50 211; N. Lavranos, *The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?*, 29 March 2013, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241455.

⁷⁵ Article 2(1) ICS proposal.

⁷⁶ See ICS proposal: the Most-Favoured nation clause is mentioned but not included in the investment chapter, as it is bound to be included in the horizontal part of the agreement, nor is the National Treatment clause. CETA, Article X.7(4).

⁷⁷ Article 7 ICS proposal. In CETA, the umbrella clause proposed by the EU and included in a previous drafts is absent in the currently available text.

⁷⁸ Article 3(4) ICS proposal. Article X.9(4) CETA.

⁷⁹ Article 5 ICS proposal and Annex I. Annex X.11, point 3 CETA.

⁸⁰ Article 3(2) ICS proposal. Article X.9 CETA, noting that all possible extensions of these standards are made subject to the approval by the Trade and Investment Committee.

⁸¹ Article 3(5) ICS proposal. Article X.9 CETA.

⁸² Article 9 ICS proposal. Article X.15 CETA, referring to ownership by subjects of third countries and measures relating to peace and security.

⁸³ See under "definitions" in the ICS proposal. Article X.17 CETA codifies the clean-hands doctrine.

drafting in CETA. Arguably, the controversies that have led to the criticism that investment arbitration results in contradictory decisions will not be replicated in the CETA regime and, by extension, in the TTIP regime, on the basis of the tighter drafting.

Insistence on an appellate system is, to some extent, an overreaction against an issue that might not concern TTIP. However, even when legal certainty is not at risk, an appellate system might have a corrective effect – not so much against the persistence of conflicting interpretations – but against potentially unwelcome findings. Even when there is no confusion at all, or none yet, arbitral tribunals could interpret TTIP in “undesirable” ways.⁸⁴ However, it is unclear whether “undesirable” decisions would only be those that are technically wrong or also those that are plausibly correct but unexpected and unfavourable to host States.

Obviously, the establishment of an appellate system would cut both ways and allow investors to appeal decisions too, thereby potentially producing some “undesirable” rulings for the host States. The EP’s recommendations and the approach of the European Commission seem to proceed from an implicit correlation: awards against host States and wrong awards are largely overlapping, and an appellate system would curb both. This perception does not seem to take into account the possibility that the AT may rule against the host State. The fact that claimants may avail themselves of the appeal mechanism may be undesirable to the US, in particular since the US has largely fared well in investor-state disputes and therefore may be disinclined to introduce a system which allows the claimant to prolong proceedings and exacerbate costs by challenging a TFI provisional award.

CHAPTER II: The *status quo* in the investment regime

This Chapter discusses the state of the art of post-award review in investment arbitration. It describes the origins and functions of the annulment process under the ICSID Convention and the mechanisms to set aside non-ICSID awards in domestic courts. It also provides a brief account of the attempts that were made within the ICSID and PCA system to introduce a different post-award mechanism of review, and a brief aside regarding the practice of arbitration appeals in some non-investment arbitral regimes. In particular in the light of the perceptions about the current ISDS system, the analysis below is to provide some clarification on what is being departed from by the move towards an ICS and to allow better comparisons between the features of the current and proposed systems in the context of post-award review.

1. The notion of finality

The finality of awards is one of the basic tenets of arbitration, and arguably one of its main *raison d’être* (and selling points). The principle of finality might have a different function in different fields

⁸⁴ Public consultation on investment protection and ISDS in the TTIP, *supra*, 121.

of arbitration, for instance if we compare commercial arbitration between private entities and investment arbitration, where the defendant is a sovereign State.

Thus, for the first type of litigants – mainly commercial parties – finality potentially grants a swift path towards an ‘imposed consensus’ on the matter at hand, allowing them to quickly resume their usual business relationship, without losing valuable time in a never-ending cycle of appeals, of ordinary and extraordinary judicial challenges to the tribunal’s decision.⁸⁵ More precisely, for commercial parties, the finality of awards represents a guarantee that further unnecessary litigation and potential costs and delay and prolonged public exposure in state courts can be avoided.⁸⁶

Conversely, in investor-State arbitrations the parties also place an emphasis on finality, but for slightly different reasons. In essence, while the private investor desires an expeditious proceeding which shall clarify its position toward the host-state and allow it to either resume its activity there or to cease it after payment of a compensation, the sovereign party is interested in not damaging its reputation – and, consequently, increase its country risk – as a recipient of foreign direct investment. For both actors, *certainty* is the most important issue at stake in the aftermath of arbitral proceedings. Certainty to keep on investing, certainty to attract other investments. However, in none of such cases is the final character of the awards *absolute*. Their ‘relative finality’ allows different degrees of review – mostly formal and limited to procedural issues – at either domestic level or in the international framework⁸⁷ provided by the specific rules used. Despite its constitutive character for the arbitral system, finality cannot be permitted to ‘enclose’ and protect trespasses upon the litigious reflections of the rule of law. Therefore, the limits of finality itself are the limits of fairness, the two fundamental values being juxtaposed in a search for equilibrium.⁸⁸

2. Review of investment awards – the status quo

In the following sections we will restrict our area of analysis to the finality of awards – and possibilities of altering them – in cases of investor-state dispute settlement, either under the specialized and autonomous aegis of ICSID, or on the basis of other widely-used rules such as UNCITRAL, SCC or PCA. The two different regimes that apply to such investment awards (and their review) will be discussed separately below. Thus, while ICSID-based awards shall be treated distinctly, given their multilateral public international law origin and the professed autonomy of such a procedural system, the other awards (based on UNCITRAL, SCC or PCA rules) shall be analyzed

⁸⁵ See Pierre Lalive, ‘Absolute Finality of Arbitral Awards’, in *Revista Internacional de Arbitragem e Conciliação*, I (2008), p. 6.

⁸⁶ As one reputable author stated: “[a]bsent the possibility of binding arbitration, some transactions will remain un consummated. Others will be concluded only at increased prices, to reflect the risk of potentially biased adjudication” – see William W. Park, ‘Why Courts Review Arbitral Awards’, in *Festschrift für Karl-Heinz Böckstiegel* (2001), p. 596.

⁸⁷ Such as in the case of the ICSID Convention and Arbitration Rules.

⁸⁸ As William W. Park notes: “[e]fficient arbitration implicates a tension between the rival goals of finality and fairness.” – see William W. Park, *op. cit.*, p. 596.

in the general framework of domestic review of international arbitration awards with its correlated absence of verifying mechanisms embedded in the rules themselves.

a. Awards Rendered under ICSID Convention

(i) History and Principles

From the inception of the ICSID Convention in the early '60s, a constant objective of its drafters was to ensure that the rendered awards would not face the same fate as commercial arbitration awards, i.e. being subject to long-lasting and complicated domestic court review under the auspices of localized procedural rules – and public policy exemptions – that had no meaning within the context of the dispute.

Thus, before arriving at the present form of the Article 53(1) of the ICSID Convention, the concept of finality was reflected in several manners in the text of the drafts, suffering gradual metamorphoses. More precisely, even if there was no mention regarding the final character of the award in the two initial Notes of the General Counsel⁸⁹, the 1962 Working Paper⁹⁰ emphasized in Article VI, Section 10 that

“The award shall be *final and binding* on the parties. Each party shall abide by and comply with the award immediately, unless the Arbitral Tribunal shall have allowed a time limit for the carrying out of the award or any part thereof.” [emphasis added].

The same formulation was maintained in the text of the 1963 Preliminary Draft⁹¹, containing both of the legal determinations regarding the nature of the award, i.e. ‘*final and binding*’, while the 1964 First Draft of the Convention⁹² retained only a limited phrasing:

“The award shall be *final and without appeal*. Each party shall abide by and comply with the award in accordance with its terms.” [emphasis added].

Thus, the issue of binding force was excluded from its scope, while finality was further emphasized by introducing the ‘non-appealable’ character of the award.

However, the 1964 version of the Revised Draft⁹³ – following the work of the Legal Committee – modified the approach in the opposite direction, showing that

⁸⁹ Written by Aron Broches in August 1961 and January 1962 for the Executive Directors of the World Bank - see ICSID, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention*, Volume I, Part 2, Washington D.C., 1968, pp. 1-2 and 6-12 – hereafter quoted as “History of the ICSID Convention, II, 1”.

⁹⁰ See Document 6 – ‘Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors’, *History of the ICSID Convention*, II, 1, pp. 19 et seq.

⁹¹ See Document 24 – ‘Preliminary Draft Convention: Working Paper for the Consultative Meetings of Legal Experts’, *History of the ICSID Convention*, II, 1, pp. 184 et seq.

⁹² See Document 43 – ‘Draft Convention: Working Paper for the Legal Committee’, *History of the ICSID Convention*, II, 1, pp. 610 et seq.

⁹³ See Document 123 – ‘Revised Draft of the Convention’, *History of the ICSID Convention*, II, 2, pp. 911 et seq.

“[t]he 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 during any stay of enforcement in accordance with the provisions of this Convention.” [emphasis added].

Therefore, this formulation – also present in the final version of the ICSID Convention itself – placed the accent upon the ‘binding’ character of the award and directed finality on a secondary position, acknowledging it implicitly and in a more nuanced manner. Its *relative* status was emphasized by strictly defining it in relation with the available remedies present in the Convention, excluding only the possibility of ‘external’ interference within the self-contained ICSID system.

In this regard, the wording of Article 53 of the ICSID Convention, was only intended to be “a restatement of customary international law based on the concepts of *pacta sunt servanda* and *res judicata*”⁹⁴, as Aron Broches explained in the aftermath of its coming into force. It was not intended to reform the international adjudication regime established either positively or customarily, as similar provisions were already in force and effective in the field of international and transnational law.

However, the concept of Article 53 largely mirrors the philosophy that underpins the entire Convention: parties to an investment arbitration require swift and efficient resolution, enclosed within the positive and non-disputable borders of the ICSID system, shielding an award from any domestic interference and allowing it to remain substantively unaltered.

Thus, the desire for ‘finality’ is reflected in the Convention as a complete impossibility to use external ‘leverage’ upon an issued award, restricting the review process to the modalities offered within the system. Although not *internally* absolute, the final character of an award is conceived in such a manner as to offer no chance to tactically prolong the proceedings by requesting a review in a different forum.

Finality is often confirmed even in the text of the IIAs. It is common for treaties to contain express language indicating that “The award rendered by the arbitral tribunal shall be final and binding upon the disputing parties”.⁹⁵ This is notwithstanding the possibility of the setting aside or annulment of the award, which are regarded as exceptions (see next paragraph) to the default shared understanding that arbitral awards are final for the parties.

(ii) Exceptions to Finality

The relative finality of ICSID awards should be analyzed in light of Articles 50 to 52 of the Convention, these being the only legal provisions that allow awards to be reconsidered within the boundaries of the system. In accordance with Article 53, there are no exceptions from the ‘non-appealable’ character of an award, but only alternative *limited* remedies are available for various causes that threaten the integrity of the legitimacy of the arbitration mechanisms themselves.

⁹⁴ Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’, *ICSID Review – FILJ*, 2 (1987), p. 289.

⁹⁵ Japan – Oman BIT (2015), Article 15(14). See also, for instance, Netherlands – Albania BIT (1995), Article 9(6).

In this regard, it is generally admitted that the finality of an award rendered under the auspices of ICSID can only be put into question by one of the following three ways: interpretation (Article 50), revision (Article 51) and annulment (Article 53). The provisions concerning interpretation and revision closely follow the path established by the Statute of the International Court of Justice, reflecting in a mimetic manner the conditions found in the Statute for admissibility.⁹⁶

Interpretation. Although present in the same chapter with the other two review mechanisms, interpretation *per se* does not in any manner “impair the finality of the award”⁹⁷, not being an exception from this principle. Rather, it is an exegetic instrument offered for clarifying already decided issues, not for triggering a development of the established legal situation, as previously observed in the case-law of the International Court of Justice.⁹⁸

More precisely, Article 50(1) ICSID Convention states that “[i]f any dispute shall arise between the parties as to the *meaning or scope* of an award, either party may request interpretation of the award” [emphasis added]. The wording of this Article restricts the admissibility of interpretation to issues of ‘meaning or scope’, precluding the parties from filing a request for interpretation so as to obtain an alternative outcome by mere ‘sovereign hermeneutics’.⁹⁹

The later ICSID case-law confirmed this fundamental principle, showing in the *Wena Hotels v. Egypt* case that

“[t]he Tribunal is mindful that the admissibility of an application for interpretation has to be balanced against the principle that an ICSID award is final and binding on the parties to the dispute [...] Accordingly, the purpose of an interpretation is to obtain a clarification of the meaning or scope of an award. It cannot be invoked for the purpose of obtaining an answer or ruling regarding points which were not settled with binding force in the underlying decision.”¹⁰⁰

Therefore, it can be clearly observed that Article 50 ICSID Convention was not conceived to pose an exception to the principle of finality, not being an authentic ‘review mechanism’, but rather a limited

⁹⁶ Aron Broches, ‘Observations on the Finality of ICSID Awards’, in Aron Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law*, Dordrecht: Kluwer Academic Publishers, 1995, p. 294.

⁹⁷ *Idem*.

⁹⁸ See the Request for Interpretation of the Judgment of November 20, 1950 in the *Asylum Case* (Colombia v. Peru), Judgment of November 27, 1950, 1950 ICJ Rep., where it was shown that: “The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain *clarification* of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided.” (p. 402); also see Interpretation of Judgments Nos. 7 and 8, *Chorzów Factory*, Judgment of December 16, 1927, PCIJ Series A, No. 13: “The interpretation adds nothing to the decision, which has acquired the force of *res judicata* and can only have binding force within the limits of what was decided in the judgment construed” (p. 21).

⁹⁹ For this concept, see Horia Ciurtin, ‘Beyond the Norm: The Hermeneutic Function of Treaty Preambles in Investment Arbitration and International Law’, *Revista Romana de Arbitraj*, Issue 4/2015.

¹⁰⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award, 31 October 2005, paras. 103-104.

hermeneutic instrument meant to ensure the clarity of the award’s binding terms. Its goal is exactly to be an aid in supporting the finality by providing undisputable landmarks in enforcing the award.

Revision. On the other hand, the revision mechanism envisioned by Article 51 ICSID Convention is the only manner in which the parties might substantively alter the result of the arbitral process.¹⁰¹ More precisely, such an application must be based

“on the ground of discovery of some fact of such a nature as *decisively* to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence” [emphasis added].

Thus, in order to be successful, such a request for revision must be based upon the representation that the party – and the tribunal – could not have knowledge about those facts before the decision was taken, a presumption in this regard working in its favor. As Aron Broches noted at a meeting of legal experts in the drafting phases of the Convention:

“there would probably be a presumption of absence of knowledge and that the burden of proof would be on the party that resisted the application for revision on the ground that the tribunal or the other party had had such knowledge”.¹⁰²

The fundamental basis of such a review is not simply factual, but epistemological. It stands within the realm of facts, some of which were not available to the knowledge of the Tribunal when deciding upon the legal issues of the case. Therefore, it could be argued that the revision does not alter the final character of the award, but rather shows that such an award had never been granted such a finality due to an incomplete representation of the facts upon which the decision was taken. In this sense, revision allows an award to become truly final and binding after a definitive consideration of all the realities that underpin the dispute. Only by revision does finality instill upon an award which was initially vitiated by a partial lack of knowledge.

However comprehensive it might seem at a first glance, the scope of this provision has fairly limited practical applications. The wording of Article 51 ICSID shows that the unknown facts must have remained outside the knowledge of the applicant and not due to its negligence. In complex cases such as investment matters which involve profound preliminary investigations and disclosure of documents procedures, it can be generally assumed that relatively few facts remain hidden, especially *decisive* ones. The case-law so far is convincing in this regard: from a total of eight revision

¹⁰¹ Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 2nd Edition, Cambridge: CUP, 2009, p. 879 – hereafter “The ICSID Convention: A Commentary”.

¹⁰² See Document 31 – ‘Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, April 27-May 1, 1964’, *History of the ICSID Convention*, II, 1, p. 518.

applications registered at ICSID¹⁰³, only three were concluded with a Decision, and no applications were granted.

Annulment. Contained in Article 52 of the ICSID Convention, annulment is the sole review mechanism which “potentially erases the award”.¹⁰⁴ The annulment procedure allows one party to question the legitimacy of the award, in strictly defined procedural conditions. Unlike other mechanisms of the Convention, annulment might lead to a total or partial invalidation of the award, allowing for a re-submittal of the claim anew.

In the enclosed system of ICSID-led arbitration, “annulment constitutes a limited exception to the principle of finality”¹⁰⁵, developed to intervene only under exceptional circumstances that threaten the integrity of the arbitral process itself and which place a serious doubt about the positive legitimacy of the award. As emphasized by Hans van Houtte, the existence of the annulment mechanism is a guarantee that the fundamental requirements of a just decision have been respected.¹⁰⁶

The design of the annulment procedure was envisioned to function as a balance between the finality desired by the parties and the quest for a correct and fair decision. Although the final character of the award was not deemed to be absolute, the ICSID Convention system only permits a formal and procedural challenge to the outcome of the arbitration. The realm of the merits is out of reach in the annulment, as is the possibility to alter in any way the award. The only permitted path is that of using one – or more – of the exhaustive grounds which are available as a remedy in the case of decisions which are *legally* incompatible with the basic procedural tenets of the rule of law.

An application for annulment is decided by a so-called ad hoc Annulment Committee. The composition and formation of this ad hoc Annulment Committee is regulated in Article 52 ICSID Convention. Accordingly, once an application for annulment is registered, the Chairman of the Administrative Council of ICSID must appoint three members for the ad hoc Annulment Committee to decide the application. Ad hoc Annulment Committee members are appointed from the ICSID Panel of Arbitrators, which consists of persons designated by ICSID Contracting States and ten designees named by the Chairman of the Administrative Council. The ICSID Convention requires that Panel designees be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.” Unlike the ICSID’s appointment of Tribunal members, which may in certain circumstances be made

¹⁰³ See *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18; *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15; *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5.

¹⁰⁴ David Caron, ‘Framing the Work of ICSID Annulment Committees’, *World Arbitration & Mediation Review*, Vol. 6:2 (2012), p. 175.

¹⁰⁵ Christoph Schreuer, ‘From ICSID Annulment to Appeal Half Way Down the Slippery Slope’, *The Law and Practice of International Courts and Tribunals*, 10 (2011), p. 211.

¹⁰⁶ Hans van Houtte, ‘Article 52 of the Washington Convention. A Brief Introduction’, in Emmanuel Gaillard and Yas Banifatemi (eds.), *Annulment of ICSID Awards*, Paris: Juris Publishing, 2004, p. 11.

outside of the Panel of Arbitrators with the parties' consent, the Chairman of the Administrative Council is restricted to appointing ad hoc Annulment Committee members from persons on the Panel of Arbitrators.

The function of an ad hoc Annulment Committee is either to reject the application for annulment or to annul the award or a part thereof on the basis of the grounds enumerated in Article 52 ICSID Convention. Its function is not to rule on the merits of the parties' dispute if it decides to annul, which would be the task of a new Tribunal should either party resubmit the dispute following annulment of the award.

The few grounds for filing an annulment application are restrictively enumerated in Article 52(1) ICSID Convention:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

Briefly said, as it was acknowledged in the *Soufraki v. UAE* case, the ad hoc Annulment Committee is only empowered to verify three types of 'integrities', all of a technical nature:

- (i) the integrity of the tribunal [points (a) and (c)];
- (ii) (ii) the integrity of the procedure [points (b) and (d)];
- (iii) (iii) the integrity of the award [point (e)].¹⁰⁷

Without being allowed to offer a more comprehensive review of the award, an ad-hoc Annulment Committee is bound to decide strictly upon matters pertaining to such integrity, to the formal legitimacy of the arbitral process itself.

Moreover, when comparing the annulment proceeding with a regular appeal, it can clearly be observed that they differ not only in the scope and outcome of the analysis, but also in the (non)hierarchical dynamics of the involved courts. Thus, while the multi-tier domestic law appeal supposes a dual concern¹⁰⁸ – with the substantive reasoning of the decision *and* with its technical correctness –, the ICSID annulment focuses only on the latter. This limited type of review is only concerned with ensuring that the award is the result of a legitimate process, not taking into consideration errors of law or fact.¹⁰⁹ Furthermore, while an appeal allows the court to modify the

¹⁰⁷ *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 23.

¹⁰⁸ As David Caron argued, the appeal questions both 'the legitimacy of the process of decision and the substantive correctness of the decision' – see David Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal', *ICSID Review – FILJ*, 7 (1992), p. 24.

¹⁰⁹ See Aron Broches, 'Observations on the Finality of ICSID Awards', *cit. supra*, p. 322; also see Christoph Schreuer et al., *The ICSID Convention: A Commentary*, p. 901.

decision of the original tribunal and indicate a different interpretation or application of the law, the outcome of an annulment procedure can only lead to confirming or invalidating the award, but not altering it in any way. As Prof. Schreuer elegantly put it, *ad hoc* annulment committees “can destroy a *res judicata* but cannot create a new one”.¹¹⁰

This distinction in their function is normally reflected in the different qualification of the individuals staffing the second-level bodies; whereas appellate judges are normally appointed on the basis of higher credentials (of expertise or, at least, seniority) than the first-tier judges’, the profile of individuals sitting on *ad hoc* Annulment Committees is roughly the same of the members of arbitral tribunals.

With regard to the relationship between the interacting (quasi)judicial actors, the regular appeal is founded upon the assumption of an intrinsic hierarchy among the courts.¹¹¹ The body lastly called upon is superior in its ability to ‘utter the law’, in an enclosed pyramidal system. However, in the case of annulment, the *ad hoc* committee is just different in its nature and function from the initial tribunal, being summoned not to establish a new finality, but to either confirm or invalidate the original one. Their dynamics is thus horizontal and not vertical; it does not, *per se*, operate to ensure coherence.

(iii) Annulment Arbitral Practice: Misuse and Reconstruction

Although theoretically the limited grounds for annulment have been acknowledged by nearly all committees, in practice they have been circumvented in a series of landmark cases from the early period of the system. Such a tendency to substitute the function of the *ad hoc* Annulment Committee with that of an appellate body was first manifested in the *Klöckner I*¹¹² and *Amco I*¹¹³ cases, where the boundary of finality was trespassed; the annulment decisions went as far as altering the content of the initial decision and establishing a new understanding of the factual-legal matrix. More precisely, these two committees – the first ones nominated to rule upon an annulment – issued some of the most criticized decisions in the field of investment arbitration.

Thus, the *Klöckner I* committee was largely seen as engaging in a form of ‘legal purism’ and challenging the presumption in favor of the award’s validity, as well as triggering the endless debate in regard to the misapplication of the law as a proper ground for annulment.¹¹⁴ Although the legal reasoning of the original award was certainly contestable, the committee seriously departed from the restrictive provisions of the ICSID Convention and indulged into an activist stance. Soon thereafter,

¹¹⁰ *Ibidem*.

¹¹¹ Noemi Gal-Or, ‘The Concept of Appeal in International Dispute Settlement’, *European Journal of International Law*, Vol. 19, No. 1 (2008), p. 58.

¹¹² *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985.

¹¹³ *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986.

¹¹⁴ W. Michael Reisman, ‘The Breakdown of the Control Mechanism in ICSID Arbitration’, *Duke Law Journal*, No. 4 (1989), p. 760 et seq.

the *Amco I* decision on annulment – which did not show doctrinal-technical sophistication – further entered into the merits of the dispute, and sanctioned the annulment of the award.

These initial annulment decisions left the undesirable impression that the Convention system operated as a two-tier jurisdiction, offering a second chance to dissatisfied parties or – at least – the possibility to engage in tactical settlement negotiations aimed at preventing the possibility of awards being annulled. Such a practice posed the danger – as Ibrahim Shihata argued in 1986 – that “the effectiveness of the ICSID machinery might become questionable” and deter parties from using it in the future.¹¹⁵

However, after this first generation¹¹⁶ of annulment decisions, the second (*Klöckner II*, *Amco II*, *MINE*)¹¹⁷ and the third generations (*Wena*, *Vivendi I*)¹¹⁸ appeared to distance themselves from the expansive interpretation of the role of ad hoc committees, practicing more and more restraint in regard to their analysis of the award and demonstrating that “the ICSID annulment process ha[d] found its proper balance”.¹¹⁹

More precisely, a steady ‘reconstruction’ of the annulment system began, allowing the limited review envisioned by the Convention to regain both the credibility and the legal precision desired by the parties. In this regard, the subsequent second generation decisions explicitly emphasized the general principles of interpreting Article 52(1) and the corresponding role of the Annulment Committees, arguing – in *MINE v. Guinea* – that

“Article 52(1) makes it clear that annulment is a limited remedy. This is further confirmed by the exclusion of review on the merits of awards by Article 53. *Annulment is not a remedy against an incorrect decision.* Accordingly, an ad hoc Committee may not in fact reverse an award on the merits under the guise of applying Article 52” [emphasis added].¹²⁰

It is possible to appreciate how the system designed by the ICSID Convention had managed, after the first dubious steps, to restore its credibility and stick to the rationale of the Convention, as envisaged by the contracting parties thereof. This adjustment did not derive from an external intervention (for

¹¹⁵ Report of the Secretary General to the Administrative Council, ICSID Doc No AC/86/4, 2 October 1986, Annex A, p. 2.

¹¹⁶ The ‘generation’ taxonomy was coined by Christoph Schreuer, ‘Three Generations of ICSID Annulment Proceedings’, in Emmanuel Gaillard and Yas Banifatemi (eds.), *Annulment of ICSID Awards*, cit. supra, pp. 17 et seq.

¹¹⁷ *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Resubmitted Case: Decision rejecting the parties' applications for annulment signed by the ad hoc Committee, 17 May 1990; *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case: Decision on Annulment, 3 December 1992; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989.

¹¹⁸ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002.

¹¹⁹ Christoph Schreuer, ‘Three Generations of ICSID Annulment Proceedings’, supra, p. 18.

¹²⁰ *MINE v. Guinea*, para. 4.04.

instance, through a change in the text of the Convention by the parties) but resulted from a gradual evolution in the normal work of tribunals and committees.

The final case of the third generation strand – *CDC v. Seychelles*¹²¹ – marked not only an ending of this era, but also a new beginning for the fourth generation.¹²² In its principled approach, this ad hoc committee explicitly referred to *Klöckner I* and *Amco I* as negative examples of annulment activism that should remain isolated, stating that

“there has been an evolution in the ICSID annulment case law and scholarship away from *Klöckner I* and *Amco Asia I* that has culminated, in our view correctly, in ad hoc Committees reviewing arbitral proceedings only to the extent of ensuring their fundamental fairness, eschewing any temptation to “second guess” their substantive result”.¹²³

However, it soon turned out that the fourth generation was indeed a child of the postmodern age. Far from maintaining a unitary approach toward the limits of the procedure and the reasons for accepting to void an award, this latest series of annulment cases could – in the best case – be called heterogeneous.¹²⁴ Other scholars have referred to some of its constituting decisions as another downfall along ‘the slippery slope’ of appeal¹²⁵ or as a ‘second wave of abusive ICSID annulments’¹²⁶.

More precisely, while some of the decisions have continued the moderate and self-restrained approach of the third generation – even in the face of obvious errors of law –, some annulment committees¹²⁷ have reverted to the ‘activist’ trend of the first generation and “re-opened the Pandora’s box of re-assessing the merits of the challenged decision as if they were appellate courts”.¹²⁸ No uniform position or principled reasoning was adopted in this loose grouping of cases, creating a relative degree of uncertainty for the parties involved in ICSID arbitration. However, in the context of considering if and how far a new system of investor-state dispute resolution should move away from the current one, it is important to recall how the decisions of ad hoc committees have developed and how the system has self-corrected itself to reach a stable practice.

¹²¹ *CDC Group PLC v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 14 July 2004.

¹²² R. Doak Bishop and Silvia Marchili, *Annulment under the ICSID Convention*, Oxford: OUP, 2012, p. 28.

¹²³ *CDC v. Seychelles*, para. 35.

¹²⁴ R. Doak Bishop and Silvia Marchili, *Annulment under the ICSID Convention*, supra, p. 28.

¹²⁵ Christoph Schreuer, ‘From ICSID Annulment to Appeal Half Way Down the Slippery Slope’, cit. supra.

¹²⁶ Paul Friedland and Paul Brumpton, ‘Rabid Redux: The Second Wave of Abusive Annulments’, *American University International Law Review*, 27:4 (2012).

¹²⁷ See *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010; *Enron Creditors Recovery Corporation v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010; *Fraport AG Frankfurt Airport Service Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, 23 December 2010.

¹²⁸ R. Doak Bishop and Silvia Marchili, *Annulment under the ICSID Convention*, supra, pp. 28-29.

(iv) *The Practice of ICSID Annulment at a glance*

The ICSID Secretariat provides the official statistics referring to the number of awards issued under the Convention and the frequency of annulment proceedings.¹²⁹ Between 1971 and 2015, ICSID tribunals have rendered 209 awards. In 63 cases, annulment proceedings have been initiated against an award (approximately 30% of the total). Only in 13 cases have *ad hoc* committees annulled in full or in part an award, and only once since 2011. In 22 occasions the annulment proceedings were discontinued,¹³⁰ and in 31 cases (almost half of all annulment proceedings) the application for annulment was rejected *in toto*.

It is not difficult to derive some indications from these numbers. Only in 6% of all cases was an application for annulment successful at least in part, and the trend is downward-looking.¹³¹ Whereas it is possible to question the consistency of the reasons adduced by the committees to annul or uphold awards, it is fair to say that *ad hoc* committees are taking seriously the exceptional nature of annulment. In turn, the parties are increasingly conscious of how difficult it is to bring successful annulment proceedings, and the rate of applications and discontinuance reflect this awareness (compare with the much higher rate of appeals in WTO proceedings, below).

Therefore, the ICSID system's experience with the limited review mechanisms of arbitral awards has – generally – been a productive one, reacting to egregious trespasses upon the integrity of the proceedings themselves, which would have otherwise undermined the very foundation of the regime upon the rule of law. The existing 'activist' exceptions were isolated – and remain so even today – and did not significantly alter the efficiency of the annulment system or bring upon a predicted 'breakdown'.

In essence, the review envisioned by the Convention, obtained its primary goal of balancing between finality and fairness, ensuring that no award shall become binding and final without respecting the basic rules of due process. On the other hand, its strictly limited character provided a guarantee that annulment shall not become an automatic venue for the dissatisfied party, in an attempt to be granted a second chance at re-arguing its position. These are important considerations in evaluating both the features of the proposed process and the scope of review under an ICS.

¹²⁹ ICSID Secretariat, The ICSID Caseload – Statistics (Issue 2015-1), available at: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf), see p. 17, chart 11 (statistics updated as of 30 June 2015).

¹³⁰ Often for failure of the applicant to pay the costs, see for instance *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs of 28 April 2011.

¹³¹ To give an idea, the all the four annulment decisions issued in 2015 dismissed in full the annulment applications. See *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment of 7 January 2015; *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment of 13 January 2015; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment of 12 February 2015; *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment of 14 July 2015.

b. Rendered outside the ICSID Convention

Principles

In all arbitration regimes the parties have the expectation of reaching a final and binding award. Just like in the framework of the ICSID Convention, also under any other widely-used set of arbitration rules, the parties rely on a specific set of dispute resolution procedures which lead to a binding and enforceable decision. More precisely, as Prof. Gary Born explains, “arbitration results in a *final and binding* decision by a third-party decision-maker – the arbitrator – that can be coercively enforced against the unsuccessful party or its assets [our emphasis].”¹³²

The origin of such an expectation is two-fold: it flows from the (quasi)contractual will of the parties manifested in the agreement or consent to arbitrate¹³³ and the general framework of transnational law which customarily and positively supports the idea of a single-instance arbitration. Moreover, most national laws – especially those based on the UNCITRAL Model Law – do not envisage procedural interferences with the arbitral process, recognizing the award has a *res judicata* effect and automatically considering it: (a) final and not subject to any appeal on the merits; (b) challengeable only on strictly delimited procedural grounds and (c) immediately enforceable under the New York Convention regime.¹³⁴

Even though non-ICSID investment arbitration might differ in its object from regular (commercial) arbitration, the choice of rules such as the UNCITRAL ones or the rules in use under the auspices of institutions such as SCC or PCA subjects it to the same procedural treatment; moreover, the resulting awards will have the same status. More precisely, all these sets of rules assume a definitive finality of rendered awards, without envisioning any procedure or possibility for review within their semi-enclosed¹³⁵ procedural system.

In this regard, the 2010 UNCITRAL Arbitration Rules provide in Article 34(2): “All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay”. The 2010 SCC Arbitration Rules provide in Article 40: “An award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay”. While the 2012 PCA Arbitration Rules – mirroring the UNCITRAL Rules – provide in Article 34(2): “All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.”

Therefore, the parties to investment arbitration run under these procedural rules – outside the self-contained framework of ICSID – are bound by the norms governing commercial arbitration cases,

¹³² Gary B. Born, *International Arbitration: Law and Practice*, Alphen aan den Rijn: Kluwer Law International, 2012, 1.01 [A] [3], digital edition.

¹³³ Pierre Lalive, ‘Absolute Finality of Arbitral Awards’, *supra*, p. 6.

¹³⁴ Kaj Hobér and Nils Eliasson, ‘Review of Investment Treaty Awards by Municipal Courts’, in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford: OUP, 2010, pp. 638-639.

¹³⁵ They can – in certain cases – be supplemented with procedural rules from the domestic law of the seat of arbitration.

with the ensuing approach to awards’ finality and binding force. The parties are also as well as by its special relation with domestic courts from the place of arbitration.

Setting Aside of Awards in Domestic Courts

In this context, a non-ICSID arbitral award shall enjoy a ‘presumption’ of validity – and finality – contingent upon the conditions of the (supra)national legislation applicable in the jurisdiction of the seat of arbitration. The relative nature of this legal presumption is brought out by the possibility of obtaining that the municipal courts of the state where the arbitral award was rendered set it aside. This mechanism is available not to impose limits upon the binding force of an award, but to ensure that it is the outcome of a process that took into consideration the basic rules of due process and procedural fairness. In this general sense, the function of domestic annulment is similar to that of annulment under the ICSID Convention, only devolved to each jurisdiction’s judiciary rather than centralized.

To attain this teleological equilibrium, most domestic regimes provide for a mechanism of limited judicial review upon arbitrations carried out within their territory,¹³⁶ in the framework of Article V(1)(e) of the 1958 New York Convention. Awards set aside by the courts of the place of arbitration lose their binding force in that jurisdiction. Such a review, however, is considered an exceptional measure, which should only arise in specific circumstances. The European Court of Justice convincingly declared in the *Eco Swiss* case that “it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.”¹³⁷

Due to the limited character of such mechanism, domestic rules for setting aside arbitration award usually restrict the admissible grounds to those necessary to ensure that: (a) a valid agreement to enter into arbitral proceedings existed prior to their commencement; (b) due process and procedural fairness were observed during the arbitration; (c) the result of the entire process is not incompatible with the public policy of the state where the arbitration took place.¹³⁸ The most meaningful difference between these grounds and those listed in Article 52 of ICSID, of course, concerns the third point, which does not concern directly the arbitration agreement or the conduct of the arbitration proceedings, but depends entirely on the specificities of domestic law.

Most national rules, however, follow the pattern of the UNCITRAL Model Law which – in Article 34 – permits setting aside an award exclusively on six grounds:

- (1) absence or invalidity of the agreement to arbitrate,
- (2) lack of proper notice during the proceedings,
- (3) excess of power and *ultra petita*,

¹³⁶ See William W. Park, ‘Why Courts Review Arbitral Awards’, *supra*, p. 600.

¹³⁷ *Eco Swiss China Time v Benetton International*, Case C-126/97, [1999] ECRI-3055.

¹³⁸ Lars Markert and Helene Bubrowski, ‘National Setting Aside Proceedings in Investment Arbitration’, in Marc Bungenberg, Jorn Griebel, Stephan Hobe and August Reinisch, *International Investment Law*, Baden-Baden: Nomos, 2015, 1461-1462.

- (4) irregular composition of the tribunal,
- (5) non-arbitrability of the subject-matter and
- (6) contrariness to the public policy of the state of the seat.

A notable exception to the UNCITRAL Model Law is the English Arbitration Act 1996, under which an award can be appealed on the grounds of error of English law.¹³⁹ Under these conditions, an investment award issued under non-ICSID rules faces in principle a wider range of reasons for losing its binding force than provided for in the Washington Convention. Namely, the public policy objection can raise issues in the context of investor-State arbitration where – usually – states can ascribe the measures taken against foreign investors to their public policy. Accordingly, municipal courts of the seat of arbitration might be receptive to such arguments and lean in favour of the host State.

However, when analyzing all the six conditions in a unitary and coherent manner, it can be observed that the Model Law was designed in such a way to preclude an interventionism of national courts upon international arbitration. The gist of the provision was to allow them to censor egregious conduct and errors, as well as to address potentially explosive political issues through the “public policy” clause. The Model Law does certainly not envisage an ‘appeal’, but rather a due process ‘filter’, and entrusts domestic courts with the power to carry out a limited kind of judicial the review which is essential in the absence of a centralized and self-contained annulment regime. Thus the municipal courts, which cannot modify in any way the award but only confirm it or set it aside, must strike the balance between the efficiency-related requirement of finality and the justice-related requirement of fairness.

Set-Aside in Practice

Presently, more than twenty cases are known to have been decided in national courts regarding the validity of investment treaty awards. While most of such proceedings have taken place in Europe (mostly Sweden, Switzerland and England), some NAFTA cases have also been reviewed by either Canadian or U.S. courts. The practice so far – due to a multiplicity of approaches and national paradigms – has been far from uniform and shows no indication that a set of general principles could be discerned. However, as emphasized by Prof. Kaj Hobér and Nils Eliasson, some conclusions can nevertheless be drawn from the existing disparate case law.¹⁴⁰

First of all, with very few exceptions, most national courts have shown a high degree of deference toward the awards issued by investment tribunals, restraining themselves from expansively interpreting the grounds offered by the UNCITRAL Model Law or other national provisions.

¹³⁹ See S69 of the English Arbitration Act 1996, available at: <http://www.legislation.gov.uk/ukpga/1996/23/section/69>.

¹⁴⁰ Kaj Hobér and Nils Eliasson, ‘Review of Investment Treaty Awards by Municipal Courts’, *supra*, pp. 661 et seq. See also, for a survey of domestic legislation applicable to the annulment of non-ICSID awards, Susan D Franck, ‘The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions’ (2005) 73 Fordham Law Review 1521, 1547 ff.

Moreover, the ‘public policy’ defense – the single one different from the Washington Convention annulment scheme – was rarely invoked by applicants and never proved to be successful. Despite being considered *in abstracto* one of the most sensible and indeterminate grounds for setting aside the award, it could not be practically invoked in a convincing manner.¹⁴¹

Moreover, the most commonly invoked grounds for a *vacatur* has been the ‘excess of power’ (like in the case of ICSID annulments). It is commonly alleged that the arbitral tribunal ruled upon issues falling outside its jurisdiction. There seems to be no final – i.e. last instance – decision of municipal courts setting aside an award on this ground, arguably because domestic courts prefer not to trespass upon a jurisdiction already appropriated by arbitral tribunals.¹⁴² Such arguments were largely seen as a post-arbitration attempt to bring a jurisdictional objection that was rejected during the arbitral proceedings.

Of the two cases that were set aside in a definitive manner by national courts, one (*Metalclad*) was only partially vacated,¹⁴³ while the other (*Petrobart I*) was invalidated¹⁴⁴ on the opposite ground, as “the Swedish Supreme Court found that the arbitral tribunal was wrong in *declining* jurisdiction”.¹⁴⁵ None of these cases raised a serious criticism from the arbitration community, as none of the courts called to set aside the award appeared to overstep the imposed limits of their mandate.

Therefore, whereas the distinction with the ICSID annulment mechanism is neat in principle, it is fair to say there has been no marked pattern of abuse of the possibility to set aside non-ICSID awards in domestic courts. More precisely, domestic courts have not indulged in trespassing upon the merits of the dispute so far, they apparently refrain from censoring the reasoning of arbitral tribunals. In this context, the domestic review procedure – like the annulment one – can be said to raise a low-intensity challenge to the finality of investment awards, while ensuring that the basic requirements of due process, procedural fairness and deference toward public policy are safeguarded during the arbitration.

3. Suggested reforms and infra-arbitration appeal

Reforms have been proposed to amend the annulment system under the ICSID Convention and the procedure of setting aside non-ICSID awards. At a certain moment, for several institutions it appeared that the desideratum of finality could be compromised at the benefit of ensuring a greater fairness of the awards. Thus, while a project emerged within the PCA to establish an ICSID-inspired model of revision/annulment, in the ICSID Convention system itself the idea was taken even further, aimed at the creation of a self-standing appeal mechanism.

¹⁴¹ Lars Markert and Helene Bubrowski, ‘National Setting Aside Proceedings in Investment Arbitration’, *supra*, pp. 1475 et seq.

¹⁴² Even though, until the Supreme Court decision in *BG Group PLC v. Argentina*, No. 12–138, 572 U.S., from 5 March 2014, the award in that case appeared to be vacated precisely on this ground.

¹⁴³ *The United Mexican States v. Metalclad Corporation*, Judgment of the Supreme Court of British Columbia, May 2, 2001.

¹⁴⁴ *Petrobart Limited v. Kyrgyz Republic*, Judgment of the Supreme Court of March 28, 2008, Case No. 2113-06.

¹⁴⁵ Kaj Hobér and Nils Eliasson, ‘Review of Investment Treaty Awards by Municipal Courts’, *supra*, p. 664.

a. PCA: To Review or Not to Review

In the early ‘90s a plan was proposed to amend the 1992 PCA Optional Rules for Arbitrating Disputes between Two States. One member of the Steering Committee of the Permanent Court of Arbitration, Judge Koorosh Ameli, advocated the introduction of a direct revision/annulment mechanism, similar to that present in the ICSID Convention.

Although the constituent documents of the Court¹⁴⁶ allowed for a revision of the awards, this was only possible subject to the parties’ explicit consent in the arbitration agreement. Given the PCA’s established experience in administrating complex disputes, it seemed appropriate to endow it with a self-contained system of reviewing awards, which could operate automatically and without the requirement of a prior agreement of the parties.

Said system of review appeared desirable as “the availability of annulment proceedings establishes a kind of confidence in arbitration”, in the words of Judge Koorosh Ameli.¹⁴⁷ Conversely, even after the unfortunate *Klöckner I* experience, the advantages of a revision/annulment mechanism seemed to outweigh the risks of having awards fundamentally reconsidered. This risk, moreover, would be present in any case, given the current jurisdiction of Dutch courts on applications to set aside PCA awards.

However, in the end, the proposal was not accepted as a part of the revised Rules and was “retained for situations where parties desired an annulment procedure they could add it to their PCA Rules or agreement.”¹⁴⁸

b. An Instance of Intra-Arbitration Appeal: the European Court of Arbitration

Besides the intra-ICSID process of annulment, there exist cases in which an arbitral institution provides for internal full appeal, although not with respect to investment disputes. The European Court of Arbitration (CEA) is the department dealing with arbitration of the European Centre of Arbitration and Mediation, formed in 1959 in Strasbourg under the patronage of the Council of Europe, of the Stock Exchange and the Chamber of Commerce of Strasbourg and several other public bodies, including various Professional Associations. Its registered office is still in Strasbourg.

In 1997 the Arbitration Rules of the European Court were amended, upon the initiative of the chairman Mauro Rubino-Sammartano, to provide for intra-arbitration appellate proceedings. This is in contrast to the limited external arbitration appeals before local courts, which are allowed in various jurisdictions such as England and Wales, France, Spain, the US, Germany and Switzerland. Such specific rules,¹⁴⁹ freely chosen by the parties in advance, fit into the structure of the European Court

¹⁴⁶ See the 1899 Convention for the Pacific Settlement of International Disputes, Art. 55, and the 1907 Revision of the Convention, Article 83.

¹⁴⁷ Koorosh H. Ameli, ‘Comments: Reconsidering a key tenet of international commercial arbitration: Is finality of awards what parties really need? Has the time of an international appellate arbitral body arrived?’, *Journal of International Arbitration*, Vol. 16, No. 1 (1999), p. 101.

¹⁴⁸ *Idem*.

¹⁴⁹ Which are laid down in Article 28. The full text of the provision reads:

of Arbitration, which provides for first-instance arbitration managed by a sole arbitrator and lasting up to nine months (extendable in special cases by additional six months).

Upon service of the first-instance award, a party has 40 days to apply for appellate arbitral proceedings. A condition of admissibility of an application is a posting of a deposit (or equivalent security) in the amount deemed appropriate to ensure the enforcement of the appellate award. If a

28(1) Subject to any contrary provision of applicable mandatory law, and unless expressly excluded by agreement of the parties, the Award is subject to the right of appeal to an Appellate Arbitral Tribunal by way of rehearing. If a party challenges the award before a state court to avoid time limitation, the challenge will be promptly followed by an application to that court to stay it until the appellate arbitral proceedings are decided.

28(2) A party intending to apply for appellate arbitral proceedings against an award rendered according to the present Rules shall file a request with the Competent International Registrar, even if it is a domestic dispute, within the mandatory time-limit of 40 days from service of the first instance award in conformity to the procedural requirements of the Defendant's country of residence. The Competent International Registrar has sole jurisdiction in arbitral appellate proceedings, even as to domestic arbitrations.

If such an appeal is filed, the victorious party, by accepting these Rules, undertakes not to enforce the first instance award - except for taking just the possible essential steps needed not to incur into time limitation - and to replace the appellate award to the first award.

28(3) The appeal will be admissible only if it is accompanied, unless otherwise directed by the Court by order made with reasons and based on exceptional circumstances, by the deposit by the appellant with the Competent International Registrar of the principal sum, and such interest and costs as may have been awarded against it by the award under appeal. The appellant may lodge with the Competent International Registrar in lieu of such a deposit a guarantee payable unconditionally upon demand issued by a primary bank, with operating offices at the Competent International Registrar's seat as per standard form approved by the Court, payable in accordance with the instructions which shall be given to that bank approved by that Registrar by the Appellate Arbitral Tribunal or by that Competent International Registrar.

Where it is not possible to establish an express money sum as required above and/or where the appellant was partially successful in the first instance award, the appellant shall lodge the amount, or a guarantee on demand as provided above, as may be determined by the Court for the purposes of ensuring appropriate enforcement of the contemplated appellate award.

28(4) The appellate arbitral proceedings allow a full review of the dispute by way of rehearing, including dealing in particular with admissibility, the facts and the merits.

28(5) The Court will appoint all the members of the Appellate Arbitral Tribunal consisting of three arbitrators, without the parties being involved in the least in such appointments and will fix the place of arbitration.

28(6) The procedural rules to be applied, in addition to what is expressly provided for the second instance proceedings, will be those governing the first instance arbitral proceedings under these Rules.

28(7) The Appellate Arbitral Tribunal shall make its award within six months, if there is no evidentiary stage, and otherwise within nine months of its receipt of the file by rehearing the case and deciding it on its merits.

This time-limit may be extended as provided for in Article 23.

28(8) The appellate award is subject to no attacks save for those which the parties may not validly waive under the applicable mandatory procedural provisions.

28(9) The Appellate Arbitral Tribunal has the power to deal with the funds which have been deposited for such proceedings, and as appropriate with the guarantees which have been lodged, to the benefit of the party that it finds entitled thereto.

At the time it makes its award, the Tribunal will give, the same day, instructions to the Competent International Registrar, and where appropriate to the guaranteeing bank, to return the funds deposited or to cancel the guarantee to it, or to cause the funds or guarantees to be returned, or to pay them immediately in part or in full to the party entitled to them under the appellate award, and shall deliver the appellate award to the guaranteeing bank.

28(10) This shall authorise the bank referred in sub-paragraph (3) above to validly deal with the monies under the guarantee issued by it, in accordance with the instructions which shall be given to it by the Arbitral Tribunal or by the Competent International Registrar.

28(11) The appellate award will then be sent by the Competent International Registrar to the parties.

challenge of the first award has been made, the Rules provide (art. 28.1) that an application to that Court to stay the challenge may be filed.

If appellate proceedings are instituted, the victorious party in the first arbitral proceedings undertakes not to enforce the first instance award (except for what is needed not to incur in time limitation) and the second award replaces the first one.

The appeal allows “*a full review of the dispute by way of rehearing, including dealing in particular with admissibility, the facts and the merits*”, and the proceedings are heard by three arbitrators appointed by the CEA. The appellate award is rendered within six months from receipt by the arbitrators of the file, nine months if evidence is to be heard. In special circumstances (to be stated in a fully reasoned and justified application) this time limit may be extended once or twice up to a total of six months.

In one case, an appellate arbitral tribunal construed the arbitration rules previously in force as allowing it to set aside the first-instance award, without deciding upon the merits. To avoid similar interpretations, the Rules were amended.

Major commodity arbitration rules such as the Grain Feed Trade Association (GAFTA) and sport arbitration rules such as those of Court of Arbitration for Sport (CAS) also provide for internal appeal mechanism. Moreover, the American Arbitration Association (AAA), and the new Dutch Arbitration Act provide for optional arbitral appeal mechanisms. For instance, the Dutch Arbitration Act of 2015 provides an elaborate set of rules for an optional appeal arbitral tribunal on points of law and facts concerning all decisions of the first instance tribunal, while limiting any court review of the award to the appeal award.¹⁵⁰ Likewise, under the AAA’s 2013 Optional Appellate Arbitration Rules, the parties have thirty days to file their notice of appeal, which commences from the date the underlying award was issued.¹⁵¹

The AAA’s Optional Appellate Rules, which are closer to our subject-matter, state in Rule A19(a) that the appellate panel must issue its decision within thirty days from the notice of the last brief. Exceptionally, under sub-paragraph (b), the appellate panel may extend this period for a further thirty days for “good cause” or if oral argument is to take place but has not yet transpired.

The general principle in institutional rules (and relating to first instance arbitral proceedings) is that the applicant is typically requested to pay a provisional advance of costs covering all expenses until the terms of reference have been drawn up. Thereafter, costs are split between the parties. As regards the limited external appeals before local courts, section 70 of the English Arbitration Act also requires some security from the applicant, failing which the appeal may be dismissed. Given that security for costs is by now a general principle of institutional rules (and arbitral statutes) it is fair to argue that it should constitute a general principle of intra-institution arbitral appeal proceedings. The AAA’s

¹⁵⁰ See Articles 1061a to 10611.

¹⁵¹ See Rule A3(a)(i).

Optional Rules charge the applicant a fixed administrative fee and an additional fee is required of the party making a cross-appeal. These fees are additional to the fees of the appellate tribunal/panel.

c. ICSID: In Search of an Appeal Facility

In 2004, a decade later than the PCA’s efforts, ICSID started the discussions for improving the framework for ICSID arbitration and in this context also considered the possibility of a comprehensive review of awards. More precisely, the ICSID Secretariat supported the creation of an Appeals Facility in a discussion paper.¹⁵² The academic community had already been debating a similar reform for years.¹⁵³

Two reasons sustained the proposal of such a profound reform: (a) “to ensure coherence and consistency in case law generated in ICSID and other investor-to-State arbitrations initiated under investment treaties”¹⁵⁴ and (b) to avoid the risk that *ad hoc* appellate mechanisms established in specific investment treaties would increase the fragmentation of international investment law.¹⁵⁵

As regards the first motivation, given that a main function of any legal regime is to stabilize social interaction, the concern for consistency is legitimate, especially within the framework of investment arbitration.¹⁵⁶ In particular, the broadly defined standards of protection of BITs have been sometimes interpreted in the practice inconsistently.¹⁵⁷ Thus, a unique overarching appellate structure could potentially provide the necessary means to harmonize multiple strands of practice and to provide a point of theoretical convergence.

The second motivation is all the more relevant in the context of several new BITs that contain the possibility of establishing an appeal mechanism. For example, the 2004 U.S. Model BIT provided in Annex D that “[w]ithin 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”. Therefore, following the risk that several – potentially different – types of appeal could be established under the auspices of various BITs, it seemed preferable that a single mechanism controlled by ICSID would be responsible with ruling on all the challenges to investment awards.

The design envisioned by the ICSID Secretariat (under the supervision of Antonio Parra) would have been fully operational for awards rendered under the ICSID Rules, UNCITRAL or any other institutional rules.¹⁵⁸ However, the ‘Appeal Facility Rules’ would have remained essentially

¹⁵² ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper (22 October 2004).

¹⁵³ See, for example, Elihu Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge: Grotius Publications, 1991, p. 111: “Arbitration is, however, an important component of the international system and cannot be done away with. We should contemplate the possibility that its value may be enhanced if it is the possibility that its value may be enhanced if it is linked to a system of appeal linked to a system of appeal.”

¹⁵⁴ ICSID Discussion Paper *cit.*, para. 6.

¹⁵⁵ *Idem*, para. 20.

¹⁵⁶ See Christian J. Tams, ‘An Appealing Option? The Debate about an ICSID Appellate Structure’, *Essays in Transnational Economic Law*, No. 57 / June 2006, p. 17.

¹⁵⁷ See, for example, the debates surrounding the application of MFN or umbrella clauses.

¹⁵⁸ ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, *supra*, Annex, para. 1.

consensual and “subject to adjustment in the underlying consent instrument,”¹⁵⁹ i.e. the BIT or the multilateral treaty. Thus, states could include or exclude – at their will – the application of provisions regarding the possibility of recourse to the Appeal Facility, in accordance with their policy and contextual interests at the moment of concluding an investment agreement.

The grounds for appeal were – mainly – those already present in the annulment procedure, with the addition of “clear error of law” and “serious errors of fact”.¹⁶⁰ Therefore, the appeal allowed reconsideration of the merits of the dispute, going beyond the mere verification of the procedural propriety carried out by annulment committees. Moreover, the proposed rules also surpassed the confirmation/invalidation outcome of the annulment proceedings, enabling the appeal tribunal to “uphold, *modify* or reverse the award concerned”.¹⁶¹

The main innovation of such a mechanism was the possibility to review an award on the basis of ‘clear error of law’. The legal verification – although restricted to a *clear* error – would have been “unique for arbitration awards”¹⁶², allowing appeal tribunals to engage in a *de novo* analysis of the legal issues of the case and eventually modify the reasoning of the initial tribunal. However, a year later, in its follow-up working paper to the members of the Administrative Council, the Secretariat showed that the consultations on the draft proposal led to the conclusion that the Centre should not – for the time being – try to develop such an appellate mechanism.¹⁶³ The obstacles – political, legal and strategic – for such an innovation appeared insurmountable at the time, while the academia has so far continued to strongly debate upon this issue.

On 23 October 2015 Meg Kinnear, Secretary-General of ICSID, recalled the failed attempt to establish an ICSID appeal in 2004, but remarked ICSID’s offer to “further study the matter and to offer its assistance and expertise if treaty negotiators decided to pursue this course in the future”,¹⁶⁴ with specific reference to the proposal of the European Commission (see next paragraph).

It seems therefore that the debate over the appropriate level of review of investment awards is very much alive and the institutional subjects involved are ready to explore new solutions beyond the dichotomy described above (ICSID v non-ICSID; annulment v setting aside).

Accordingly, the question arises whether it would not be better for the EU (and the US) to revisit an appeal mechanism within the current ICSID system rather than create an Appeal Tribunal within TTIP, which would have to co-exist – possibly uneasily – with all the ICSID arbitral tribunals established under the existing 3,000+ BITs/FTAs. Indeed, it would seem much more efficient to modify the existing ICSID annulment system into a proper appeal system. The advantages of changing an existing system, which is globally accepted by more than 150 states and whose awards

¹⁵⁹ *Idem*, para. 4.

¹⁶⁰ *Idem*, para. 7.

¹⁶¹ *Idem*, para. 9 – emphasis added.

¹⁶² Thomas W. Walsh, ‘Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality’, *Berkeley Journal of International Law*, Volume 24, Issue 2 (2006), p. 455.

¹⁶³ ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat, May 12, 2005, 4 (May 2005 Working Paper).

¹⁶⁴ See ISDSblog, at <http://isdsblog.com/2015/10/23/icsid-guest-post-appeal-review-annulment-whats-it-all-about/>.

are automatically recognized and enforced, are obvious. Also, the expertise of the ICSID Secretariat in terms of appointing arbitrators and administer complex investor-state disputes is another important asset to consider.

CHAPTER III: The viability of taking the WTO system as the main model

The opportunity and viability of establishing an appellate mechanism for investment awards depend on its features. Scholars, international institutions, States and policy-makers frequently credit the WTO Appellate Body (“AB”) as the ideal model to shape the features of a new appellate system for treaty-based investment litigation.¹⁶⁵ The draft ICS text published by the European Commission in November 2015 clearly draws inspiration from the WTO dispute settlement system.

This section first analyzes briefly the unique traits of the WTO AB (1). The following sections explore, respectively, the putative advantages of adopting an AB-like mechanism within the ISDS provisions in TTIP, (2) and the potential drawbacks (3), with reference to the EC’s proposal, and section 4 concludes the analysis.

The conclusion indicates the need for caution in transposing the WTO system due to the idiosyncrasies which support the successful function of the AB, and focuses on the consequences for the finality, length of time and cost of proceedings in introducing a WTO-like mechanism into the TTIP.

1. The AB within the Dispute Settlement Mechanism

With the entry into force of the WTO treaties in 1994, the establishment of the dispute settlement mechanism – in particular AB – was welcomed as the coming of age of the system of enforcement of WTO law. Namely, the reversal in the adoption procedure of panel and AB reports by the Dispute Settlement Body (from positive to negative consensus) determined a shift from diplomacy to legality in international trade relations that attracted general praise and approving scholarly commentaries.¹⁶⁶ The system of compulsory jurisdiction, widely described as the ‘jewel in the crown’ of the WTO legal system, represented a new model of enforcement of international legal obligations. It established a

¹⁶⁵ See Yenkong Ngangjoh-Hodu and Collins C Ajibo, ‘ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration’ (2015) 6 *Journal of International Dispute Settlement* (advance access); David A Gantz, ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges’ (2006) 39 *Vanderbilt Journal of Transnational Law* 39; Johanna Kalb, ‘Creating an ICSID Appellate Body’ (2005) 10 *UCLA Journal of International & Foreign Affairs* 179; Debra P Steger, ‘Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism’ in Armand de Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge 2013) 257.

¹⁶⁶ Joseph HH Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (2001) 35(2) *Journal of World Trade* 191; see also the detailed account of the revolution occasioned by the DSU in Ernst-Ulrich Petersmann, ‘How to Promote the International Rule of Law-Contributions by the World Trade Organization Appellate Review System’ (1998) 1(1) *Journal of International Economic Law* 25, 33-34.

system of compulsory jurisdiction accepted *ex ante* by all parties to a multilateral treaty, and guaranteed the systematic enforcement of the resulting decisions. Under the rules of the Dispute Settlement Understanding (DSU), all WTO members can unilaterally request the establishment of an arbitral panel after unsuccessful consultations.¹⁶⁷ The right of the parties to appeal panel decisions before the AB marked the consecration of the new system:

It seems clear that the quasi-judicial WTO Appellate Body system is the so far most ambitious appellate review system in worldwide international law...¹⁶⁸

The possibility to appeal first-instance decisions, reminiscent of two-tier review in domestic judicial systems, appeared from the outset to guarantee the augmented correctness and predictability of WTO law application by quasi-judicial bodies. These additional guarantees were deemed opportune for WTO members, which had to relinquish control over the adoption of panel reports through unilateral vetoing.¹⁶⁹

The DSU lays down the main features of the standing AB, and left much of its functioning to the self-regulatory action of the same.¹⁷⁰ It comprises seven members, of “recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally,”¹⁷¹ elected by consensus by the Dispute Settlement Body.¹⁷² A division of three members serves on each case according to a rota. Members sit on the bench for four years and can be reappointed once. AB members serve in their personal capacity, but must be “broadly representative of membership in the WTO”.¹⁷³ Although it is not a full-time position, members must be available at short notice and be apprised of all stages and files of appeal proceedings. The WTO provides the AB with administrative and legal support (through the Legal Secretariat¹⁷⁴) and provides for the payment of the members’ expenses.

The AB hears appeals brought against the panel report by either or both parties in the panel proceedings. Third parties can notify an interest to make written submissions to the AB and request to be heard.¹⁷⁵ The appellate proceedings should take between 60 and 90 days,¹⁷⁶ but routinely take

¹⁶⁷ Articles 4 and 6 DSU.

¹⁶⁸ Petersmann, *supra*, 40.

¹⁶⁹ The use of negative consensus has led some to ponder whether the current *ad hoc* panel system too should develop into a permanent panel body, see William J Davey, ‘The case for a WTO permanent panel body’ (2004) 6(1) *Journal of International Economic Law* 177. See also WTO Dispute Settlement Body Report, *Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding*, WTO Doc. TN/DS/W/1 (Mar. 13, 2002).

¹⁷⁰ Article 17(9) DSU. This unusual hands-off approach, which contradicts the practice used, for instance, with respect to the International Court of Justice, the International Criminal Court or the International Tribunal for the Law of the Sea, is noted in Debra P Steger, ‘Improvements and Reform of the WTO Appellate Body’, in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System* (Kluwer 2004) 41-49, 41.

¹⁷¹ Article 17(3) DSU.

¹⁷² Article 2(4) DSU.

¹⁷³ Article 17(3) DSU.

¹⁷⁴ Article 17(7) DSU.

¹⁷⁵ Article 17(4) DSU.

¹⁷⁶ Article 17(5) DSU.

longer in complex disputes. On average, the appellate review takes 3 to 4 months,¹⁷⁷ although lately several complex cases have exceeded this average by much. Under Article 17(10) of the DSU, the proceedings of the Appellate Body are confidential. However, the AB can decide to lift the requirement of confidentiality and hold public oral hearings if the interests of the parties are not adversely affected.¹⁷⁸ All the requests for consultations, panels and AB reports are published on the WTO website in the three official languages (English, French and Spanish). Whereas the submissions of the parties are not ordinarily published as such, the reports of the panels and AB typically include a meticulous account of all the parties' submissions and often include specific annexes summarising the written and oral submissions of the parties and third parties.¹⁷⁹

Likewise, there is no general obligation for the AB to consider unsolicited *amicus curiae* briefs, but the AB has on occasion mentioned receiving them in its reports. Although normally the AB simply ultimately declared that it “did not find it necessary to take the brief into account in resolving the issues raised in [the] appeal”,¹⁸⁰ it is reasonable to believe that the briefs are at least read by the AB members, and that the points made therein are in fact considered. The boilerplate dismissal of *amicus curiae* briefs is a matter of institutional caution: WTO Members are reluctant to have private entities influence the decision-making process of panels and AB. Moreover, the legal determinations of the panel must fall within the terms of reference indicated in the panel request,¹⁸¹ and the dispute settlement mechanism cannot be hijacked by third parties to change the agreed balance of obligations codified in the Covered Agreements.¹⁸² Therefore, the AB normally avoids all express reliance on the briefs in the reports, irrespective of their actual relevance.

The appellants can only challenge “issues of law ... and legal interpretations”¹⁸³ in the decisions of the panel. Findings of facts lie outside the AB's appellate jurisdiction.¹⁸⁴ Whereas the interpretation of domestic law is treated as a factual matter in international proceedings, determining its compatibility with WTO law is a “legal characterisation” that the panel makes and that the AB can review,¹⁸⁵ yet affording some degree of deference to the factual findings on which the panel's decision

¹⁷⁷ https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf.

¹⁷⁸ Alberto Alvarez-Jiménez, ‘Public Hearings at the WTO Appellate Body: The Next Step’ (2010) 59(4) *International and Comparative Law Quarterly* 1079.

¹⁷⁹ To give an example, in the case *United States – Certain Country of Origin Labelling (COOL) Requirements* WT/DS384/R, 18 November 2011, the Panel preceded each finding with a paragraph describing the “main arguments of the parties”. Even the paragraphs titled “analysis by the Panel” are often divided to address in turn the arguments of the parties. Moreover, the 214-page report was accompanied by Annexes of more than 220 pages which contained all the submissions of the parties in the proceedings.

¹⁸⁰ See the case-law digest at: https://www.wto.org/english/tratop_e/dispu_e/repertory_e/a2_e.htm.

¹⁸¹ Article 7 DSU.

¹⁸² Article 3(2) DSU.

¹⁸³ Article 17(6) DSU.

¹⁸⁴ Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, para 132. See Tania Voon and Alan Yanovich, ‘The Facts Aside: The Limitation of WTO Appeals to Issues of Law’ (2006) 40(2) *Journal of World Trade* 239.

¹⁸⁵ Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, paras 105-106; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para 200. See Nganjoh-Hodu and Ajibo, *supra*.

relies.¹⁸⁶ In other words, the panels called to interpret domestic law to determine its compliance with WTO law rely on the parties' submissions and, when the ordinary literal meaning of the impugned national measure is not conclusive, the parties will have to provide evidence to support their suggested interpretation (this being a question of fact, which is not appealable). The subsequent step, which concerns assessment of the measure's compliance with WTO obligations, is instead properly characterised as a legal interpretation, and the panel's conclusion can be challenged before the AB.

Critically, the AB has no power to remand cases when it vacates a panel's report for a wrong interpretation and application of the law. The AB's statutory powers are limited to upholding, modifying and reversing the panel's findings,¹⁸⁷ but the AB has interpreted its powers to include the power to complete the "legal analysis" of the panel. Therefore, when a legal finding of the panel is reversed, the AB might not be in the position to explore alternative legal avenues which may not have been developed in the panel's report (for example, for reasons of judicial economy), to solve the dispute. This is particularly the case if the factual record is incomplete. The dispute can be resolved even in the case of reversal if, on the basis of the findings of fact contained in the panel report, the AB is able to complete the legal analysis applying WTO law as interpreted correctly. Otherwise, the panel report is vacated without remand, with the ensuing implications (the winning party at the panel stage might have to start proceedings anew).

Sometimes, both parties bring cross appeals against a panel report. This occurs when the winning State objects the interpretation of the panel on a legal point and wants the AB to set the record straight on the interpretation of a norm of the WTO Covered Agreements. Alternatively, the winning States might want to preserve the possibility that, if the AB reverses one finding in its favour, their claim might still succeed based on an alternative argument, which the panel did not accept but the AB might uphold.

The appellate system of the WTO is well used. Roughly, two thirds of the panels' reports are appealed.¹⁸⁸ *Ngangjoh-Hodu and Ajibo* listed some reasons for this success¹⁸⁹: the relative brevity of the proceedings; the non-retroactivity of remedies (which makes it convenient for the losing party to appeal, if only to maintain the challenged measures in place for longer); the consistency and authority of AB's decisions, which is buttressed by the rarity (and anonymity¹⁹⁰) of dissenting opinions.

The relative consistency of AB's decisions is due to several factors. First, members sit on the AB bench for prolonged periods, allowing decisions to be confirmed in the medium term by the same individuals, hence facilitating the consolidation of precedents into established case-law. Second, the

¹⁸⁶ Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, paras 224–225 and Footnote 306: "We recognize that there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements. With respect to such elements, the Appellate Body will not lightly interfere with a panel's finding on appeal."

¹⁸⁷ Article 7(13) DSU.

¹⁸⁸ See WTO official statistics available at: https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm.

¹⁸⁹ *Ngangjoh-Hodu and Ajibo*, *supra*.

¹⁹⁰ Article 7(11) DSU.

AB's mandate is expressly geared towards the clarification of WTO law *erga omnes partes* of the Covered Agreements, hence decisions are drafted with the awareness of dictating a rule of law, rather than merely providing the solution in specific cases.¹⁹¹ Third, the AB is assisted by a permanent staff (see below). Fourth, the AB's working procedures provide for a system of "exchange of views" among all members with respect to the legal issues of each appeal. This system guarantees that the views of the 3-member division responsible for the decision are discussed with the other four members before any final decision is taken, to "ensure consistency and coherence in decision making".¹⁹² Other practices are in place to ensure the collegiality of the AB's activities.¹⁹³ Fifth, the AB's reports only become binding once the DSB has adopted them. The possibility of negative consensus is remote, but the possibility of refusing the adoption of part of the report is conceivable, and would plausibly be explored in case of unacceptable findings of panel or AB.

2. Advantages of using the WTO AB model as template for reforming the ISDS

The WTO model of appellate review features certain critical differences compared to the annulment proceedings available under the ICSID Convention or the standard norms of domestic arbitration laws providing for the possibility to set aside awards in municipal proceedings. In light of the remarks above regarding the WTO AB's mandate and practice, and bearing in mind the features of the current system of review of investment awards, this section explores the potential innovations entailed by transposing the former system onto the latter.

a. Full appeal

First and foremost, the AB can **review the legal determinations made by the panels**, correcting, if need, be legal mistakes in their reports. Instead, a mistake in the application of the law by an investment tribunal, as such, is no grounds for annulment or setting aside.¹⁹⁴ The institutional function

¹⁹¹ This awareness results in an approach of judicial economy that favours synthetic reasoning, which leaves little margin for future distinguishing. See Claus-Dieter Ehlermann, 'Experiences from the WTO Appellate Body' (2003) 38 *Texas International Law Journal* 469, 486: "Legal security and predictability would not be served by an apparently richer motivation offered today if that motivation or reasoning has to be changed or corrected in a future case."

¹⁹² See Rule 4 of the Working Procedures, in the relevant parts: "Collegiality. (1) To ensure consistency and coherence in decision making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure. ... (3) In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalises the appellate report for circulation to the WTO Members." In the words of former AB Chairman Ehlermann, "the system of "exchange of views" has proved to be of enormous benefit to the work of the Appellate Body. ... these exchanges have contributed greatly to consistency and coherence of decision making" (*supra*, 478). A detailed description of these practices is contained in Steger (2004), *supra*, 44.

¹⁹³ See Debra P Steger and Peter Van Den Bossche, 'WTO Dispute Settlement: Emerging Practice and Procedure' (1998) 92 *American Society of International Law Proceedings* 79.

¹⁹⁴ Note that, on the contrary, the application of the wrong law has been considered to qualify as abuse of arbitral powers and constitute grounds for annulment. The grounds for annulment of ICSID awards are contained in Article 52 of the ICSID Convention, whereas a fair indication of the grounds available for annulment before domestic courts of non-ICSID awards is provided by Article 34 of the Model Law, which closely follows Article V of the New York Convention. See, in general, David D Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal' (1992) 7(1) *ICSID Review* 21.

of the AB, therefore, is not merely to review decisions reached by numerous independent proceedings, but to produce the authoritative interpretation of WTO law in general, correcting where necessary wrong panel reports. This nomophylactic mandate is mostly unknown to *ad hoc* committees and domestic courts seized to set aside international awards, including investment ones.

As seen above, instead, the ICS proposal (and more generally the position of the EU) attributes to the AT the task of policing any potentially contradictory interpretation of TTIP norms arising in the TFI's arbitral awards. The authoritative interpretation provided by the AT would be capable of repeated application in future cases. In this sense, the AT would follow closely the practice of the WTO AB. In another respect, instead, it would distance itself from it. Indeed, whereas the WTO AB can only complete the analysis of the panels when the factual record is sufficient, the jurisdiction of the AT has no such restriction, and includes expressly the possibility to vacate TFI's decisions on grounds of manifest errors in the appreciation of the facts, including domestic law.

If the AT has indeed the jurisdictional powers to engage in fact-finding, it could be argued that there is no genuine double degree of proceedings for the ensuing legal determinations: the appellate phase would be the only one at least for certain legal findings based on factual circumstances. Conversely, the problem of a remand mechanism whereby the factual findings were to be addressed by the AT on remand would be that the possible time-arc of a proceeding could stretch further before reaching a final decision.

b. Increased legal coherence

Second, a permanent body tasked with full review of the legal aspects of a dispute would increase, at least, the **internal consistency of the applicable law**. Currently, the lack of a centralised system of investment arbitration, compounded by its reliance of hundreds of different investment treaties, has generated a fragmentation in the case-law that has not spared the annulment proceedings.

On the one hand, the rulings of an appellate system on the points of law and procedure would inform the interpretation of lower tribunals subjected to its review. In the EC's proposal, the AT's decisions would have a meaningful weight on the subsequent case-law of the TFI and the AT. If the appellate system were to acquire sufficient authoritativeness within its legal regime (the TTIP), other bodies applying equivalent provisions from other applicable investment treaties could draw inspiration and, possibly, contribute to a process of multilateralization of certain basic substantive standards.

On the other hand, the establishment of the AT would at least guarantee a certain degree of consistency with regard to the rules of the appeal proceedings. Even within the narrow mandate conferred by the ICSID Convention, different *ad hoc* committees have taken incompatible decisions.¹⁹⁵ Domestic courts requested to set aside non-ICSID awards, in turn, are simply not expected to follow or build up a consistent case-law, applying different national laws as they do. The system, in other words, is not designed to secure internal consistency, let alone consistency across

¹⁹⁵ Dohyun Kim, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System' 86 *New York University Law Review* 242.

different (and differently worded) investment treaties, albeit comprising similar provisions. The permanent membership of the AT in the EC’s proposal, instead, would give rise to a consistent body of decisions with respect to the extent of the appellate judicial review. For instance, the interpretation of procedural provisions referring to “manifest errors” as well as the norms of Article 52 ICSID (which are incorporated in the jurisdiction of the AT¹⁹⁶) would achieve a comparatively higher coherence in the decisions of a permanent AT than similar provisions can achieve in the sparse case-law of *ad hoc* committees and domestic courts.

c. A clearer division of labour

Third, the establishment of the AT, as specified above, would also allow a **clean division between the arbitrators and the members of the appellate system**. This division is currently lacking in ICSID: the same arbitrator who issues an award that is subsequently brought for annulment before an *ad hoc* committee can sit on another *ad hoc* committee. This confusion of roles might create questions of fairness. A commentator described the situation as follows:

... Togo had to rely on the Enron annulment decision, fresh out of the oven, in its arguments before one of the authors of the Enron award that had been recently annulled. This simply should not be permitted.¹⁹⁷

A similar risk is absent in the WTO system. Not only is it impossible for serving AB members to be appointed as panellists, but the AB recently issued a set of guidelines referring to the post-employment opportunities of former AB members, designed to avoid this kind of situation. For instance, a former AB member shall not serve as panellist for two years after the end of his or her office, and shall not join a national delegation in oral hearings before the AB for three years.¹⁹⁸

d. A permanent membership of the AT

Fourth, the **permanent membership of the AT** is clearly modelled on the WTO AB’s one, as seen above. This is not an improvised solution: already in 2004 the ICSID Secretariat pointed to the rules of appointment of the DSU as a template for the appointment of a hypothetical ICSID “Appeals panel”¹⁹⁹, and the ICS clearly contains several rules of the corresponding clauses in the DSU.²⁰⁰ The permanent term of service of WTO AB members was devised to compensate the *ad hoc* selection of

¹⁹⁶ See Article 29(2) ICS proposal.

¹⁹⁷ Hamid Gharavi, ‘ICSID Annulment Committees: The Elephant in the Room’ (224 November 2014), at <http://www.Derainsgharavi.Com/2014/11/Icsid-Annulment-Committees-The-Elephant-In-The-Room/>, referring to the annulment proceedings in *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* (ICSID Case No. ARB/06/7) and the previous annulment decision in *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3). The author’s final thought is one of criticism: “For a judge to sit on first-instance and appellate benches at the same time would be unthinkable.”

¹⁹⁸ See Post-Employment Guidelines, communication from the Appellate Body of 16 April 2014, document WT/AB/22, guideline 1.

¹⁹⁹ See ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper 22 October 2004,

<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>, Annex I, 3.

²⁰⁰ See above.

panels' members which, taken alone, could "endanger the legal consistency of the complex WTO system".²⁰¹ It is to be noted that, in the current system of ICSID annulment proceedings, the appointment of the committees' members is *de facto* in the hands of the Secretary-General, who acts on behalf of the president of the Administrative Council.

Since there is no inherent guarantee that an appellate decision be better than the lower body's one, the higher institutional status of AB members is premised on a stricter selection process than that of panels' members. In order to mirror this feature of the WTO system, an appellate system for investment disputes should be staffed, for instance, by permanent members with significant experience in international legal proceedings or from academia. This method has worked well with the selection of WTO AB members,²⁰² who have guaranteed on average decisions of better quality than the panels have.²⁰³ Another relevant factor is that the AB benefits from the assistance of a dedicated staff, within the Secretariat of the WTO.²⁰⁴ Whereas it is not possible to quantify the influence that the Secretariat's staff has on the quality of the AB's decisions, it is safe to assume that the work of the Secretariat ensures the high degree of continuity of the AB's case-law, which translates into a systematic attention to previous decisions.

In the ICS proposal, as discussed above, there is no obvious distinction between the credentials required for the appointment of Tribunal's and the AT's members. The only express distinction concerns the qualifications required for appointment to the domestic judicial offices (which for AT candidate must regard exclusively the "highest" judicial offices). Jurists of "recognised competence" are qualified interchangeably for appointment to the TFI or the AT. These indistinct criteria do not serve well the intention to establish two different bodies with distinct functions and different authority. The relatively low salary envisaged for AT members, as well as the rules of incompatibility that make it easier for TFI members to carry out other professional activities, seem to create an incentive for the most experienced lawyers to apply for the TFI instead of the AT, which would be of course an unintended consequence of these appointment rules.

e. Rules on conflict of interest

Fifth, the members of the WTO AB are bound by **strict rules on conflict of interest**. The Rules of Conduct for the DSU²⁰⁵ and, in particular, the Working Procedures for Appellate Review,²⁰⁶ require AB members to refrain from all activities incompatible with their duties.²⁰⁷ Among their duties are

²⁰¹ Petersmann, *supra*, 39.

²⁰² For an account of the diversity of expertise of the original AB members, appointed in 1995, see Ehlermann, *supra*, 475.

²⁰³ Claus-Dieter Ehlermann, 'Six Years on the Bench of the World Trade Court: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36 *Journal of World Trade* 605.

²⁰⁴ Ehlermann, *supra*, 476.

²⁰⁵ Document WT/DSB/RC/1 (96-5267) of 11 December 1996, available at:

https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm.

²⁰⁶ Document WT/AB/WP/6 of 16 August 2010, available at:

https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#annexii, see in particular Article 8 and Annex II.

²⁰⁷ *Ibid*, Article 2(2).

the obligations to “avoid direct or indirect conflicts of interest”²⁰⁸ and to “disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to that person’s independence or impartiality”.²⁰⁹

The ICS proposal purports to set a high standard of ethics for the judges of the TFI and the AT members. It expressly prohibits their participation in disputes which would lead to direct or indirect conflict of interests and provides for an absolute incompatibility between their position and any activity as counsel in any investment protection dispute, under any governing instrument of international and domestic law.²¹⁰

More importantly, the EC proposal refers to a separate document laying down the code of conduct for TFI and AT’s members.²¹¹ The Code has extensive rules regarding impartiality and independence²¹² and disclosure.²¹³ It also includes rules applicable to former members, who “must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage” from their decisions.²¹⁴ These rules go beyond the post-employment guidelines of the WTO, mentioned above.

f. Proceedings free of charge

Sixth, proceedings before the WTO panels and AB are **free of charge** for the parties. Should a permanent appellate system start to operate, a similar arrangement might diminish the risk that applicants forfeit their chances to reverse a wrong award because they are deterred by the cost of the proceedings. Instead, the ICS proposal envisages a system similar to the ICSID’s one, in which the parties pay equally the remuneration of the TFI’s judges and AT’s members into an account held by the secretariat.²¹⁵

It is nevertheless important to note that proceedings fees normally account for a minor share of total costs in investment proceedings, and that the majority of costs (fees and expenses paid to the legal teams) would be effectively duplicated in the case of an appellate stage.²¹⁶ The EC’s proposal codifies the principle whereby the loser can be ordered to pay the costs incurred by the winning party, in all or in part.²¹⁷

²⁰⁸ *Ibid*, Annex II, principle II.

²⁰⁹ *Ibid*, principle III(1).

²¹⁰ Article 11(1) ICS proposal.

²¹¹ See Annex II ICS proposal.

²¹² Annex II, Article 5.

²¹³ Annex II, Article 3.

²¹⁴ Annex II, Article 6.

²¹⁵ Articles 9(13) and 10(13) ICS proposal.

²¹⁶ An OECD survey reveals that in 2012 the average estimated cost of proceedings was USD 8 million, which costs exceeding USD 30 in exceptional cases. Of these amounts, tribunal’s fees accounted for only 16% of the total, on average. See *Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012*, available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>, 18.

²¹⁷ Article 28(4) ICS proposal. A similar rule is contained in Article 42.1 of the 2010 UNCITRAL Rules.

g. Increased transparency and participation

As mentioned above, WTO proceedings are transparent and all documents are published on the WTO website. Hearings are in principle closed to the public, but the parties can agree to hold public hearings and both panels and AB have held sessions open to public viewing with increasing frequency. Reception of briefs by *amici curiae* is unregulated but not ruled out (see above).

The practice in investment arbitration is mixed and evolving. Since 2006,²¹⁸ the ICSID Secretariat publishes a minimum set of information for each dispute registered with the Centre, even if the parties have opted for confidentiality. Also in 2006 the ICSID rules were amended to proceduralise and encourage the participation of third parties to the hearings and the submission of *amicus curiae* briefs.²¹⁹ Whereas the parties can still object to the former, the tribunal has the last word on the latter matter. In non-ICSID arbitration, the normal default in the applicable rules is full confidentiality, and can be opted out by the parties.²²⁰ Hearings are presumed to be in camera²²¹ and submissions by non-parties are rarely accepted.

The new UNCITRAL rules on Transparency in Treaty-based Investor-State arbitration (the UNCITRAL Transparency Rules), which entered into force in April 2014 reverse this default position, and apply to all treaty-based investment arbitration, whether *ad hoc* or administered by an institution, run under the UNCITRAL rules.²²² Under the new UNCITRAL Transparency Rules, which States can decide to apply even in disputes based on pre-2014 treaties, all documents concerning the dispute are made available to the public,²²³ with certain reasonable exceptions.²²⁴ Hearings are public²²⁵ and submissions by non-disputing parties (whether parties to the same applicable substantive treaty²²⁶ or not²²⁷) are extensively regulated, somewhat similarly to the post-2006 ICSID rules.²²⁸

The EC's proposal seeks to build on the newest and most advanced standard, sanctioning expressly that the UNCITRAL Transparency Rules apply to all investment disputes.²²⁹ It also adds to the list of the available documents the exhibits of the proceedings.²³⁰ Moreover, *amicus curiae* submissions are in principle to be accepted by the TFI and AT.

²¹⁸ See new Rule 48(4).

²¹⁹ See, respectively, Rule 32(2) and Rule 37(2).

²²⁰ See for instance LCIA Rules, Article 30; SCC Rules, Article 46; UNCITRAL Rules, Article 34(5).

²²¹ Rule 28(3).

²²² Article 1(9).

²²³ Article 3.

²²⁴ Article 7.

²²⁵ Article 6(1).

²²⁶ Article 5.

²²⁷ Article 4.

²²⁸ See for a detailed analysis: Lucas Bastin, 'Amici Curiae in Investor-State Arbitration—Eight Recent Trends' (2014) 30(1) *Arbitration International* 125, 134. See also ICSID Rule 32(2).

²²⁹ Article 18.

²³⁰ Article 18(3). In the UNCITRAL Convention, exhibits are not automatically available, but only upon a decision of the arbitral tribunal, see Article 3(3).

3. Impediments to the transplant

The biggest objection to the establishment of an appellate system for the review of investment awards is that it would sacrifice the finality of the awards, by deliberately adding a set of proceedings to the process leading to a final decision. As discussed above, the virtue of the finality of arbitral awards is intrinsic in the arbitral system just as the virtues of an appellate mechanism are a prerogative of judicial systems. Opting for one or the other is evidently a matter of wider policy and it is inappropriate to discuss whether one is preferable to the other in general.²³¹ This section, instead, discusses some of the potential problems that the transplant of the WTO AB model would have on the system of ISDS.

a. Sufficient expertise and professionalism of arbitrators

As noted at the outset, the introduction of the WTO AB was considered an appropriate arrangement when the rule of reverse consensus entered into force, entailing that binding panel reports would be adopted as a matter of routine. The relative mistrust towards WTO panellist can translate to the investment arbitration system only in part. Whereas WTO panellists are often trade officials with little or no experience in international proceedings,²³² arbitrators sitting on investment tribunals are almost invariably very experienced in the field, with impeccable (international law) credentials. It is anticipated that their understanding of investment law is highly developed and reliable.

Whilst the investment arbitration system is criticised for the practice of appointing predominantly the members of a restricted “club,” this allows for appointment of arbitrators with experience, expertise and legal shrewdness. These circumstances make it harder to envisage an appropriate procedure to select a narrow circle of better-qualified lawyers to sit on the appeal body.²³³ In other words, it is not obvious or arguable that the legal understanding of a selected group of permanent members of an appellate tribunal would be, on average, better than that of *ad hoc* arbitrators, which is instead the case in the WTO system. A hint of this problem might be observed in the current practice of ICSID annulments, in which committees’ decisions do not seem to grant, as a whole, a clearly superior or more consistent legal analysis than that of tribunals.

The presumed comparable quality of tribunals’ awards and appellate decisions, premised on the comparable expertise of the respective adjudicators, could raise doubts as to the actual possibility of achieving accuracy and consistency through a two-tier system. It was suggested, to the contrary, that

²³¹ Steger (2013) *supra*, notes the criticism raised against the proposals to establish an appellate mechanism, which would sacrifice finality in favour of accuracy, referring in particular to Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 321-339.

²³² For a full recent study, see Judges Louise Johannesson and Petros C. Mavroidis, ‘Black Cat, White Cat - The Identity of the WTO’ (2015) EUI Working Paper, available at:

http://cadmus.eui.eu/bitstream/handle/1814/34879/RSCAS%202015_17.pdf?sequence=1. It is noted at p. 2 that 74% of all panellists are current or former government officials, and most of them are one or two-players in panel proceedings.

²³³ Gabrielle Kaufmann-Kohler, ‘In search of transparency and consistency: ICSID reform proposal’ (2005) 2 *Transnational Dispute Management*, 5-6.

the fact-intensive nature of investment awards and the open-ended formulation of several applicable norms make inconsistencies physiological in the arbitral case-law, and appeals inappropriate.²³⁴

The EC's proposal does not seem to lay down express provisions that could ensure any meaningful differentiation between the membership of the TFI and the AT. Whereas this is mostly due to the strict and commendable rules regarding the TFI (permanent membership, higher credentials and rules of conduct), it does lead to the question of the actual usefulness of an appellate system made up of equivalent bodies.

b. Difficulty to establish a multi-treaty mandate

Another obvious hindrance complicating the fruitful creation of an appellate system is the practical impossibility to gather under the jurisdiction of one body the review of awards based on a multitude of applicable investment treaties and trade agreements. Because the matters of inconsistency highlighted above derive for the most part from the diverging interpretation of similar clauses in different treaties, a treaty-specific appellate system would arguably achieve little or no overall consistency. The 2004 ICSID Discussion Paper acknowledges the virtual futility of *ad hoc* solutions:

it would 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.²³⁵

It has been suggested that an appellate system with limited jurisdiction *ratione materiae* (i.e., over one applicable treaty) could nevertheless produce a harmonising effect by applying the common principles of investment law, developed into custom through the practice of investment tribunals. However, the suggestion that a body of customary law has emerged, corresponding to the recurring clauses of BITs, is not born out in a review of numerous awards.²³⁶ In fact, the International Court of Justice has noted that the proliferation of investment treaties, however similar, has created a conventional network that is normatively separate from the customary principles on the treatment of aliens.²³⁷

The most practicable scenario may therefore be the establishment of an appellate system within the ICSID framework, with jurisdiction over all ICSID awards. The possibility to amend the Convention is of course remote (Article 66 requires unanimity), but an opt-in mechanism through a special protocol could be considered, or through the use of *ad hoc* language in the applicable investment treaty.²³⁸

²³⁴ Jan Paulsson, 'Avoiding Unintended Consequences' in Karl P Sauvart and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 241, 253.

²³⁵ ICSID Discussion Paper, *supra*, 15.

²³⁶ Ngangjoh-Hodu and Ajibo, *supra*, 17.

²³⁷ International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, paras. 88-90.

²³⁸ See ICSID Discussion Paper, *supra*, 2.

Instead, the European Commission appears to favour a treaty-specific appellate system, i.e., the proposed ICS to be included in the TTIP. This system may be limited in its ability to achieve consistency as regards the application of other investment treaties.²³⁹ However, the expected flurry of litigation arising from the TTIP alone, given the sheer magnitude of the investment flows between US and EU, is such that a mechanism to pre-empt arbitral fragmentation within the specific regime could nonetheless be worthwhile, and could possibly have a spill-over effect on external treaty regimes.

Aside from the points discussed so far, one must not forget that it takes two to tango. In other words, will this ICS proposal be acceptable to the US or not? Since the proposal has been conveyed to the US negotiators, not much of an official US reaction has been heard as yet.

However, it is the official US position that ISDS is the method of choice for resolving disputes between US investors abroad and the host countries (and between foreign investors in the US). The fact sheet released in March 2015 by the Office of the US Representative on ISDS, which takes stock of the criticism against ISDS, notes as follows:

Based on our more than two decades of experience with ISDS under U.S. agreements, we do not share these views. We believe that providing a neutral international forum to resolve investment disputes under international law mitigates conflicts and protects our citizens.

Moreover, Trans Pacific Partnership (TPP) agreement, which is largely based on the US model BIT text of 2012, between the US and a dozen other Asian and Pacific countries, which was concluded in 2015 includes the traditional ISDS mechanism. In line with the US model BIT text of 2012, also Article 9.22(11) TPP contains a similar explicit possibility of setting up an appellate mechanism.

At the time of writing (January 2016) it is impossible to predict, whether and if so, in what form and shape the ICS proposal will ultimately be included in the final TTIP text. Moreover, it is at this point in time even more uncertain whether TTIP will ever be signed and ratified by all Contracting Parties. Much will depend on the position of the US President in office at the relevant time – most likely not Barack Obama anymore – and the position of the EP and the most relevant Member States such as in particular Germany, France, UK, Poland, Spain and the Netherlands.

c. Downsides of a strict system of professional incompatibility

A practical problem, which is strictly related to the expected size of the appellate system’s docket, is the system of incompatibilities envisaged for its members. It is reasonable to believe that a strict set of rules of conduct, comparable to those applicable to WTO AB members, might result in a wide

²³⁹ Although, the European Commission envisages to work on an international investment court, which would over time 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 third countries.” See point 4 of the Reading Guide to the ICS proposal, available at: http://europa.eu/rapid/press-release_MEMO-15-5652_nl.htm.

range of professional incompatibilities, during and after the post. This is acceptable in the case of the WTO AB, whose members are part-time in name but virtually work full-time.

On the contrary, the opportunity of sitting on an investment appellate system with few cases to hear, comes at a high cost of being required at the same time to forfeit other professional opportunities. It is not unreasonable to suppose that the brightest and most experienced lawyers, who currently serve as counsel and arbitrators in investment disputes, could turn down an appointment to a less-than-busy appellate body, which would force them to abandon their profitable practice altogether.²⁴⁰ It is useful to recall that the retainer fee for WTO Appellate Body members amounts approximately to 7,000 Euros per month,²⁴¹ a much lower sum than the average monthly income of top lawyers.

As noted above, the system sketched in the EC's proposal suggests to follow the practice of the WTO AB for the retainer fee of the AT's members, and to pay the TFI's judges approximately 2,000 Euros per month. The severe system of incompatibility described in the Code of Conduct and the relatively low amounts proposed as professional retainers might undermine the requirements of professionalism and expertise.

It must be added that the total professional remuneration of WTO panellists and WTO AB members is almost impossible to define with any precision. AB members receive, besides the retainer, a daily fee or CHF 780 (there can be between 120 and 200 days of work per year) and a *per diem* of approximately CHF 400, plus travel expenses and health insurance.²⁴² The daily fee for WTO panellists is CHF 600, but they do not receive it if they are government officials, which is very commonly the case. It is unclear whether the pecuniary incentives in place at the WTO are sufficient to attract the best candidates; likewise, it is difficult to speculate as to whether those pecuniary incentives can work effectively, if replicated in the TTIP investment court system.

d. Length and cost of proceedings

It is impossible to ignore that WTO panel proceedings last, on average, much less than investment arbitral proceedings. Various sources indicate that WTO panel proceedings take between 12 and 18 months, on average, to complete, with the WTO setting the *de facto* average at 14 months.²⁴³ WTO proceedings are costly in proportion of their length, but the gratuity of the panel and AB work and the fact that both parties are States make the impact of costs less critical than it is in investment proceedings, which involve private entities.

In 2012, the ICSID awards issued were handed down on average after five years since the start of proceedings.²⁴⁴ Another report indicates that the average length of investment proceedings is 3 years

²⁴⁰ Although, as has been noted previously, AT members may continue to sit as arbitrators in non-TTIP disputes.

²⁴¹ Article 10(12) ICS proposal.

²⁴² See the presentation given by Valerie Hugues, former Director of the WTO Appellate Body Secretariat, available at: http://www.biicl.org/files/945_valerie_hughes_presentation.pdf.

²⁴³ WTO, Resolving Trade Disputes between WTO Members, 2014, available at:

https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf.

²⁴⁴ Adam Raviv, 'Achieving a Faster ICSID' (2014) 11(1) Transnational Dispute Management.

and 8 months.²⁴⁵ These findings are compatible with a detailed survey that concluded in 2009 that the average ICSID arbitration, from request to award, took 1,325 days (3 years and 7 months),²⁴⁶ and with a similar finding in a study made in 2014 by the firm Allen & Overy.²⁴⁷ Annulment proceedings average a bit less than two years in length.²⁴⁸ A learned estimate of the overall average costs paid by both parties is approximately USD 10 million for a typical investment claim, with the median cost being at around USD 6 million.²⁴⁹ With a median award to successful claimants at just USD 10,5 million (the average being USD 76 million),²⁵⁰ it is obvious that costs represent a powerful factor in shaping arbitration strategies and possibly stifling the attempts of smaller claimants (in other words, the costliness of the process can affect the access of small and medium enterprises to arbitral proceedings).

Therefore, the impact of an appeal stage on the overall length of proceedings is starkly different considering the different baselines, i.e., the length of the first-instance proceedings. It can be safely said that, save for some very complex WTO disputes, the large majority of WTO disputes are concluded, appeal included, in a shorter time than it takes for an investment tribunal takes to issue the first award on the merits. Adding an appeal stage to the investment arbitration system would increase the expected length of a dispute, net of the back and forth of possible remands, to circa 8 years. This rough calculation does not take into account the possibility that even the appeal decision be non-final, for instance because of its formal status as non-ICSID international award, thus subject to annulment, recognition and enforcement proceedings in domestic courts.

The ICS proposal sets an indicative length for proceedings before the TFI and a maximum length for the AT proceedings. It is difficult to speculate as to the likelihood that these terms are realistic, or whether the TFI would regularly avail itself of the possibility to extend the proceedings. However, it is possible to make the following comparisons:

- (1) ICSID investment proceedings including an annulment phase last at least twice as long as the proceedings described in the EC’s proposal (18 months plus 270 days), and
- (2) the annulment procedure in ICSID is by definition less complex compared to an appeal before the AT.

It can be concluded, tentatively, that either the proposed ICS system would display an unexpected efficiency and cut the average length of proceedings to the benefit of all parties involved or,

²⁴⁵ EFILA, TTIP Consultation Submission (2014), available at:

http://efila.org/wp-content/uploads/2014/07/EFILA_TTIP_final_submission.pdf.

²⁴⁶ Anthony Sinclair, Louise Fisher and Sarah Macrory, ICSID arbitration: how long does it take?, *Global Arbitration Review* 4(5), available at:

<http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf>.

²⁴⁷ Available at: <http://www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx>.

²⁴⁸ See data available at:

http://www.allenoverly.com/SiteCollectionDocuments/Costs_Study_Annulment_Table.PDF.

²⁴⁹ Matthew Hodgson, ‘Costs in Investment Treaty Arbitration: the Case for Reform’ (2014) 11(1) TDM.

²⁵⁰ *Ibid.*

alternatively, it will tend to reflect – and possibly aggravate – the typical scenario of long arbitration proceedings, followed by long and arduous enforcement proceedings if the investor is successful. There is no way to conclude in either direction: whereas the functioning of a permanent institution could render certain matters more rapid, there are elements in the proposal that point in the opposite direction (such as the extent of the AT’s jurisdiction and the intermediate step for the determination of the Respondent between the EU and a Member State).

The obligation for the appellant to post security for the amount of the TFI’s provisional award, as seen above, is in line with the practice of other infra-institution appeals. The obligation to post security for the costs of proceedings, instead, coupled with the loser-pays-principle, could put a heavy burden on claimants and appealing investors, given the expected cost of proceedings described. This regime would certainly discourage some contrived claims but also, arguably, some genuine claims where success is less certain or, which is more worrisome, claims by small and medium investors whose resources might be insufficient to access arbitration based on the deposit-first principle.²⁵¹

4. Conclusions

The success of the WTO AB system makes it an obvious model for reform attempts seeking to institutionalise the investment arbitration system through an appellate mechanism.

However, for a number of reasons, the transplant of a functioning model may not be successful. The success of the WTO system of appeal review depends in part on certain idiosyncrasies of the WTO legal order that are absent in the international investment regime. A few can be listed:

- WTO disputes are inter-State only. It is therefore understandable that the AB members are appointed and paid by the member states and that accuracy in their application of the law where law-making is institutionally arduous becomes a priority over finality.
- The selection of panellists is very different from that of AB members, which justifies the augmented authority of the latter. Investment tribunals are already staffed with the best professionals in the field, which lowers the added value of a second-level mechanism.
- The DSB, which adopts AB’s reports, is tasked with ensuring the consistent application of a set of multilateral treaties, hence each report has validity *erga omnes partes* as authoritative interpretation of their international obligations. This is absent in investment law, and will remain absent with the ICS proposal.
- AB members work virtually full-time and manage a sizeable number of cases and it is difficult to predict whether the circumstances will be the same for an investment appeal mechanism based on one investment treaty.

²⁵¹ See particularly on the burden for small and medium investors-claimants: O. Sandrock, *Das Internationale Handelsgericht im TTIP, Recht der Internationalen Wirtschaft* 2015, pp. 625 et seq., at p. 635.

- Proceedings are free of charge, and legal expenses are sustained by sovereign States, as opposed to private entities.
- WTO proceedings (including appeal) last approximately 14 months on average, as opposed to multi-year investment arbitrations. Thus, it is questionable whether the ICS procedures (including appeal) would be much faster.

Other features of the WTO AB can be arguably reproduced, resources allowing, in the investment system. These include the assistance by a permanent secretariat, the establishment of collegiality procedures and enforcement of procedural deadlines to ensure a reasonable length of proceedings. Stricter codes of conduct and more developed rules on transparency and participation, as suggested by the EC, can also be implemented.

The major obstacles to the establishment of a WTO-like system seem to be, in ultimate analysis, the sacrifice of finality and the inevitable lengthening of already long proceedings. These drawbacks, moreover, are not certain to ensure a better record of coherence in the application of investment law, at least with respect to the well-studied phenomenon of hermeneutic fragmentation occurring across different investment instruments with similar provisions.

IV. GENERAL CONCLUSIONS

1. The paper concludes that the ICS proposal is, first and foremost, a bold move to appease the EP and the public opinion in many EU Member States, which are critical against TTIP generally, and in particular against including any type of ISDS. The ICS proposal attempts to make the inclusion of an investor-state dispute settlement mechanism in TTIP politically acceptable, while at the same time trying to address the perceived shortcomings of the existing ISDS.
2. The paper notes that – in contrast to the public perception – mechanisms for limited review of investment arbitration awards are already in place, such as the ICSID annulment mechanism and the setting aside procedure for non-ICSID awards by national courts. These mechanisms – while not perfect – provide useful corrective tools.
3. The analysis of the WTO dispute settlement mechanism illustrates that caution should be exercised in simply transplanting it to investor-state disputes. The reason is that WTO law is structurally different from investment law, serves different purposes and has different users.
4. Generally, it can be concluded that the ICS proposal clearly breaks with the current party-appointed, ad-hoc ISDS as provided for in practically all BITs and FTAs. The main result is that it deprives claimants of any role in the appointment of the judges, while giving the respondent States the exclusive authority to do so, albeit in advance of a particular case.

The appointment of the judges by the Contracting Parties raises several problems, which the ICS proposal does not sufficiently address.

5. The pre-selection of the TFI and AT judges by the Contracting Parties carries the inherent risk of selecting “pro-State” individuals, in particular since they are paid by the States (or rather their tax payers) alone. Apart from this danger, it remains doubtful whether a sufficient number of appropriately qualified individuals with the necessary expertise can be found. This is particularly true since many professionals currently working in arbitration may be excluded on the basis that they could be considered to be biased. The pool of TFI and AT judges would seem to be limited to academics, (former) judges and (former) Governmental officials. That might not be sufficient to guarantee the practical experience and expertise needed and/or independence from the State.

6. The standard of impartiality and independence of the judges is highly subjective, and their independence on a practical level is not assured by the proposed text. Also, the system of challenging TFI judges and AT members can be further criticised for envisaging that the presiding judge will decide the challenge against one of his own colleagues on the bench, rather a decision being made by an independent outside authority.

7. The system of determination of Respondent (in the case of the EU or Member States), in particular the binding nature of that determination, which is done by the EU and its Member States alone, creates significant disadvantages for the claimant and does not allow the ICS tribunals to correct any wrong determinations. This could result in cases being effectively thrown out because of a wrong determination of the Respondent.

8. Since the ICSID Convention is not applicable to the EU, the recognition and enforcement of ICS decisions remains limited to the EU and the US. The proposal also fails to clarify the difficulties related to the New York Convention 1958.

9. The ICS proposal does not address the difficult legal situation between the CJEU and other international courts and tribunals. There is no reason to believe that the CJEU would be more positive towards the ICS as compared to its outright rejection of the European Court of Human Rights when it comes to the potential interpretation or application of EU law. Also, the CJEU’s consistent rejection of any direct effect of WTO AB panel reports – even those that have been approved by the DSB and after the implementation deadline has lapsed – raises doubts as to the legal effects of ICS decisions within the European legal order.

10. In sum, the suggested creation of a two-tier (semi)permanent court system would give the Contracting Parties a significantly stronger role in the whole dispute settlement process – potentially at the expense of both the investor/claimant and the authority of the ICS. In particular, the appeal possibility carries the risk of burdening small and medium investors by increasing the potential length of the proceedings and costs.

11. While the US position towards the ICS proposal remains unclear for the time being, it also remains unclear how the ICS proposal could be multilateralized. Indeed, the perceived shortcomings of the current ISDS system is based on the fact that more than 3,000 BITs/FTAs are in place, which have been concluded by practically all countries in the world. The ICS proposal – limited to TTIP and perhaps extended to CETA – does not change that. The way the UNCITRAL Transparency Rules of 2014 are incrementally applied by way of an opt-in system established by a separate international treaty could be a possible way forward.

12. As the TTIP negotiations between the US and the EU are now focusing on the ICS proposal, this is a perfect moment to further improve the proposal by addressing the matters identified in this analysis.

13. Finally, the US and the EU should also consider whether it would not be more preferable to modify and improve existing systems, such as turning the ICSID annulment procedure into a full appeal mechanism.
