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Discussion Paper
The Investment Treaty Working Group Task Force on the Investment Court System Proposal

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The Investment Treaty Working Group Task Force Report on the Investment Court Proposal is a Task Force Report by the Investment Treaty Working Group of the International Law Section’s International Arbitration Committee of the American Bar Association. The Task Force was initiated in the Spring of 2016 and comprises a diverse global group of legal practitioners, arbitrators and members of the judiciary and scholars.

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I. Executive Summary

Ad-hoc investor-state dispute arbitration tribunals to resolve investment disputes between investors and states are made available in nearly 3000 bilateral investment treaties. The ubiquity of these treaty provisions has made investor-state arbitration the most prevalent process of dispute resolution under free trade agreements. Concerns have arisen about whether investor-state arbitration is the most suitable approach for the resolution of investment treaty disputes. Civil society groups have questioned the appropriateness of relying on a dispute settlement mechanism created to resolve private commercial disputes to apply to public law disputes. Critics have raised concerns over the potential for arbitrator bias and the unbridled potential for conflict of interest. These criticisms were instrumental in developing the EU’s Investment Court proposal.

The EU has indicated that the Investment Court is a permanent feature of all future EU investment treaties and is an integral element of all new EU investment treaties. The European Union’s proposal for an Investment Court offers a transformative change in the process to resolve international investment treaty disputes as the Investment Court would have an immediate effect of reducing the predominant role of investor-state arbitration.

The Investment Court proposal would replace investor-state ad-hoc panels in the proposed Trade and Investment Partnership (“TTIP”) under negotiation between the European

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1 Prof. Muthucumaraswamy Sornarajah describes criticism of the investor-state dispute system:
   The illegitimacy of ISDS flows, according to its critics, from the allegation that a select few arbitrators routinely decide disputes in favor of multinational enterprises in an ideologically prejudiced manner, articulating doctrines more extensively than agreed upon by governments negotiating the treaties, thereby also curtailing those governments’ regulatory functions. M. Sornarajah “An International Investment Court: panacea or purgatory? Columbia FDI Perspectives: Perspectives on topical foreign direct investment issues, No. 180. August 15, 2016 at page 1.
2 This Working Group Report does not address the sufficiency or validity of these criticisms of the investor-state arbitration system.
3 European Union proposed text for the Transatlantic Trade and Investment Partnership (“TTIP”), November 12, 2015 (All references to the TTIP in this Working Group Report are to the November 12, 2015 version unless otherwise noted).
Union and the United States of America. It is also a part of the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") and in the EU-Vietnam Free Trade Agreement.

Under the Investment Court proposal, the Investment Court has a Court of First Instance (the “Tribunal”) comprised of fifteen judges and an Appeal Tribunal with six members. The Court of First Instance would sit in benches of three members each and would decide the original complaint. The members of each bench would be chosen by random lot. The Court would be administered by a multilateral institution. In the CETA, it is administered by the World Bank’s ICSID Centre. In the TTIP and the EU-Vietnam FTA, the Investment Court is administered by either the ICSID or by the Permanent Court of Arbitration at the Hague.

The TTIP text contains an Ethical Code which prohibits judges from the Investment Court from acting as legal counsel in investment dispute cases. The CETA also requires that the judges follow the International Bar Association Guidelines on conflict of interest for arbitrators.

Colin Brown, the EU’s deputy chief negotiator on the Investment Court, discussed the objectives of Investment Court as being neutral, effective, legally predictable and coherent. He stated:

Let me start from the proposition that the EU’s policy approach first and foremost takes its cue from what investors and states need at the end of the process, namely access to a neutral, effective, legally predictable and coherent investment dispute settlement system. The EU is both the largest exporter of FDI and the largest recipient. It has a very clear interest in an effective system of investment protection and its enforcement.

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5 European Union– Vietnam Free Trade Agreement, ("EU – Vietnam FTA"). The EU has announced that the EU-Vietnam Treaty will come into force sometime in October 2016.
6 CETA at Article 8.27(16). The CETA does not identify whom will administer the Appellate Tribunal. Pursuant to Article 8.28(7) this is a decision that will have to be made by the Committee.
7 TTIP at Article 9(16) and 10(15). The administering institution remains in bracketed text in the November draft; See also EU-Vietnam FTA at Articles 12(18) and 13(18).
8 Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.
Since its announcement by the EU, the Investment Court has been the target of significant criticism. In a May 2016 panel organized by the American Bar Association and the American Society of International Law, former International Court of Justice President, Judge Stephen Schwebel, raised serious concerns about the Investment Court Proposal. Judge Schwebel did not accept that the current system of investor-state dispute settlement undertaken by ad-hoc tribunals was “broken”. Global Arbitration Review reported on the criticisms of the EU proposal raised by Judge Schwebel at this public discussion:

Schwebel expressed what he called the “fundamental objection” to the proposal … It would replace “a system that on any objective analysis works reasonably well” with “a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing.”

This Working Group Report does not address the issue whether the criticisms of the investor-state dispute settlement system are valid. Indeed, there are very many investor-state arbitration awards which have been objective, fair and of high quality. There also have been rare examples of poorly-reasoned awards and other examples raising questions about conflict of interest. This topic about the merits of the investor-state dispute settlement system is a broad matter that falls outside of the scope of this Working Group Report.

In considering the Investment Court proposal, the ABA Investment Treaty Working Group has reflected on whether the Investment Court proposal addresses the essential concerns raised by the EU in its consultations. This Working Group Report assesses whether the Investment Court is “neutral, effective, legally predictable “and a “coherent investment dispute settlement system”. The Working Group Report considers whether the Investment Court Proposal is practical, efficient and workable.10

10 The Working Group Report does not dwell on the substantive investment obligations within the new generation of EU investment treaties as such issues are canvassed in other documents. For example, see Catherine Titi, The European Commission’s Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court System - An overview of the European Commission’s draft TTIP text of 16 September 2015 or the Report from the European Federation for Investment Law and Arbitration, Task Force Paper regarding the proposed International Court System, February 2, 2016.
This Report attempts to provide information and to recommend practical enhancements for the Investment Court. The drafters hope this Working Group Report will assist all stakeholders not only in evaluating the Investment Court but in the furtherance of the discussion of broader issues which affect dispute resolution under international investment treaties.
II. The Road to the Investment Court System Proposal

The member states of the European Union” invented investor-state dispute settlement procedures in bilateral investment treaties in the late 1960’s. Since that time, the member states of the European Union have voluntarily entered over 1,500 bilateral investment treaties, almost all of which contain investor-state arbitration provisions.\textsuperscript{11}

But since the time when the original investment treaties were signed, the legislative competence over the negotiation of international treaties in the EU has changed. In 2009, the Lisbon Treaty (\textit{Treaty on the Functioning of the European Union}) confirmed that the competence for the negotiation of international trade agreements rested with the European Union. Article 207 of the Lisbon Treaty establishes the competencies of the EU institutions for the negotiation of trade agreements and also underscores the role of the member states regarding ratification of such agreements. The European Parliament and Council will implement the common commercial policy and that the Commission will negotiate commercial treaties (such as investment treaties) with third parties. Decisions taken by the Council are by a qualified majority except for specific areas such as services or intellectual property which require the unanimous consent of the Council. On May 6, 2016, the Commission issued a directive confirming that ratification of the CETA would be done as a mixed agreement requiring unanimity rather than a qualified majority.\textsuperscript{12}

\textsuperscript{11} Michael Goldhaber reports that “Europe invented investor-state arbitration, in the German-Pakistani treaty of 1959, when it first empowered foreigners to sue a state that traduces their investment. The system roared to life 15 years ago with a then-unprecedented $355 million award against the Czech Republic, and it reached full throttle with the 2014 Yukos v. Russia award of $50 billion, pending court review. (A study by Washington & Lee Law professor Susan Franck finds the more typical recovery to be $17 million, on a claim of $623 million.) EU investors have filed over half of the 608 investor-state claims documented by UN Conference on Trade and Development through the end of 2014. Likewise, EU treaties account for about 1,500 of the world’s 3,000-plus investment arbitration treaties.”. See Michael D. Goldhaber, “Europe says No to Treaty Arbitration”. \textit{American Lawyer Magazine}, Focus Europe, July 1, 2016.

The impact of the change in competency for international investment has been important in the promotion of the Investment Court and the decline of investor-state arbitration. This has been described by Michael Goldhaber in *American Lawyer Magazine*:

In Europe, the opposition movement lay dormant until the 2009 Treaty of Lisbon, which broadly altered the EU’s power structure. Hunter notes two particular changes with fateful unanticipated effects. Within Europe as a whole, Lisbon shifted power over foreign investment from the member states to the EU (without shifting the responsibility to promote exports). Then, at the EU level, it moved final authority over trade and investment from the commission to the Parliament. Investment protection now fell to a left-leaning parliamentary majority, unbraked by national ministries with a mandate and tradition of promoting industry.\(^{13}\)

The effects of the transition of competencies within the European Union are still a work in progress nearly eight years after the adoption of the Lisbon Treaty. There are still questions about the powers of the EU Commission to negotiate treaties that abut upon member state competencies. These questions have resulted in two advisory opinions being referred to the European Court of Justice on the approach for approving international treaties negotiated by the European Union.

In Opinion 2/13, the European Court of Justice addressed the powers of the EU to enter into human rights treaties which included courts able to determine the violations of human rights. The Court of Justice stated that the EU had competence in the field of international relations and that it had the capacity to conclude international agreements, entailing the power to submit to the decisions of a court created or designated by such international agreements as regards the interpretation and application of the international treaty provisions. The European Court of Justice also determined that an international agreement may affect its own powers only if “the indispensable conditions for safeguarding the

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essential character of those powers are satisfied and that, as a consequence, there is no adverse effect on the autonomy of the EU legal order.”

A second opinion, Advisory Opinion 2/15 considering the extent of EU Commission competency regarding the inclusion of investor-state arbitration in the EU – Singapore Investment Treaty is due for release by the winter of 2017. Michael Goldhaber has summarized the impact of a negative EU Court of Justice advisory opinion:

A crucial question in Europe is whether the Court of Justice finds a given treaty to fall within the “competence” of the EU, as opposed to the member states. A pending case involving Singapore, known as Opinion 2/15, will be precedential on this point. To the extent that the CJEU finds that TTIP falls within the member states’ competence, it will need either to be pared back or approved by 27 national and eight regional Belgian legislatures. Farcically, this could place EU trade policy at the mercy of Socialist Walloons.

Opinion 2/15 may have an important effect on the content and ratification of EU international investment agreements such as the CETA, Vietnam FTA, and the TTIP. The CETA and the TTIP are both broader in subject and scope than the that covered by the EU – Singapore Treaty, so it is possible there may yet again be another Advisory Opinion to the Court regarding the exact method of member state ratification for these agreements.

To date, the Investment Court is a creature of three treaties. The EU may find itself unable to obtain a unanimous majority in the Council on the TTIP. The CETA is up for consideration for the autumn of 2016. The impact of these European Court advisory decisions may determine whether the treaties which bring the Investment Court into effect can be implemented by a qualified Council majority rather than by unanimity.

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14 Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties.  
A. The EU Debate on Investment Disputes Under the TTIP

The unofficial precursor to the TTIP negotiations was the 2011 US-EU High-Level Working Group on Jobs and Growth, established at the 2011 EU-US Summit.\textsuperscript{16} By February 2013, this US-EU Working Group had produced a final report concluding that “a comprehensive agreement, which addresses a broad range of bilateral trade and investment issues, including regulatory issues, and the development of global rules to provide significant mutual benefit. The Working Group recommended that the United States and the European Union launch negotiations, in accordance with their respective domestic procedures.”\textsuperscript{17} This conclusion was publicly endorsed by Presidents Barroso, van Rompuy, and Obama. An initial Resolution by the European Parliament in October 2012 supported the advancement of the TTIP negotiations and another supportive EU Parliamentary Resolution followed in May 2013.\textsuperscript{18} The TTIP negotiations were officially announced in a Joint Statement by US President Obama and EU President Barroso on February 13, 2013.\textsuperscript{19}

The EU Commission obtained a Directive for the negotiations for the Transatlantic Trade and Investment in June of 2013.\textsuperscript{20} Regarding investor-state dispute settlement process, the directive states:

\begin{quote}
After prior consultation with Member States and in accordance with the EU Treaties the inclusion of investment protection and investor-to-state dispute settlement (ISDS) will
\end{quote}

\textsuperscript{17} European Commission, Terms of Reference, TTIP Sustainability Impact Assessment 24 July 2013, at 7.
\textsuperscript{20} EU directives for the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, adopted by the Council on June 14, 2013 and declassified and made public by the Council on October 9, 2014.
depend on whether a satisfactory solution, meeting the EU interests concerning the issues covered by paragraph 23, is achieved. The matter shall also be considered in view of the final balance of the Agreement.\textsuperscript{21}

Paragraph 23 further elaborated on the initial investor-state dispute settlement process system which directed by the Commission in negotiations:

The Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, including through the possibility of binding interpretation of the Agreement by the Parties. [...] It should provide for investors as wide a range of arbitration fora as is currently available under the Member States’ bilateral investment agreements. The investor-to-state dispute settlement mechanism should contain safeguards against manifestly unjustified or frivolous claims. Consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement, and to the appropriate relationship between ISDS and domestic remedies.\textsuperscript{22}

From the beginning of the TTIP negotiation process, the EU was directed to consider an investor-state dispute settlement process, which provided transparency, independence of arbitrators, predictability, mechanisms relating to unjustified and frivolous claims, and one which considered an appellant mechanism.

The Commission established a public consultation on investor-state dispute settlement in investment treaties which took place between 27 March and 13 July 2014. The consultation was limited to the proposed EU approach to investment protection and dispute settlement

\textsuperscript{21} EU directives for the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, adopted by the Council on June 14, 2013 and declassified and made public by the Council on October 9, 2014 at p. 8.

\textsuperscript{22} EU directives for the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, adopted by the Council on June 14, 2013 and declassified and made public by the Council on October 9, 2014 at p. 9.
in the TTIP. Nearly 150,000 responses were received in the online public consultations. On January 13, 2015, the Commission issued a report on these consultations through a staff working document. The European Commission Staff Working Document reported these results of the consultation:

The Commission received a total of nearly 150,000 replies. All replies have been taken into account on an equal basis. The vast majority, around 145,000 (or 97%), were submitted collectively through various on-line platforms containing pre-defined answers which respondents adhered to. In addition, the Commission received individual replies from more than 3,000 individual citizens and from some 450 organisations representing a wide spectrum of EU civil society (business organisations, trade unions, consumer organisations, law firms, academics, etc.).

American Lawyer Michael Goldhaber colorfully described how the overwhelming online response to the EU consultation initiative on investor-state arbitration crashed the European Commission's servers:

On July 3, 2014, the European Commission's computers crashed. The commission had invited comment on investor-state arbitration, a private justice system that has inspired a global case law of unprecedented sweep. Citizens organized by 180 public interest groups bombarded Brussels with 145,000 comments voicing fierce hostility. Many scorned arbitrators as a secretive club of corporate lawyers with a vested interest to rule for foreign investors against states. Only 19 large companies, 60 trade groups, and seven law firms rose to the system's defense.

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24 Former International Court of Justice Stephen Schwebel has taken the view that the “replies to the EU survey were overwhelmingly manufactured by NFO manipulation and that the EU was ill-advised to pay attention to them.”
25 The Commission Staff Report on TTIP Online Public Consultations states that there were 149,399 responses to the consultation. Of these responses, approximately 145,000 responses were pre-defined answers where a respondent adhered to pre-defined comments provided by a non-governmental organization. The EU Report states that “in addition to the collective submissions, the consultation database also recorded 3,144 individual replies by EU citizens and 445 individual replies by various organizations such as NGOs, academics, individual companies, trade union organisations, consumer protection groups, business associations.” at page 111.
26 Commission Staff Report on TTIP Online Public Consultations.
The Working Document Report from the EU-wide consultation states:

The collective submissions reflect a wide-spread opposition to Investor-State dispute settlement (ISDS) in TTIP or in general. There is also quite a majority of replies opposing TTIP in general.

In these submissions, the ISDS mechanism is perceived as a threat to democracy and public finance or to public policies. It is also considered as unnecessary between the EU and the US, in view of the perceived strength of the respective judicial systems. Such views are largely echoed by most of the trade unions, a large majority of NGOs, Government institutions and many respondents in the "other organisations" category, including consumer organisations. Many among the collective submissions express specific concerns about governments being sued by corporations for high amounts of money which in their view create a "chilling effect" on the right to regulate. In addition, certain replies from trade unions express a generic mistrust with regard to the independence and impartiality of the arbitrators or are concerned that ISDS may create a possibility for investors to circumvent domestic courts, laws or regulations.

By contrast, a large majority of business associations and the majority of large companies strongly support investment protection and ISDS in TTIP, while small companies are more critical. 28

On May 7, 2015, Cecilia Malmström, the Commissioner for Trade responded to the consultations through the release of a Concept Paper to the European Parliament and to the European Council. 29 Entitled “Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court,” the Concept paper made clear that the EU would henceforth reject investor-state arbitration models and instead consider new approaches “towards an investment court”. 30

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28 Commission Staff Report on TTIP Online Public Consultations, Section 3.1 at page 14.
30 Professor Krajewski notes that both Germany and France had drafted their own technical proposal’s on the investment court, however, did not have the competence to make such proposals. See Markus Krajewski, “Leading the reform of the global investment regime? The EU’s approach towards international investment law” March 4, 2016 available at: http://www.lcil.cam.ac.uk/events/lcil-friday-lecture-leading-reform-global-investment-regime-eu%E2%80%99s-approach-towards-internation.
The Concept Paper reflected Commissioner Malmström’s opinion that reform of the investor-state dispute settlement system is critical to ensure fairness and independence.\textsuperscript{31} The Commissioner concluded that that lack of these features is “[a] major part” of the current challenges that investment arbitration poses to the Member States’ ability to pursue public policies. She wrote that the Investment Court should include:

A requirement that all arbitrators are chosen from a roster pre-established by the Parties to the Agreement (they could then be chosen either by lot or by the choice of the disputing parties). This option would not present technical difficulties, and would allow to “break the link” between the parties to the dispute and the arbitrators. It would mean that all arbitrators have been vetted by the Parties.

This requirement could be accompanied by requiring certain qualifications of the arbitrators, in particular, that they are qualified to hold judicial office in their home jurisdiction or a similar qualification. This would need to be complemented by the fact that they also need expert knowledge of how to apply international law as contained in the agreement – which would very precisely frame the exercise of their functions and reduce drastically the risk of unforeseen interpretation of the rules on investment protection. Thus, even the choice of the disputing parties would be limited to persons whom the Parties to the Agreement have decided in advance are competent, independent, impartial and can be trusted to decide in accordance with known and predictable legal principles.\textsuperscript{32}

On appellate review, Commissioner Malmström wrote:

The EU proposal should include a bilateral appellate mechanism for ISDS. The EU text should lay out its role, its set-up and practical operation. The appellate mechanism would review awards as regards errors of law and manifest errors in the assessment of facts (this would include an incorrect factual treatment of domestic law as interpreted by domestic courts), ensure consistency in the interpretation of TTIP and increase legitimacy both on substance and through institutional design by strengthening independence, impartiality and predictability.

The bilateral appellate mechanism could be modeled largely on the institutional set-up of the WTO Appellate Body, with some adaptations both to make it specific for ISDS, and in light of experience in the WTO. There could be 7 permanent members (2 from each Party, 3 non-nationals) whose qualifications could be broadly similar to those of the WTO Appellate Body and/or the International Court of Justice. There would inevitably be certain costs

\textsuperscript{31} The Concept Paper states “A major part of that challenge is to make sure that any system for dispute settlement is fair and independent.” Concept Paper at page 1.

\textsuperscript{32} Concept Paper at pages 7-8.
associated with the establishment of the body including a possible secretariat to help the appellate members in their work. An appellate mechanism is a realistic possibility with the United States. The US has included a reference to the possible creation of an appellate mechanism in its agreements since 2002.\textsuperscript{33}

The Concept Paper specified that future EU agreements would require an appellate body with the power to review investor-state dispute settlement decisions\textsuperscript{34} and it confirmed the sufficiency of existing judicial systems in the EU and the United States.\textsuperscript{35} Most significant of all was a reference in the Concept Paper to the creation of an Investment Court. The conclusion to the Concept Paper set out a clear direction for the Commission. It said:

First, ... a bilateral appellate mechanism should be included not only in TTIP, but should become a standard feature in all EU trade and investment agreements with other negotiating partners. Thus it should be considered to start working on an appellate mechanism with tenured judges, applying to multiple agreements and between different partners, for example on the basis of an opt-in system.

Second, the creation of a fixed list of arbitrators will already move ISDS procedures closer to a permanent court. A development that would institutionalise ISDS even further is to establish an actual permanent investment court with tenured judges. Pursuing such an investment court for each individual EU agreement that includes ISDS presents obvious, technical and organizational challenges.

Therefore, the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system.

The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization.....

The European Parliament responded to the Concept Paper on June 1, 2015, when Bernd Lange, the Special Rapporteur for the European Parliament’s Committee on International Trade (INTA) issued is TTIP report (the Lange Report) which stated:

\begin{itemize}
  \item \textsuperscript{33} Concept Paper at page 9.
  \item \textsuperscript{34} Concept Paper at page 4.
  \item \textsuperscript{35} Concept Paper at pages 9 - 11.
\end{itemize}
taking into account the EU’s and the US’ developed legal systems, to trust the courts of the EU and of the Member States and of the United States to provide effective legal protection based on the principle of democratic legitimacy, efficiently and in a cost-effective manner, 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, in the medium term, a public International Investment Court could be the most appropriate means to address investment disputes”.

The Lange Report makes the first mention of the advisability of the possible creation of an Investment Court.

The European Parliament issued a resolution on July 8, 2015, containing its recommendations to the Commission on the TTIP. The resolution set out an instruction from the Trade Committee about replacing the investor-state dispute settlement system with a “new system” with “publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism.” On this issue, the resolution stated:

(xv) ...... 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;" 

Since July 2015, it has been clear that the European Union position in all of its investment treaties would now require an Investment Court with the hallmarks of being publicly appointed with professional judges and with an appellate mechanism.

36 Lange Report at para 1(d)(xv).
37 European Parliament Resolution containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, July 8, 2015 (2014/2228(INI)).
38 European Parliament Resolution, 8 July 2015, at section 2(d)(xv).
In October 2015, the EU Commission released a new trade policy entitled “Trade for All.” In relation to the treatment of investment, the policy notes:

The need for reform is now largely acknowledged globally and ‘while practically every country is part of the global investment regime, and has a real stake in it, no one seems really satisfied with it,’ as underlined in a recent UNCTAD report. The question is not whether the system should be changed but how this should be done. While the status quo is not an option, the basic objective of investment protection remains valid since bias against foreign investors and violations of property rights are still an issue.\(^\text{39}\)

The policy further states:

The EU is best placed — and has a special responsibility — to lead the reform of the global investment regime, as its founder and main actor.\(^\text{40}\)

In setting out the concrete steps that the EU will take under this policy, the Communication document states:

- In a first step, include modern provisions in bilateral agreements, putting stronger emphasis on the right of the state to regulate, something which was not sufficiently highlighted in the past. EU bilateral agreements will begin the transformation of the old investor-state dispute settlement into a public Investment Court System composed of a Tribunal of first instance and an Appeal Tribunal operating like traditional courts. There will be a clear code of conduct to avoid conflicts of interest, independent judges with high technical and legal qualifications comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body\(^\text{41}\);
- In parallel, engage with partners to build consensus for a fully fledged, permanent International Investment Court;
- In the longer term, support the incorporation of investment rules into the WTO. This would be an opportunity to simplify and update the current web of bilateral agreements to set up a clearer, more legitimate and more inclusive system; and


\(^{40}\) European Commission, “Trade for All: Towards a more responsible trade and investment policy” 2015, at 21.

\(^{41}\) European Commission, “Trade for All: Towards a more responsible trade and investment policy” 2015, at 21.
Before the end of its mandate, take stock of the progress made, review the 2010 communication on international investment and map out the way forward.42

The Commission’s Expert Advisory group met on October 9, 2015, to discuss issues relating to investment.43 The Commission answered various questions posed by the 14 member Advisory Group.

The EU has expressed policy position confirming the investor-state dispute settlement system requires reform, and that the EU will be actively pushing for a public investment court system in future.

The EU published a full public version of their proposal for an investment court within the TTIP negotiations on November 12, 2015.44 On February 1, 2016, the EU published the full text of the EU-Vietnam Free Trade Agreement which includes the Investment Court.45 This was followed by the revision of the EU-Canada free trade agreement, which includes an Investment Court, which was agreed upon by February 29, 2016.46 This proposal appears to be headed towards multilateralization by the EU as other treaties are negotiated by the European Union including treaties with Mexico, Japan, Indonesia, Tunisia, China, the Philippines, Myanmar, Australia and New Zealand.47

Colin Brown, the EU’s deputy chief negotiator on the Investment Court referred to the broad public policy question at an American Bar Association- American Society of International Law panel on the Investment Court:

42 European Commission, “Trade for All: Towards a more responsible trade and investment policy” 2015, at 22.
44 See e.g. TTIP (n
47 The multilateralization of the Investment Court is currently under consideration. For example, see EU, Initiative Impact Assessment: Establishment of a Multilateral Investment Court for investment dispute resolution, DG Trade – F2 – August 1, 2016 (Hereinafter ”Impact Assessment”) at page 3.
The debate centered on the basic question of whether a system of dispute resolution designed for commercial arbitration remains the optimal system of dispute resolution for resolving what may be very important public policy questions. Which system is best designed for holding states to account when it is possible that public policy choices can be considered as potentially infringing rights granted under an international treaty? Which system is best designed to legitimize potentially significant damages awards against a state? These were the questions which the EU polity was wrestling with.\textsuperscript{48}

The practical objectives of the new EU Investment Court policy were outlined as incorporating well-functioning International and domestic systems for dispute resolution as the WTO.” The goal was to produce awards which can be enforced under the New York Convention or the ICSID Convention.\textsuperscript{49}

To date, the United States has not publically responded to the EU Investment Court Proposal but the Investment Court has come under significant criticism. In a May 2016 panel organized by the American Bar Association and the American Society of International Law, former president of the International Court of Justice, Stephen Schwebel, raised serious concern about the Investment Court. Global Arbitration Review reported on these criticisms leveled by Judge Schwebel.

Schwebel expressed what he called the “fundamental objection” to the proposal … It would replace “a system that on any objective analysis works reasonably well” with “a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing,” he said

,... Rather than being grounded in valid criticisms, Schwebel suggested the proposal for an

\textsuperscript{48} Comments made by from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.

\textsuperscript{49} Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016. Mr. Brown said:
The basic idea is the incorporation of core characteristics of well-functioning international and domestic systems for dispute settlement such as the WTO as a means to increase the legitimacy of the investment dispute settlement system without losing its effectiveness in protecting investments.
The essence of that policy is the creation of a tribunal of first instance, composed by persons nominated by the Parties to the agreement, and chosen at random by the President of the Tribunal for hearing a particular case. This is complemented by an appeal tribunal, capable of hearing appeals on errors of law and manifest errors of facts. The system is designed to produce awards which can be enforced either under the New York Convention or the ICSID Convention, as the case may be.
investment court has come about "because uninformed or misinformed critics have made so much uninformed and misinformed noise that the EU has been moved to appease the views of those critics." \(^{50}\)

\(^{50}\) Alison Ross, Schwebel criticises EU act of "appeasement" *Global Arbitration Review*, May 24, 2016.
III. Overview and Analysis of the Investment Court System

The Investment Court with appellate mechanism has been contained in two negotiated treaties and in one current negotiation.

1. The text of the EU–Canada Comprehensive Economic and Trade Agreement (CETA) was published in August 2014. Article X.42 of the initially concluded CETA text provided that the Committee on Services and Investment “shall provide a forum for Parties to consult on issues related to this Section… (c) whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements. Such consultations will consider these issues, among others:

(i) the nature and composition of an appellate mechanism;
(ii) the scope and standard of review;
(iii) transparency of proceedings of an appellate mechanism;
(iv) the effect of decisions by an appellate mechanism;
(v) the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article X.22 (Submission of a Claim to Arbitration); and
(vi) the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.”

2. The EU released its negotiating draft for the TTIP in September 2015 and issued a revised draft on November 2015. This draft contained a full investment court proposal with an Appellate body model in Article 9 and 29.

3. On February 1, 2016, the EU–Vietnam Free Trade Agreement contained provisions explicitly adopting an Investment Court and an Appellate Body in Articles 12 and 13 of Chapter II, Section 3.
4. On February 29, 2016, Canada announced that it would henceforth adopt an Investment Court model for the CETA.\(^{51}\)

5. On October 5, 2016, media reports discussed an interpretative statement being drafted by the EU and Canada on the CETA, including commentary on the Investment Court.\(^{52}\)

**A. The Composition of the Investment Court**

The Investment Court proposal establishes a self-contained system, with a Tribunal of First Instance and an Appeal Tribunal. The number of members on each of the Tribunal of First Instance and the Appeal Tribunal varies by the treaty.

The TTIP and CETA each provide that the Tribunal will comprise of fifteen judges,\(^{53}\) while the EU–Vietnam FTA provides for nine judges.\(^{54}\) The TTIP and the EU–Vietnam FTA provides for an Appeal Tribunal with six members.\(^{55}\) The CETA has an Appellate Tribunal with an unspecified number of members, instead of providing that the “CETA Joint Committee shall promptly adopt a decision setting out” “the number of Members of the Appellate Tribunal.”\(^{56}\) Under the TTIP, one-third of the judges of the Tribunal would be nationals of a Member State of the European Union, one-third would be nationals of the other treaty party and one-third would be nationals of third countries.\(^{57}\) The same rule applies to the composition of the Appeal Tribunal under the TTIP\(^{58}\) and the EU–Vietnam FTA.\(^{59}\) CETA does not specify the nationality for the composition of the Appellate Tribunal.

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\(^{52}\) TTIP Article 9(2); CETA at Article 8.27(2).

\(^{53}\) EU-Vietnam FTA at Article 12(2).

\(^{54}\) TTIP at Article 10(2). EU–Vietnam FTA at Article 13(2).

\(^{55}\) CETA at Article 8.28(7)(f).

\(^{56}\) TTIP at Article 9(2); CETA, at Article 8.27(2); EU Vietnam FTA at Article 12(2).

\(^{57}\) TTIP at Article 10(2) (providing that the Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries).

\(^{58}\) TTIP at Article 10(2) (providing that the Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries).

\(^{59}\) EU Vietnam FTA at Article 12(2) & 13.3 (for the appeal division - providing that each Party shall propose three candidates, two of which may be nationals of that Party and one candidate a non-national).
The TTIP and EU-Vietnam FTA envision a Tribunal led by a President and Vice-President, appointed for a limited term who will handle organizational issues. The President and Vice-President will be drawn by lot from among the judges who are nationals of third countries. The same process applies to appoint the President and Vice-President of the Appeal Tribunal under the TTIP text and the EU – Vietnam FTA. The CETA does not provide for a President or Vice-President of the Appeal Tribunal but provides that the CETA Joint Committee will adopt a decision setting out the elements it determines to be necessary for the effective functioning of the Appellate Tribunal.

1. Qualification

The TTIP sets out standards for the qualification of the judges to be appointed solely by Parties to the treaties.

The TTIP requires that candidates for appointment to the Tribunal satisfy two requirements. The first requirement is that they must “possess the qualifications required in their respective countries for appointment to judicial office;” or “be jurists of recognized competence.” The second requirement is that they “have demonstrated expertise in public international law.” In addition, the TTIP states it is “desirable” that candidates have expertise, “in international investment law, international trade law and resolution of disputes arising under international investment or international trade agreements.”

The qualifications for judges on the Appeal Tribunal are the same as those for judges on the Tribunal except that for the Appeal Tribunal, members must possess the qualifications required in their respective countries for appointment to the “highest” judicial offices or be jurists of recognized competence.

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60 TTIP at Article 9(8); CETA at Article 8.27(8); EU Vietnam FTA at Article 12(8).
61 TTIP at Article 10(6); EU Vietnam FTA at Article 13(6).
62 CETA at Article 8.28(7)(g).
63 TTIP at Article 9(4).
64 TTIP at Article 9(4).
65 TTIP, at Article 10(7).
Although, at first glance there seem to be a distinction in the qualifications required for Tribunal and the Appeal Tribunal members (by the requirement that candidates for the Appeal Tribunal possess the qualifications for appointment to the “highest” judicial offices), the alternative qualification that permits an appointee to be a “jurist of recognised competence” (a term not defined) applies at both the Tribunal and Appeal Tribunal levels. This alternative diminishes any meaningful distinction between the credentials of judges on the Tribunal and the Appeal Tribunal. The lack of distinction in the qualifications for appointment contradicts the intention to create two bodies with distinct functions and a hierarchy (the Appeal Tribunal having the authority to modify or reverse the legal findings and conclusions in the Tribunal’s provisional award.)

In other international judicial bodies with an appeal mechanism, e.g., the WTO, distinct selection criteria are provided to appoint individuals to the WTO’s Appellate Body.

The criteria for appointment to the Tribunal and Appeal Tribunal, the qualification to hold judicial office and having demonstrated expertise in public international law, might overly restrict the pool of qualifying persons to serve on the Investment Court.

66 TTIP at Article 29(2).
67 For example, for Panel Members Article 8 of the DSU states:
1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
Whereas Article 17(3) of the DSU states:
3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.
See 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 36 J. WORLD TRADE 605, 627 (2002) (“The criteria that define the categories of eligible persons [to participate on a panel] are broad and leave a wide margin of discretion.”).
68 Note that there may be significant differences regarding the qualifications for judicial offices between the different EU Member States. In some Member States, freshly graduated lawyers can qualify for judicial office, whereas in others additional training and qualifications are required. See Koorosh Ameli et al., EFILA Task
qualified to hold judicial office in their jurisdiction are often specialists in domestic law and are with no demonstrated expertise in public international law. This limitation on appointment this could cause academics and experienced arbitrators with expertise in international investment law, who may not meet the formal requirements for appointment to judicial office in their home jurisdictions. However, the alternative qualifications in the proposal that the member is a “jurist of recognised competence,” can be expected to significantly increase the pool of qualifying members. Many recent cases being determined involved the consideration of applying fairness in governmental regulatory systems. Seeking additional sources of expertise, such as knowledge of comparative constitutional and administrative law or regulatory process, may also greatly benefit the composition of the Investment Court.

2. **Lack of Public Input on State Appointment of Judges**

The TTIP, the CETA, and the EU-Vietnam Free Trade Agreements contemplate that the members of the Investment Court are appointed by the state parties through the “Committee” which meets in a non-public session and would solely comprise representatives of the TTIP member governments.  

Under the TTIP, judges appointed to the Investment Court will serve “for a six-year term, renewable once,” with the exception “of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, [whose terms] shall extend to nine years.” The judges will be “available at all times and on short notice and shall stay abreast of dispute settlement activities.” They will receive a “monthly retainer fee” which the TTIP text suggests being one-third of the retainer fee for

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69 TTIP at Ch. II, Article 9(2) & 10(3); CETA at Article 8.27(2) & 8.28(2); EU Vietnam FTA at Article 12 (2) & 13(3).
70 TTIP at at Ch. II, Article 9 (5), 10 (5).
71 TTIP at Ch. II, Article 9 (5).
72 TTIP at Ch. II, Article 9 (11).
WTO Appellate Body members, i.e., “around €2,000 per month” 73 unless the Committee employs them on a full-time basis in which case they will be paid a salary. 74 Therefore, judges have the option to work part-time, so long as any additional commitments do not prevent them from being available on short notice and staying current on the activities of the Investment Court, and create no conflicts with their Tribunal appointment.

The European Commission contends that taken together, these elements are an effective way to insulate judges from any real or perceived risk of bias. 75 However, commentators have raised concerns that the selection of judges will be carried out in a political fashion and carries the risk of the treaty parties appointing individuals who, whilst independent, are more likely to be sympathetic to the interests of the State Respondents. 76 This may lead to the perception that the Investment Court is biased for the State Respondent. 77

On appointments to decision-making bodies, Global Arbitration Review reports these observations from former International Court of Justice President Stephen Schwebel raising concerns about the Investment Court, stating:

The inference to be drawn is that the system of having arbitrators chosen by the parties found in BITs and the ICSID Convention is not insulated from bias, Schwebel argued. But he detected a risk of real or perceived bias in favour of states and against investors in the Commission’s own proposal.

“I do not believe that it is the intention of the EU to entrench such bias,” Schwebel said. “But if it is to be presumed that an arbitrator appointed by an investor is biased in favour of the investor – a presumption that the record of investor-state arbitration does not sustain – is there reason to presume that judges appointed only by states will not be biased in favour of states?” 78

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73 TTIP at Ch. II, Article 9 (12).
74 TTIP at Ch. II, Articles 9 (14) and (15), 10(14) and (15).
76 EFILA Report at 15.
There is no doubt there have been past instances where states have attempted to influence the outcome of an investor-state claim. 79

Colin Brown, the EU’s deputy chief negotiator on the Investment Court referred to the concerns over bias and predisposition in the appointment of court members:

Some have raised a concern on the alleged risk of pro-state bias in the selection by the Contracting Parties of tribunal members for the court system.

From a government perspective, it would be counterintuitive to push for state biased tribunal members. What we want and need is that the standards negotiated in agreements are upheld, even in the face of powerful sovereigns. The EU, or the US or China are not immune from acting inconsistently with international agreements. There are plenty of examples of that, for example in the WTO context. Purely pro-state tribunal members will not be appointed because governments will be anticipating such scenarios.

The selection process of tribunal members will be highly scrutinized, thus making the risk that overtly pro-state individuals - or overtly pro investor for that matter – are appointed rather unlikely. Moreover, the EU and its negotiating partner need to agree on all tribunal members, so the possibility that one side might "pack" their tribunal members with pro-state individuals is slight.

It should be recalled that there are examples, such as the US-Iran Claims Tribunal, where the states appoint all members of the tribunal. Judges of international human rights courts and tribunals are also appointed by governments whereas their function is to hear cases brought by individuals against governments. This has not been regarded as problematic. 80

In summary, Judge Schwebel warns that the process could be applied unfairly and result in a biased bench. EU negotiator Brown says that the EU supports a fair and independent court and that it would not appoint the members to the court who were unfair, biased or prejudicial.

79 Indeed, this Task Force Report considers infra two situations where governments took inappropriate measures to influence the arbitrator decisions. See the discussion about the inappropriate US government influence on Judge Abe Mikva in the appointment of Judge Mikva for a NAFTA arbitration and upon the Government of Slovenia’s ongoing contact with its party appointed arbitrator in a dispute against Croatia. Infra at Section B(3.1).
80 Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.
The appointment process differs from the process to appoint judges to other international institutions such as the European Court of Human Rights (ECtHR). Although there are significant differences between investment treaties and human rights treaties, the ECtHR, in providing individuals with standing before it, is arguably one of the most analogous international bodies to the EU’s proposed Investment Court.\footnote{See Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified, 108 (Steffen Hindelang & Markus Krajewski eds., 2016).} To appoint judges to the ECtHR, each treaty party puts forward three candidates, who are then assessed and voted upon by the Parliamentary Assembly of the Council of Europe, and one is elected by the Parliamentary Assembly.\footnote{Convention for the Protection of Human Rights and Fundamental Freedoms Article 22, Nov. 4, 1950, 213 U.N.T.S. 222.}

In addition, the Investment Court requires no EU Parliamentary, national legislature or public involvement in the selection of judges to the Investment Court. There is no suggestion in any of the Investment Court treaties that the appointment of members will be conducted in a transparent manner or whether the input of various other stakeholders will be solicited. The absence of transparency in the selection process in the Investment Court is surprising, particularly because of the comments from EU leaders that the Investment Court System is “accountable, transparent and subject to democratic principles.”\footnote{See e.g., Cecelia Malmström, Proposing an Investment Court System, (Sept. 16, 2015), https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en.} The Investment Court treaties do not preclude such transparency from taking place and consideration to transparency in appointments should be strongly considered by the treaty parties.

To increase the credibility of the Investment Court System and avoid the reasonable perception of bias, judges should be selected in a transparent manner through consultations with stakeholders.\footnote{EFILA Report at 15.} Transparency should, in principle, increase confidence in judges appointed to the Investment Court. One way of addressing such concerns might be to vet potential nominees through a committee established by international professional associations such as the International Bar Association, the American Bar Association or the
International Council for Commercial Arbitration. Such a body could be created through the assistance of the OECD and could consider whether candidates seeking appointment to the court were qualified for appointment. Such approaches are used regarding the nomination of judges in the United States and Canada. Alternatively, the Parties could consider having an independent body, such as a Committee comprising of the Presidents of the International Court of Justice, the US-Iran Claims Tribunal, the European Court of Human Rights and the Inter-American Court of Human Rights, to assess the competence of potential members to the Investment Court.

Also, the treaty parties should seriously consider the advisability of making appointments of members of the Investment Court on a non-renewable longer term basis. Such steps would greatly protect the independence and the perception of fairness of the new Investment Court regarding the reasonable apprehension of bias.

These structural concerns need to be addressed to enhance the independence and legitimacy of the Investment Court. In addition, despite the fact that the members of the court will only be appointed by states, there is the possibility that the states will appoint impartial and balanced persons to the Investment Court (as they have done in the past to the International Court of Justice and other bodies) to ensure independence, neutrality, and fairness that will assure that their own investors receive a fair hearing when a dispute arises.85

### 3. Diversity Concerns

The process to replace the *ad hoc* investor-state arbitrator appointments with a new standing body of judges does not address diversity. There are no express guidelines that

85 *EFILA Report* at 15. *see also* Robert Howse, Courting the Critics of Investor-State Dispute Settlement: The TTIP draft for a Judicial System for Investment Disputes 10 (forthcoming) (“It has been put about that if the parties appoint the judges to a standing investment court, as is proposed by the EU, that they will choose persons who are favorable to states as defendants. But when the parties appoint to a standing court, as opposed to an ad hoc arbitral tribunal, they also have to bear in mind, not just their interests as defendants, but the interests of their own business and industry in effective investor protection.”), [https://cdn-media.web-view.net/i/fjji3t288ah/Courting_the_Criticsdraft1.pdf](https://cdn-media.web-view.net/i/fjji3t288ah/Courting_the_Criticsdraft1.pdf).
the members of the Investment Court comprise diverse persons. Diversity can take many forms. Gender diversity is one objective that should be considered by any modern adjudicative body. In addition, regional representation is another objective worthy of consideration. The Investment Court is not large enough to ensure there is a representative from each of the members of the EU.\textsuperscript{86}

One of the criticisms leveled against the current Investor-State Dispute Settlement system has been the lack of diversity among arbitrators, who disproportionately consist of Caucasian males.\textsuperscript{87} The Investment Court Proposal’s failure to include provisions designed to encourage diversity on the Investment Court is a missed opportunity to improve contemporary dispute settlement.

An example of a strong commitment to diversity in an international court can be seen from Article 36(8) of the \textit{Rome Statute} which created the International Criminal Court. This provides:

\begin{itemize}
  \item [(a)] The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
  \begin{itemize}
    \item [(i)] The representation of the principal legal systems of the world;
    \item [(ii)] Equitable geographical representation; and
    \item [(iii)] A fair representation of female and male judges.
  \end{itemize}
\end{itemize}

The three most senior officials of this court are women from different geographic regions.\textsuperscript{88}

Professor Sornarajah raises concerns about the lack of regional diversity of the members of the Investment Court. However, he also notes that regional diversity may not be sufficient

\begin{itemize}
  \item [(a)] For example, the complicated formula for selecting the membership of the International Court of Justice ensures that there are members for a diverse set of legal systems and from a geographically diverse set of countries.
  \item [(c)] International Criminal Court, The Presidency, available at: https://www.icc-cpi.int/about/presidency.
\end{itemize}
where the number of developing state judges constitute a minority on a particular tribunal. He states:

An Investment Court would not cure such illegitimacy. A Court would become a device for neoliberal rules of investment protection with even greater authority. Judges of the International Court of Justice (ICJ) have been sitting as investment arbitrators. A study of their record does not show that they avoid the prejudices of those arbitrators who had not also served as judges at such a high level. On the few occasions ICJ judges from developing countries sat on investment arbitration panels, they dissented from the (developed country) majority. Having a minority of five judges from developing countries is no help. They are in a minority, even assuming those appointed are not already acculturated to the neoliberal vision. They could be strong-armed into complying with majority decisions. There is no indication as to the geographical areas they may come from or how they would be chosen.\textsuperscript{89}

The absence of guidance on diversity does not impair the Committee to select judges reflecting diversity. So it remains to be seen whether the judges appointed by the Committee will reflect diversity including gender balance.

\textbf{4. Lack of Disputing Party Consultation in the Empaneling of Tribunals}

The Investment Court has no role for the disputing parties in the process for the appointing of the specific members of a panel at either level of the court. The Investment Court’s tribunals will hear cases in divisions comprising three judges, a national of a Member State of the European Union, one a national of the other treaty party and one a national of a third country. Each division will be chaired by the judge who is a national of a third country.\textsuperscript{90} The President of the Tribunal must appoint the judges composing the division of the Tribunal hearing the case rotationally, ensuring that the composition of the divisions is random and unpredictable while giving equal opportunity to all judges to serve.\textsuperscript{91}


\textsuperscript{90} TTIP at Ch. II, Article 9(6); CETA at Article 8.27(6); EU Vietnam FTA at Article 12(6).

\textsuperscript{91} TTIP at Ch. II, Article 9(7); CETA at Article 8.27(7); EU Vietnam FTA at Article 12, TTIP at Ch. II, Article (7).
The change in appointment process to a standing body comprising pre-selected judges, named by the treaty parties is a major difference between the Investment Court System and earlier ad-hoc appointment process in investor-state dispute settlement.

Members of any Tribunal in each case are appointed by the President, so the disputing parties would have no influence on which of the three judges will hear any case.

The Investment Court has been modeled on WTO dispute settlement. The Investment Court will not consider any views of the disputing parties upon the composition of the members of the particular panel on the Investment Court that will hear a case. This differs greatly from what takes place under the WTO dispute settlement process where the disputing parties to a dispute select the members of their panels based on proposals put forward by the WTO Secretariat.

The WTO approach to panel composition was described:

> The WTO dispute settlement system is based on the premise that parties will agree on who will be acting as panelists for their dispute. It is only if they do not agree that the Director General can impose such panelists. Parties may object to a proposed panelist “for compelling reasons,” including an actual or perceived conflict of interest. Disputing parties will often object to proposed panelists because they are known to have certain views on the issue in question (based on their publications) or because of the public views of their governments on the issues in dispute (based on the existence of similar legislation to that being challenged).

> The WTO Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1) provide that panelists shall be independent and impartial, and shall avoid direct or indirect conflicts of interest. In addition, the Rules of Conduct require panelists 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.92

The WTO dispute settlement system is premised on the knowledge that the disputing parties will agree on who will act as panelists for their dispute. It is only if they do not

agree that the Director General can impose such panelists. Parties may object to a proposed panelist “for compelling reasons,” including an actual or perceived conflict of interest. The WTO Secretariat produces the names of the panelists. The internal process that allows party objection has resulted in delays in panel selection and leads to an increasing number of concerns being expressed.

The WTO model was specifically not followed in the Investment Court. Instead, the disputing parties have no opportunity to raise concerns about members of a particular panel before the adjudicative process begins.

The WTO process of consulting with the disputing parties prior to empanelment has reduced the number of potential panelist challenges. The current process set out in the Investment Court proposal of having the President select the panels is not inconsistent with the WTO practice, if a consultative step was introduced before the final composition of the panel. This simple and practical practice could be followed by the Investment Court to reduce time-consuming challenges from taking place during the proceedings of the Court.
B. Ethical Considerations for the Investment Court

One of the most significant criticisms of the investor-state arbitration system has been concern over its potential for arbitrator conflict of interest.

1. TTIP Ethical Provisions

The TTIP addresses conflict of interest and ethics in Article 11:

1. The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute. 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 in any pending or new investment protection dispute under this or any other agreement or domestic law.

Articles 2 and 5 of the TTIP Code of Conduct provide more guidance about the process and impartiality.93

93 Article 2 Responsibilities to the process
Candidates and members shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interest and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former members must comply with the obligations established in Articles 6 and 7 of this Code of Conduct.

Article 5
Independence and Impartiality of Members
1. Members must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism.
2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties.
3. Members may not use their position to advance any personal or private interests and shall avoid actions that may create the impression that they are in a position to be influenced by others.
4. Members may not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment.
5. Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.
The Investment Court Proposal contains provisions which permit a challenge to an arbitrator on the limited ground of conflict of interest. Challenges can only be made within 15 days of appointment or fifteen days of discovery. The challenge process is set out in TTIP Articles 11(2) to 11(4):

2. If a disputing party considers that a Judge or a Member has a conflict of interest, it shall send a notice of challenge to the appointment to the President of the Tribunal or to the President of the Appeal Tribunal, respectively. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal or of the Appeal Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge.

3. If, within 15 days from the date of the notice of challenge, the challenged Judge or Member has elected not to resign from that division, the President of the Tribunal or the President of the Appeal Tribunal, respectively, shall, after hearing the disputing parties and after providing the Judge or the Member an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other Judges or Members of the division.

4. Challenges against the appointment to a division of the President of the Tribunal shall be decided by the President of the Appeal Tribunal and vice-versa.

Decisions on the challenge to one of the two national arbitrators are decided by the President of the First Instance Tribunal.\(^{94}\) A challenge to the President of the Tribunal is decided by the President of the Appeal Tribunal.\(^{95}\) Once a decision is taken, it is final.

The TTIP proposal also includes a process for removing judges from the Tribunal or Appeals Tribunal. Article 11(5) of the Treaty states:

5. Upon a reasoned recommendation from the President of the Appeal Tribunal, the Parties, by decision of the [...] Committee, may decide to remove a Judge from the Tribunal or a Member from the Appeal Tribunal where his behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his continued membership of the Tribunal or Appeal Tribunal. If the behaviour in question is alleged to be that of the President of the Appeal Tribunal then the President of the Tribunal of First Instance shall submit the

\(^{94}\) TTIP at Article 11 (3).
\(^{95}\) TTIP at Article 11 (4).
reasoned recommendation. Articles 9(2) and 10(3) shall apply mutatis mutandis for filling vacancies that may arise pursuant to this paragraph.

The CETA relies upon the International Bar Association (IBA) Guidelines on Conflicts of Interests in International Arbitration in CETA, and with a provision that Committee on Services and Investment “shall” adopt a code of conduct for Members of the Tribunal, which may replace or supplement the rules in the application. Here, the CETA Parties state that the “best efforts” will be made to ensure that the Code of Conduct is adopted “no later than the first day of the provisional application or entry into force of the Agreement.” A code of conduct for arbitrators for the dispute settlement chapter is included in Annex 29-B. The EU-Vietnam Free Trade Agreement contains similar ethics language as the TTIP and also provides a Code of Ethics.

The CETA also contains a removal provision. Notably, on the basis of the language in the CETA, and definition of Tribunal, the removal process would not include removal of a member of the appellant Tribunal. Presumably, this is something that the CETA Committee must then deal with. The EU-Vietnam Free Trade Agreement contains a provision similar to the TTIP, with the caveat that on a joint initiative the Parties or a reasoned recommendation the President of the Appeal Tribunal may remove a member of either Tribunal.

2. Ethical Issues in the Current Investor-State Dispute Settlement System

Ethical issues have been a consistent part of the criticism of the Investor State Dispute Settlement system. Reliance on a small coterie of repeatedly used elite arbitrators and

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96 CETA at Article 8.30, 8.44 (2).
97 CETA at Article 8.44 (2).
98 EU-Vietnam FTA at Article 14.
99 CETA at Article 8.30 (4).
100 EU-Vietnam FTA at Article 14 (5) “Upon a reasoned recommendation from the President of the Appeal Tribunal, or on their joint initiative, the Parties, by decision of the Trade Committee, may decide to remove a Member from the Tribunal or a Member from the Appeal Tribunal...”
practices such as “double-hatting” are often highlighted as a critique. As one recent study noted:

It has become normal for investment arbitrators to constantly switch hats: one minute acting as counsel, the next framing the issue as an academic, or influencing policy as a government representative or expert witness. Over the last few years, these multiple roles have become the subject of some debate. The discussion has focused on the fact that some arbitrators also act as counsel, which in some situations, can raise doubts about the arbitrator’s independence and impartiality.  

More recently, arbitrator ethical issues raised in disqualification cases include:

- Arbitrators acting as counsel
- Arbitrator and their relations with law firms
- Issue conflict in fact and law
- Continued party appointments
- Arbitrator comments
- Arbitrator and counsel relations

Such categories have been at the source of the large majority of arbitrator challenges.

2.1 Investment Arbitration Ethical Provisions

Non-binding ethical standards exist for international arbitrators and are frequently referenced in disqualification proceedings. The ethical conduct of arbitrators has been addressed by the International Bar Association through its general attempt to set out ethical rules for international arbitrators in 1987 and through its more specific attempts to address the narrower issue of conflict of interest in the IBA 2004 and 2014 Guidelines on Conflict of Interest in International Arbitration.

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102 IBA, Rules of Ethics for International Arbitrators,

103 See e.g. IBA Guidelines on Conflict of Interest in International Arbitration, 2014; IBA Guidelines on Conflict of Interest in International Arbitration, 2004.
The most important principle in the IBA Guidelines sets out independence and impartiality obligations for arbitrators:

_Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated._

Independence and impartiality obligations for arbitrators are also contained in the two most common investment arbitration rules the UNCITRAL Rules,\(^\text{105}\) the ICSID Rules,\(^\text{106}\) and the ICSID Additional Facility Rules.\(^\text{107}\) The obligations of arbitrator independence and impartiality have provided the basis for nearly every arbitrator challenge in the current investment arbitration system. These obligations have developed as a key element of the functioning of the international arbitral system.

It is also pertinent to note other obligations in these articles. The Stockholm Chamber of Commerce ("SCC") Rules and the ICSID Rules also provide that arbitrators may also be challenged on the basis of their qualifications or competence.\(^\text{108}\) The LCIA Rules state explicitly states that an arbitrator may not act as an advocate or representative of a party and that the obligation of independence and impartiality is continuing one.\(^\text{109}\) Further, UNCITRAL explicitly prohibits arbitrators with the same nationality as that of a disputing party.\(^\text{110}\)

In interpreting the ICSID Convention, various tribunals agreed upon basic definitions of independence and impartiality. The duty of independence has consistently defined as “the


\(^{105}\) _UNCITRAL Arbitration Rules 1967_ at Article 6 (4) and 10 (1); _UNCITRAL Arbitration Rules 2010_ at Article 6 (7).

\(^{106}\) ICSID Rules at Article 14 and 57.

\(^{107}\) _ICSID Additional Facility Rules at Article 8 and 15._

\(^{108}\) SCC Rules 2010 at Article 15;

\(^{109}\) _LCIA Rules 2014_, at Article 5(3) and 5(5).

\(^{110}\) _UNCITRAL Rules 1967_ at Article 6(4); _UNCITRAL Rules 2010_ at Article 6(7).
absence of external control” and impartiality has been accepted to mean “the absence of bias or predisposition towards a party.” The Abaclat Tribunal found that “[i]ndependence and impartiality both “protect parties against arbitrators being influenced by factors other than those related to the merits of the case.” It is unnecessary to prove bias in relation to both independence and impartiality under the ICSID as the standard of proof is simply the appearance of bias viewed from the perspective of a third party.

Tribunals interpreting the same obligations under UNCITRAL have come to similar conclusions. The Grand River disqualification decision stated while interpreting UNCITRAL Rule 10(1) on arbitrator impartiality, that “this is an objective standard in that it requires not only showing of doubt but doubt that is justifiable.” The same standard was stated in Vito G. Gallo v. Canada.

However, while such standards exist, few arbitrator challenges have succeeded despite some circumstances which have raised serious questions. Prior to the Blue Bank v. Venezuela decision, in over 40 challenges throughout the history of the ICSID, only one arbitrator had succeeded. Similarly, challenges under cases using UNCITRAL rules have been equally unsuccessful.

Concerns arise when the judge does not recognize the basis for a reasonable concern about the apprehension of bias. Neither the TTIP Code of Conduct nor the IBA Rules address the

113 Abaclat v. Argentine Republic at para 75.
114 Urbaser S.A. Decision on Claimants Proposal to Disqualify an Arbitrator, at para 43 (August 12, 2010); Blue Bank at para 59-61; Caratube at para 54-57.
115 Grand River Enterprises et al v. United States of America, Letter from Ana Palacio, Secretary General, ICSID, November 28, 2007 at p. 2
117 Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal (12 November 2013).
situation where a judge/arbitrator has a professional relationship with a party in interest in the outcome of the dispute but who is not a disputing party to the actual dispute. This situation arose in *the UPS of America v Canada* NAFTA Claim. The claim was between Canada and UPS of America but the dispute was predominately focused on the activities of the Canadian Post Office, a state monopoly owned and controlled by Canada. UPS challenged the appointment of an arbitrator because the arbitrator was a fee sharing partner (and chairman) of a law firm with a longstanding and significant ongoing relationship with Canada Post (billings reported by the firm to be more than $5 million euros a year). The arbitrator stated that he was independent and that in his opinion there was no conflict. When this issue was considered by the ICSID, it determined there was no conflict of interest because Canada Post was technically not a disputing party to the claim even though Canada Post’s conduct was heavily at issue. The ICSID Secretary General requested arbitrator Fortier to confirm that he was not, and would not act for Canada throughout the arbitration.\(^\text{119}\) However, a more relevant and difficult question is whether the terms of the Investment Court Proposal in the treaties are sufficiently detailed enough to address these common conflict of interest concerns. On this question, there is significant doubt that the Investment Court proposal is robust enough to address these serious concerns.

One other particularly egregious example of a past governmental and arbitrator conflict demonstrates why the Investment Court rules must be more precise, binding and transparent.

In 2001, the Government of the United States appointed a former US member of congress, and a former judge, Abner Mikva, to be an arbitrator in a NAFTA dispute against the United States. The tribunal, with Judge Mikva on it, ruled against the claim of the foreign investor. Many years later, former arbitrator Mikva admitted before a law conference he had been contacted in relation to his appointment by the United States government and informed

that free trade and the NAFTA would be over due to a public backlash won if the foreign investor won.

Michael Goldhaber, of American Lawyer, has written about the US role regarding Judge Mikva. He wrote:

Other concerns relating to power loom larger in the Eurocrat mind. One is that America rigs the system so it can’t lose to investors. Exhibit No. 1 is Loewen v. U.S., in which an arbitral panel ruled in favor of the U.S. despite finding it responsible for a miscarriage of justice. Loewen became even more infamous when arbitrator Abner Mikva, a former federal judge and White House counsel, confessed to NYU law students that U.S. officials had pressured him by warning before his appointment that “if we lose this case, we could lose NAFTA.”

A recent paper has summarized the judge’s comments about this influence:

After the Loewen award was issued, the US-appointed member of the tribunal, former US Congressman and appellate judge Abner Mikva, gave a presentation at Pace Law School in which he recounted that, after agreeing to serve on the tribunal, he met with US Department of Justice officials. “You know, judge,” he was told by the officials, “if we lose this case we could lose NAFTA.” “Well, if you want to put pressure on me,” Mikva replied, “then that does it.”

While it is understandable that states have a lot at stake when there is a public review of their actions, this does not condone governments to engage in private out of court discussions with arbitrators. This conduct was not disclosed to the disputing parties and Judge Mikva did not disclose this information when he accepted his appointment as an arbitrator despite later admitting that it influenced him in how he would decide the case before him.

The Investment Court selection criteria do nothing to address such a situation. Mr Mikva was a former US judge and a former member of the US Congress. Clearly, he would meet minimum qualification requirements but issue conflict was a real issue as was undue

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influence from the US Government regarding his appointment. When considered in this context, the qualification requirements present no meaningful protection from such improper state or court conduct.

Similarly a recent state to state arbitration held between Croatia and Slovenia presents another example of improper state contact with a member of a state-to-state dispute tribunal while the case was underway. In this circumstance, a well-known international arbitration expert was caught having detailed case strategy discussions with the party that appointed him while the case was before him.122

In both (Judge Mikva and the Slovenian arbitrator), the arbitrators agreed to act in an impartial and fair manner at the time of appointment. In both cases, not only did the arbitrator act wrongly and in a biased manner, but one state party to the dispute acted wrongly and with an absence of professional ethics.

2.2 Transparency & Disqualification Decisions

ICSID published awards in the *ICSID Reports* in 1993, although it was not until 2006, when the ICSID Rules were amended to require publication of, at minimum excerpts of awards, if the parties do not agree on the publication of the full award. Disqualification decisions are not awards based on article 48 of the ICSID Rules and their publication is not specifically covered elsewhere in the ICSID Rules. While ICSID now requests that the disputing parties consent to the publication of all procedural awards,123 Kinnear, Obadia and Gagin state this extends to “annulment, revision and interpretation decisions” in practice.124

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Numerous arbitrator disqualification proceedings have been completed utilizing the UNCITRAL Rules. Under the UNCITRAL Arbitration Rules, arbitrator challenges are made public only with the consent of the parties. Hence, certain decisions governed by the UNCITRAL Arbitration Rules are published in full, whereas others are published in digest or summary form and some are simply not publically available.

Other institutions have published digests of decisions on arbitrator disqualification. The SCC was the first arbitration institution to systematically make public its record of disqualifications. However, the SCC only releases case digests and not fully reasoned decisions. It has publically released digests of arbitrator challenges dating to 1999. Similar to the SCC, the London Court of International Arbitration has published case digests. Digests of LCIA arbitrator disqualification proceedings between 1996 and 2010

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125 UNCITRAL Arbitration Rules at Article 32(5).
126 NAFTA proceedings were one of the first investor state disputes settlement systems to develop transparency provisions. In Annex 1137.4 to NAFTA Chapter Eleven, the United States and Canada confirmed that when either party is a disputant, the award would be published by either the respondent State or the disputant. Mexico did not sign on to this approach, instead, letting publication be governed by the applicable arbitration rules. Subsequently, in the NAFTA Free Trade Commission interpretation of Chapter Eleven in July 2001 the Commission stated that “nothing in the arbitration rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven Tribunals, apart from the limited specific exceptions set forth expressly in those rules.” The Commission further stated that the parties were to “make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal” with the exception of business confidential information or information that is otherwise privileged or protected from disclosure.
128 On a technical level, Walsh and Teitelbaum note that the LCIA challenge decisions are administrative decisions and not awards or orders, and therefore the Court is not required to give reasons for its decisions. Thomas Walsh & Ruth Teitelbaum, The LCIA Court Decisions on Challenges to Arbitrators: An Introduction, Arbitration International, Vol 27(3), 2011, at 286; LCIA Arbitration Rules at Article 29.1.
were disclosed by the LCIA in 2011. As noted by Charles Brower “publication would refine the work started by the IBA Guidelines on Conflicts of Interest in International Arbitration.”

This high standard for ethical challenges, with non-transparent decisions regarding ethical challenges, has been a consistent issue. The lack of a more robust set of binding ethical rules for arbitrators has long been discussed as one element lacking in investment treaty arbitration.

### 3. Judicial Independence & TTIP

While independence has been defined in the UNCITRAL and ICSID rules in relation to ad hoc arbitration different considerations for independence arise when creating a permanent institution. Specifically, in relation to situations of conflicting financial relationships and term limits/reappointments.

#### 3.1 Conflicting Financial Relationships

The investment court proposal contains states that “judges of the Tribunal and Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt.” The European Federation for Investment Law and Arbitration Task Force Report has raised serious concerns relating to footnote 6 to Article 11 of the TTIP. A portion of Article 11 of the TTIP states that that Judges “shall not be affiliated with any government” to which a footnote, footnote 6 is appended. Footnote 6 states:

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131 This valid concern was raised in the European Federation for Investment Law and Arbitration Task Force Report at page 16. The Report stated “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
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.

This provision raises series questions about independence and the objective perception of bias, it must be read with the TTIP Code of Conduct which contains a specific provision on independence including “relationships” and “financial interest”. Having a judge receive an income, over and above the state income in the treaty, from a state surely would create “a relationship” or “financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.”132 Clear rules should be established to ensure that any payment outside of non-contingent superannuation is prohibited. Better wording is necessary here to protect fairness and neutrality. Because of the effect of footnote 6, the TTIP Investment Court Proposal provides conflicting answers about these situations:

- Can a person sit as a judge with an economic relationship with a government but where that relationship is not engaged in the present specific dispute?
- What about if the subject of the current dispute could affect the interests of a government in which the judge is involved, but that government is not directly involved in the present dispute?
- What about the situation where the judge has an economic relationship with a state enterprise other entity controlled by a government but that is not formally a part of the government? Would that be acceptable?
- What about the situation where there is a continuing relationship between persons paid by governments or working for governments who sit on the court?

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132 TTIP Proposal, Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators, at Article 5(5).
On these concerns, the terms in the Investment Court proposal address some of the serious concerns raised by civil society, and which were identified and reflected by the EU Parliament about addressing arbitrator conflict.

### 3.2 Concerns Regarding Judicial Re-Appointment

The current draft of the Investment Court does not adequately address ways of protecting the public from tainted decisions arising from improper governmental and arbitrator actions. Judicial independence issues are also a consideration in the reappointment process, and serious questions remain about whether reappointment is desirable.

The WTO Appellate Body is selected in a process similar to that being proposed in the Investment Court. There has been a great deal of criticism about the non-transparent nature in which the US government has been preventing the appointment of highly qualified individuals to the WTO Appellate Body who have exercised independent views. The clear intent has been to ensure that members of the WTO Appellate Body hold views that are highly favorable to the states who support their appointment. To make this problem worse, all this process has taken place entirely in closed-door meetings, so information about the actual discussions has been difficult for the public to obtain.

Professor Gregory Schaffer has recently summarized these troubling developments:

The initiative began when the Office of the United States Trade Representative publicly lambasted and refused to support the reappointment of US member of the Appellate Body Jennifer Hillman, supposedly for failing to defend US perspectives. Hillman was a former Commissioner of the US International Trade Commission, former General Counsel of the USTR, and now teaches at Georgetown. The USTR continued when it blocked consensus for the selection of James Gathii to the Appellate Body. Gathii, a chaired professor at Loyola University Law School in Chicago, would have been the first and only black, sub-Saharan African member of the Appellate Body during its twenty-year history.

Now, the USTR has taken its most extreme step to date by proclaiming that it will block the reappointment of the South Korean judge Seung Wha Chang. (Appellate Body members are elected for a four-year term, renewable once). The reason given is not because Mr. Chang demonstrated a lack of judicial competence or independence. On the contrary, Mr. Chang is a former national judge who has a doctorate from Harvard Law School and is the endowed Nomura Visiting Professor of International Financial Systems there. Rather, the USTR
opposes judge Wha Chang because he participated in decisions against the United States. Now South Korea plans to retaliate by threatening to block the replacement candidate for another Appellate Body member. The Appellate Body would then be reduced to five from seven, catalyzing a legitimacy crisis.\textsuperscript{133}

The desire to find WTO panelists with preconceived views favorable in advance for the state is at the heart of the WTO Appellate Body appointment difficulty. There is a real risk, evidenced from the most recent WTO Appellate Body appointment process, that appointments to the Investment Court will be made in the same manner. Governments will have “long memories” and will use reappointment to chastise those panelists who fairly go where the evidence takes them in a claim.

These actual results of the closed-door appointment process in the WTO do not inspire confidence in the independence and fairness of those who might be appointed by the Committee to the similar mechanism being proposed in the Investment Court. All of the same concerns raised by civil society about bias and pre-conceived interests cannot be addressed in an appointment process that is non-transparent and where public voice and public interest is not engaged.

\textbf{3.3 Issues Raised by Term Limits & Removal}

The members of the TTIP First Instance Tribunal will be appointed for terms of six years, with the seven first judges being appointed to terms of nine years.\textsuperscript{134} The members of the Appellate Tribunal will also be appointed for a six-year term, with the first three members being extended to nine years.\textsuperscript{135} Both judges of the First Instance and Appeals tribunals will have terms that are renewable once. Issues related to term limits and re-appointments have been previously discussed above.

\textsuperscript{134} TTIP Proposal at Article 9 (5)
\textsuperscript{135} TTIP Proposal at Article 10(5)
TTIP Article 11(5) on the removal of judges remains unclear. The article states that on a reasoned recommendation stemming from the President of the Appeals Tribunal, the Parties may remove a member “where his behavior is inconsistent with the obligations set out in paragraph 1 and incompatible with his continued membership of the Tribunal or Appeal Tribunal.” This article, as it drafted, requires further clarity. It is not clear who could petition for the removal of a member. Further clarity is needed on whether the party engaging in the challenge is the disputing party or a third party. This could be clarified the rules that the Tribunal issues.

While Article 11(5) specifies that the basis of the decision must be that a member’s actions were “inconsistent with the obligations set out in paragraph 1 and incompatible with his continued membership”, further detail on the exact circumstances may be a further issue. The grounds for removal that are “incompatible with continued membership” presumably differ from a conflict of interest challenge which relates to a specific case, however, it is not clear what specific circumstances would warrant removal of a judge.

The removal of a judge is a serious action, however, ultimately this removal must be confirmed by the Parties. The European Federation for Investment Law and Arbitration Task Force has raised concerns whether the President is the correct decision maker for conflict of interest determinations. Similar considerations would apply here. Having the state parties being the final decision maker on the removal of the judge does not provide the requisite independence or impartiality necessary to fairly consider the situation and instill public confidence in the legitimacy of the Investment Court.

To improve the equality and independence of the removal process, the TTIP Parties could consider having an independent body, such as a Committee comprising of the Presidents of the International Court of Justice, the US-Iran Claims Tribunal, the European Court of Human Rights and the Inter-American Court of Human Rights, to review recommendations from the President of the Appeals Tribunal. An outside opinion would reinforce the independence of the removal process and strengthen the equality of parties.
4. Judicial/Member Ethics

The incorporation directly into the TTIP of ethical obligations standardizes the obligations for all disputing parties over all disputes under the TTIP. The procedure to challenge arbitrators will now be harmonized with substantive obligations.

The independence and impartiality obligations in the Code of Conduct are all in mandatory terms. They explain the basis of what would constitute independence and impartiality for a member of the Investment Court. Including mandatory obligations is an improvement on the current ethical obligations in investment dispute settlement.

Article 2 of the TTIP Code of Conduct places certain obligations on “candidates.” This term is not defined and it remains unclear when such obligations would apply. Further, clarification should be provided.

Article 4 sets out the Members Duties. Article 4(2) provides that the member “shall not delegate” their duties to consider the issues raised in the proceeding. This obligation may be responsive to certain claims alleging that it has not been the arbitrator who has drafted awards or decisions. Such a provision may limit the role of law clerks to judges.

4.1 Concerns Regarding Double-Hatting and Pre-existing Issue Bias

Nothing prohibits Judges of the Investment Court from acting as arbitrators in ad hoc investment disputes taking place outside of the Investment Court system. Investment Court members may also engage in potentially troubling conduct if they sit as arbitrators. In such a circumstance, the member may still have an interest in “siding” with one party for additional appointments to tribunals or advisory work taking place outside of the Investment Court. The context for the consideration of bias regarding members of the Investment Court must be considered in its entirety and not solely regarding the Investment Court.
The focus of disputing parties on selecting arbitrators with pre-conceived views on issues which will be in dispute is a serious issue. A UNCTAD discussion paper raised the issue in the following way:

Particular concerns have arisen from a perceived tendency of each disputing party to appoint individuals sympathetic to their case. Arbitrators’ interest in being re-appointed in future cases and their frequent ‘changing of hats’ (serving as arbitrators in some cases and counsel in others) amplify these concerns.\(^{136}\)

The Commission specifically noted this ethical conflict in its public consultation, stating:

There is concern that arbitrators on ISDS tribunals do not act in an independent and impartial manner. Because the individuals in question may not only act as arbitrators, but also as lawyers for companies or governments, concerns have been expressed as to potential bias or conflict of interest.”\(^{137}\)

Commissioner Malström characterized the conflict of interest in “double-hatting”:

Many are concerned that the system creates conflicts of interest because arbitrators are also lawyers and might expect to get business from the investors in future.\(^{138}\)

A recent task force by the American Society of International Law and the International Bar Association produced a Joint Task Force Report on this impact of “issue conflict” in international arbitration.\(^{139}\) The Joint Task Force Report stated:

The term ”issue conflict“ has come to be widely used in international arbitration literature and, increasingly, in arbitrator challenges, but the term has no settled definition. In a recent decision upholding a challenge to an arbitrator on this basis, Judge Peter Tomka, then-President of the International Court of Justice, set out his understanding of the matter:

The basis for . . . a challenge invoking an “issue conflict” is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue


impartially, but rather with a desire to conform to his or her own view. In this respect ... some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not per se sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of prejudgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.\textsuperscript{140}

The ASIL – ICCA Joint Task Force Report concluded that the seriousness of concerns about the prevalence of double-hatting has been exaggerated. The Joint Task Force Report states:

In reality, public concern appears to have surpassed the actual incidence of disqualifications based on prejudgment. The “two hat” scenario, in particular, appears to be relatively rare in the context of Investor-State arbitration. The cases indicate that past service as an advocate is generally not objectionable; it is only when the context may require participants to take inconsistent positions in related situations at the same time that continued service has been found problematic.\textsuperscript{141}

A few paragraphs later, the Joint Task Force concludes by noting:

The difference between prejudgment of legal issues generally and of those posed in a specific dispute may offer a relevant analytical framework for prejudgment challenges. ... efforts to define inappropriate prejudgment pose a key conceptual difficulty: when is it acceptable to have a closed mind? The answer necessarily requires judgments about which legal issues are still justifiably open for persuasion; it would not be reasonable to challenge an arbitrator because he or she believes in the right to due process or the relevance of the Vienna Convention on the Law of Treaties to treaty interpretation. Focusing on the arbitrator’s view about a legal concept in the abstract necessarily requires making value judgments about which legal issues are still justifiably open to persuasion. Perhaps a more convincing line between acceptable and inappropriate predisposition would be whether an arbitrator is open to considering opposing views of both parties in the particular case.\textsuperscript{142}

Steps can be taken to improve the perceived independence of the Investment Court. Reconsideration should be given to the approach permitting re-appointment of Investment Court members. The conditions that would support an objectively-based perception of bias or lack of independence must be reduced for there to be public confidence in the decisions made by the members of the Investment Court. To reduce the objective risk of bias in relation to “reappointment” concerns, members could be appointed to terms that are not renewable. This would end the risk of such “reappointment bias”.

4.2 Disqualification Challenge Procedure

On the disqualification procedure, the European Federation for Investment Law and Arbitration Task Force raises concerns about this process. It states:

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.\textsuperscript{143}

The concerns raised by the European Federation for Investment Law and Arbitration here are well-founded and are worthy of being addressed by the treaty parties.

In addition, there are concerns regarding the lack of public transparency requirements associated with ethical challenges to members of the Investment Court. Challenges to a member of the Investment Court under the CETA are made to the President of the International Court of Justice under CETA Article 8.30. The ICJ President has 45 days to decide.

\textsuperscript{143} European Federation for Investment Law and Arbitration Task Force Report at page 16.
4.3 Post-Employment Restrictions

TTIP Article 2 and Code of Conduct Article 6 impose specific post-employment restrictions upon members of the Investment Court. Article 6 of the Code of Conduct provides:

All former members must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decision or award of the tribunal or Appeal Tribunal.

4.4 Ethical Obligations Regarding Staff

Article 4(3) of the Code of Conduct provides that “Members shall take all appropriate steps to ensure that their assistant and staff are aware of, and comply with, Articles 2, 3, 5 and 7 of this Code of Conduct.”

While the rules are imposed on each member of the Investment Court, there are no rules imposed directly upon the staff and assistants supporting the Investment Court. TTIP Articles 9(16) and 10(15) provide, in bracketed text, that the ICSID or Permanent Court of Arbitration “shall act as Secretariat for the Tribunal and provide it with appropriate support.” Here, it would be arguable whether the definition of “assistant” under the Code of Conduct would extend to employees of the ICSID or PCA. As these rules are imposed upon the member of the court, and not staff or assistants, it is unclear what would occur if a staff member breached an ethical obligation. Presumably, under the current terms as they are drafted, any consequence of a breach, of either a member’s own staff or potentially even the ICSID or PCA, would fall upon the member themselves. There is no meaningful regulation upon the staff supporting the Investment Court, and a heavy ethical burden placed on Members.

One additional point, in relation to the use of a secretariat such as the ICSID or PCA, can be made. While it may not be problematic for there to be a division between the trial and appeals level for day-to-day secretariat work, it would be of great importance to ensure separation of any staff of those institutions that may engage in substantive work. Here, the

144 The term "staff" in respect of a member, means persons under the direction and control of the member, other than assistants.
ethical rules may be expanded to ensure that they include any substantive work performed by those institutions.

4.5 Transparency & Challenge Decisions

One of the key concerns relating to the investor-state system was a lack of transparency. The TTIP proposal incorporates by reference the UNCITRAL Rules on Transparency to disputes under the TTIP investment chapter. Specifically, regarding decisions on disqualification TTIP Parties would have to publish disqualification decisions or awards.
C. Procedural & Functional Aspects of the Investment Court

Justice and rule of law are not simply satisfied by the announcement of a new adjudicative body. The substantial powers this new court will have and whether its decisions will bind and will be enforceable are important considerations for the state parties to the treaties creating the Investment Court. Such decisions may result in substituting an unenforceable body for a previously enforceable arbitration body (under investor-state dispute settlement). This would be highly damaging to the effectiveness of the trade and investment treaties exchanged between the state parties.

This section considers the powers and procedures of the new Investment Court proposal and if it can carry out the objectives of the treaty and also those set out by the EU.

1. Procedural Rules

Much of the effectiveness of the Investment Court will depend on its powers, be they expressed or inherent. In creating an international court, it is crucial to ensure a fair and efficient procedure for both the disputing parties and members of the Tribunal. An example of a carefully crafted international court is the International Criminal Court with detailed rules on procedure, evidence and the powers of that Court. The International Criminal Court was designed as a permanent international court, predicated on various earlier ad hoc international tribunals.

The procedural rules adopted by the Investment Court are greatly important. The Tribunals which comprise the Investment Court (both of First Instance and the Appellate Tribunal) will make important decisions governing both private and public rights and obligations. The Investment Court must either have a detailed set of rules or there be a conferral of clear authority that will enable the Investment Court to craft robust and necessary rules of procedure in a transparent manner.
1.1 ICSID, UNCITRAL & Other Rules

A claim may be submitted under one of three arbitration rules (the ICSID Convention, the ICSID Additional Facility or the UNCITRAL Arbitration rules). Under TTIP Article 6(2), claims could be permitted under any other rules that the disputing parties agree upon within 30 days of the submission of the claim. TTIP Article 6(3) is unclear about how any of these procedural rules govern a claim before the Investment Court.

TTIP Article 6(3) states that “the rules on dispute settlement referred to in paragraph 2 shall apply subject to the rules set out in this Chapter, as supplemented by any rules adopted by the Committee, by the Tribunal or by the Appeal Tribunal.” One concern is the TTIP rules can be changed after the treaty has entered into force by the Committee, by the Tribunal hearing the case or in an eventual Appeal. This is problematic and could alter the fairness and equality of the dispute resolution process.

It is unusual, from a due process and rule of law perspective, that a disputing Party Government engaged as a party in a particular dispute before the Investment Court should be able to be engaged in the modification of rules involving a dispute in which it is involved, while the other disputant is not so engaged. Such special privileges for one party appear to bring the administration of justice into question when fundamental fairness and equality in the process are so unbalanced.

Second, an additional concern is that TTIP Article 6(3) does not provide that the particular rules selected by the Claimant with the submission of the claim apply as the procedural rules. By comparison, NAFTA Article 1120(2) clearly confirms that “the applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.” The clear wording of the NAFTA is not contained in either the TTIP and the CETA. Instead, this section provides that all rules of the different agreements apply to a claim subject to modifications made by the TTIP itself, or by other rules adopted by the Committee, the Tribunal or the Appeal Tribunal. The resulting treaty text results in an uncertain outcome.
By comparison, some guidance is provided in the EU-Vietnam Treaty. Article 9(1)(a) of the EU–Vietnam treaty limits the consent to arbitration by the Claimant solely to arbitrations made under the dispute procedures laid out in the section and the Claimant’s designation of a particular set of dispute settlement rules (one of three in Article 7(2)) as “the applicable dispute settlement rules.” This reference to the “applicable dispute settlement rules” selected by the claimant is not included in either the CETA or the TTIP.

Third, the Investment Court has been left with a large margin to craft its own rules. TTIP Article 9(10) simply states that “the Tribunal shall draw up its own working procedures.”\(^{145}\) The CETA provides the same guidance.\(^{146}\) The absence of clear guidance in the TTIP, EU-Vietnam Treaty and CETA about the general approach to Tribunal procedural norms, and the absence of reference to the domestic or international law is surprising. The absence of any mention of common tribunal principles such as the requirement to ensure due process, fairness and the rule of law is a procedural lacuna, and results in the overarching course of the Investment Court being unknown.

If this lack of guidance was attributable to the exigencies arising from the need to quickly agree to a text during complex negotiations, a similar situation was confronted by the parties who rushed to create the US–Iran Claims Tribunal in 1981. Article III(2) of the Algiers Accord which established the US–Iran Claims Tribunal. This standing tribunal would “conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal”\(^{147}\)

\(^{145}\) TTIP at Article 9(10).
\(^{146}\) CETA at Article 8.27(10). The EU Vietnam Treaty in Article 7(4) says “The rules on dispute settlement referred to in paragraph 2 shall apply subject to the rules set out in this Chapter, as supplemented by any rules adopted by the Trade Committee, by the Tribunal or by the Appeal Tribunal.
\(^{147}\) The Claims Settlement Declaration (Algiers Accord) Article III (2), January 19, 1981. The Claims Settlement Declaration was one of the different accords which established a resolution to the involuntary holding of US diplomats from the American Embassy in Teheran after the Iranian revolution.
David Caron and Lee Caplan in their commentary on the UNCITRAL Arbitration Rules discussed how the UNCITRAL Arbitration Rules came to be applied for the US-Iran Claims Tribunal:

In seeking to design an international arbitral tribunal quickly, the negotiators of the Accords found that they, fortunately, had a set of procedural rules prepared by distinguished experts representing various legal systems of the world, namely the UNCITRAL Arbitration Rules. Instead of lengthy negotiations on the subject, the drafters of the Declaration simply make reference to the UNCITRAL Arbitration Rules.148

The UNCITRAL Arbitration Rules provided a strong basis upon which to craft procedural rules for a standing tribunal. Stewart Baker and Mark Davis wrote:

As the parties foresaw, the UNCITRAL Rules did require some modification. After all, the UNCITRAL Rules were written primarily for the arbitration of a single case, while the Tribunal comprised several panels with responsibility for thousands of claims. Even though the UNCITRAL Rules were written broadly to find acceptance in countries with very different legal and economic systems, no one could expect to apply the UNCITRAL Rules in the Tribunal without alterations.149

Establishing the rules for the US – Iran Claims Tribunal has been described by Judge Howard Holtzmann, a former member of this tribunal. He described the process and the decision making undertaken by the US – Iran Claims Tribunal in deciding how to apply the UNCITRAL Rules, initially designed for ad-hoc arbitrations, to apply to a permanent standing tribunal.150

Judge Holtzmann notes that the US-Iran Claims Tribunal had to consider how to apply the UNCITRAL Arbitration Rules to a permanent tribunal that has more than one chamber. Judge Holtzmann also notes that the UNCITRAL Arbitration Rules referred to the term “the arbitral tribunal” but it would be unclear whether these rules would apply to a proceeding before the Court of First Instance, a chamber of the entire Court of First Instance, or the

appellate body. For the US-Iran Claims Tribunal, the term “arbitral tribunal” was used to mean either the full Tribunal or a chamber of the Tribunal. According to Judge Holtzmann, this was a workable way of applying the UNCITRAL Arbitration Rules to a standing arbitral body.\(^{151}\)

Judge Holtzmann points out there were several reasons the UNCITRAL Arbitration Rules needed to be modified by the US-Iran Claims Tribunal. The UNCITRAL Arbitration Rules were drafted to establish procedures for ad-hoc arbitrations contemplated to be decided by a sole arbitrator or three arbitrators. They were conceptualized to address jurisdiction over a single commercial dispute where a confidential award would be rendered and then the Tribunal would no longer continue after the decision was rendered. He notes it was necessary to modify the UNCITRAL Arbitration Rules to have them applied to the circumstances where a tribunal would consider issues of public law and where tribunal might consider questions of the precedential weight of a full tribunal of over three members. He also raised questions about whether the UNCITRAL Arbitration Rules could apply to interpretive disputes and disputes regarding the performance of rights under the treaty. Judge Holtzmann noted these were disputes that were more typical of public international law than those of arbitral tribunals which dealt with issues of contracts expropriation and measures affecting private property rights. Judge Holtzmann also noted that it was important that since the new tribunal would not simply be deciding one case at the time and then ceasing to operate but instead would consider ongoing cases within a subject that the procedures consider the circumstances.\(^{152}\)

Judge Holtzmann discusses how the US-Iran Claims Tribunal addressed the rules as an entire tribunal of nine members rather than delegating the issue to a drafting committee. He noted these procedural rules were considered in draft form by the legal counsel who would represent the two disputing parties before the Tribunal; namely the United States and Iran. These legal counsels were considered in the rulemaking process. It was

\(^{151}\) Howard Holtzmann, Drafting the Rules of the Tribunal“ at 78.
\(^{152}\) Howard Holtzmann, Drafting the Rules of the Tribunal“ at 78.
considered advisable in practice that modifications made by the Tribunal only be made after giving a full opportunity for counsel who would actually follow the rules to give their views. This could be done through an open consultation on proposed changes.

1.2 Due Process and Procedural Fairness

One point of concern is a failure to require that due process, fairness or procedural fairness be applied by the Investment Court and also regarding the enactment of the rules or in the enactment and the modification of the rules by the Committee or the Investment Court. NAFTA article 1115 states:

This section establishes a mechanism for the settlement of investment disputes to the sure is both equal treatment among investors of the parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

A similar provision could be added to further bolster this point. Although similar language is included in the UNCITRAL Rules, such language is not explicit under the ICSID Convention, the ICSID Additional Facility or any of the ICSID Arbitration Rules under either of these World Bank dispute processes.

The glaring absence of any reference in the treaty to recourse to general international law, fairness, transparency, due process or the rule of law is notable. This absence was noted as a cause of concern by Judge Stephen Schwebel, a former president of the International Court of Justice, at a panel on the Investment Court.\textsuperscript{153} The lack of grounding of the TTIP, CETA or Vietnam FTA upon international law does not further the rule of law or the progress of transparency and fairness. This absence may well result in decreased predictability in decisions made by the Investment Court and a significant diminishment in protection for investments made under the Treaty.

Another concern arises from provisions which reduce the scope of the Investment Court to rule upon disputes before it. An example can be seen in CETA Article 8.22 which limits the

authority of the Investment Court to only consider measures identified in the original request for consultations. This is a significant limitation on the authority of a Tribunal. Regularly, information is disclosed during an investor-state claim which brings to light previously unknown wrongful acts taken by the state. The impact, if any of such information, should properly be within the jurisdiction of the Tribunal sitting and determining issues, however, the effect of Article 8.22 is to prevent the Investment Court from deciding on the related issue that was previously unknown.

Also, often, states have engaged in wrongful, abusive or discriminatory acts in retaliation against the commencement of an international claim by a Claimant.¹⁵⁴ Such actions had been considered by the Tribunal with the authority to address the underlying dispute. The effect of CETA Article 8.22(e) is to extend the duration of such disputes by requiring the claimant to bring a second claim regarding ongoing wrongful conduct. The reduction of the Investment Court’s authority will diminish its effectiveness and should be removed to preserve efficiency, cost savings, and finality for all the parties to a dispute.

### 1.3 Place of Arbitration

The Investment Court proposal omits to designate a place of arbitration. This lack of certainty is problematic regardless of whether the Investment Court is designated a court or an arbitral Tribunal. As drafted, the Investment Court is not a de-localized body.

Accordingly, the place of arbitration will have an important impact on enforcement of the decisions of the Investment Court, whether they are international arbitral awards or international court decisions. The place of arbitration is another key element that may affect procedural guidance (and also potentially relevant to questions of enforcement). The absence of a specifically designated place of arbitration, when coupled with an absence of

¹⁵⁴ See for example, the situation in the *Pope & Talbot v. Canada* NAFTA claim where the Tribunal found that Canada had engaged in a retaliatory and wrongful investigation of the Claimant arising directly out of the Claimant filing of a NAFTA Claim.
procedural law, compounds the procedural difficulties with the practical operation of the Investment Court proposal.

This issue must be addressed within the context of the Investment Court treaties or within an auxiliary international law instrument. One important immediate step that could be taken by the Treaty parties is to establish a “Headquarters Agreement” with the government of the territory where the Investment Court will be based. Such Headquarters Agreements” may also spell out the privileges and immunities of the institution and provide further context to the nature of the Investment Court including that the Tribunal is governed by international law.

1.4 Timing of Awards

The TTIP addresses a long-standing concern on the length of the timing of the arbitration process. TTIP Article 28(6) states that the Tribunal shall issue a provisional award within 18 months of the submission of a claim. That award will then become final in 90 days if there is no appeal. If the Tribunal can not issue its award during this timeframe the Tribunal shall “adopt a decision to that effect” and will specify the reason for the delay. The 18-month time period would greatly increase the speed of investment disputes for counsel and the disputants.

Similarly, the TTIP addresses timing issues at the appeal level. Article 29(3) provides that the “appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision.” The article further states that in “no case should the proceedings exceed 270 days.”

While the requirement for shorter arbitration procedures is welcomed, specifically for Members of the Tribunal, the timing requirements may be difficult to meet particularly when read with the ethical requirement in Article 4(2) of the Code of Ethics stating that Members shall not delegate their duties. There is also no set time limit for the Tribunal, which may cause equally lengthy delays in receiving awards. Further, there appears to be no consequence to either the Tribunal or appeals tribunals for breaching such timing limitation requirements.
2. Functioning of the Court

2.1 Governing Law

The Investment Court has no explicit governing law in the TTIP, the CETA or the EU-Vietnam FTA. This is unusual and also makes the underlying treaties difficult to interpret.

2.2 Applicable Law

Article 33 of the UNCITRAL Arbitration Rules and Article 42 of the ICSID Convention require that the arbitral tribunal applies the law designated by the Parties to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal will apply the law determined by the conflict of law rules which it considers applicable if the UNCITRAL Rules govern. If the ICSID applies, then the Tribunal will consider whether the law of the Contracting state and the rules of international law apply. The TTIP sets out the applicable law in Article 13 which provides:

(1) The Tribunal shall determine whether the treatment subject to the claim is inconsistent with any of the provisions referred to in article 1(1) bracket alleged by the claimant.

(2) ... The Tribunal shall apply the provisions of this agreement and other rules of international law applicable between the parties. It shall interpret this agreement, in accordance with the customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties.

(3) For greater certainty, pursuant to paragraph one, the domestic law of the parties shall not be part of the applicable law...

The Tribunal is to consider whether the treatment at issue in a claim contradicts the TTIP and apply the TTIP agreement and "other rules of international law applicable between the parties." Further, the TTIP provides that rules of interpretation be under customary rules of interpretation of public international law.

The CETA text is largely similar to the TTIP. CETA Article 8.31(1) provides that:

1. When rendering its decision, the tribunal established under this section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of
Treaties, and other rules and principles of international law applicable between the Parties.

The reference to “applicable law between the parties” appear to follow the wording contained in Article 31(3)(c) of the Vienna Convention which assists in the harmonization of international law norms between different treaty parties.

There are concerns about relying on the choice of wording applied in the CETA and the TTIP on this issue. In particular, we raise concerns with the adoption of the words “international law between the parties” in the TTIP and CETA. This formulation differs from the reference to “the rules of international law,” which are used in the US Model BIT (see article 30 of the 2012 Model) treaties such as the NAFTA and the Energy Charter Treaty.\textsuperscript{155}

The Investment Court arises from a treaty between the EU and its member states and the other treaty parties, such as Canada, Vietnam and potentially the United States. Under the current formulation, claimants will face uncertainty in knowing which respondent they will face when bringing a claim (that is will the respondent be the EU or a member state). The identity of the responding party will determine the applicable international law between the disputing parties.\textsuperscript{156} The EU has signed very few treaties and had a limited role in developing international law. The formulation selected in the Treaty accordingly raises significant questions about the international that may be applicable.\textsuperscript{157}

This imprecision is a serious matter of concern, and it needs to be rectified before the Investment Court goes into operation. A simple rectification would be to replace the words

\textsuperscript{155} Prof. Martins Paparinskis notes that “each word and concept of Article 31(3)(c) [...] has raised further interpretive questions relating to the scope of permissible reference. Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment, Oxford University Press, 2013, at 155.

\textsuperscript{156} This wording does not look at interpreting international law from the EU member states, but instead it relates only to the common international law between the EU and the other treaty signatories (Canada, the United States, and Vietnam).

\textsuperscript{157} It is possible that under Article 31(3)(c) of the Vienna Convention on Law of Treaties the EU practice before the WTO and the UN Charter would apply. Quite possibly, the provisions of international customary law could also apply within this category of applicable law. This uncertainty would be resolved conclusively by better treaty drafting.
“rules of international law applied between the parties” with “rules of international law” that has been used successfully in many other agreements.

No specific national law was set out by the treaties. This issue should be rectified to avoid repeating the problems experienced by the US – Iran Claims Tribunal. This problem would be entirely remedied simply through a reference in the treaty or a protocol to it.

2.3 Domestic Law

Likely because of internal EU federalism concerns, the Investment Court proposal is careful to ensure that EU law is specifically not considered part of the governing law. Traditionally, most earlier treaties have addressed this potential problem by including language that ensures that international law will govern besides the treaty. However, the TTIP has included very unusual language which provides that domestic law is to be determined to be a fact.

Mixed claim commissions have taken the view that municipal law does not take on the same importance before an international tribunal that might otherwise apply. The US – Mexico Claims Commission concluded in Illinois Central Railway that claims before international tribunals involve the application of international law. As such, existing court decisions might provide an answer to address the effects of the absence of a clear governing law for the treaties which have created the Investment Court.

158 See the discussion on this program supra.
159 Prof. Kaufmann-Kohler & Potestà also recommend that this issue be addressed through an explicit reference in their paper at ¶102. They say “Whatever the choice, it should be clearly articulated. The experience of the Iran-US Claims Tribunal shows the problems resulting from ambiguities in this respect. The question of whether the Tribunal’s proceedings were subject to Dutch Law (as a result of the Tribunal’s seat in The Hague) or whether they were completely ‘a-national’ or ‘de-localized’ was indeed a heavily debated question.” Kauffman-Kohler & Potestà at 42.
160 TTIP at Article 13(3) and 13(4). CETA at Article 8.31(2).
161 See the decision of the Permanent Court of International Justice in Mavrommatis Palestine Concessions (Preliminary Objections), PCIJ, Series A, No. 2 at 14 – 16.
Of particular concern is the express limitation upon the jurisdiction of the Investment Court to make any meaningful and independent assessment of the local law. Article 13(3) and (4) states:

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

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

Many investment claims have had to consider whether local measures were disguised barriers to trade or were actually genuine measures of general application. TTIP Article 13(3) removes the independent ability of the Investment Court to come to its own determination about a local enactment. If local law is to be considered by the Investment Court, the court is required to “follow the prevailing interpretation of that provision made by the courts or authorities of that Party.” A similar instruction is contained in CETA Article 8.31(2) and Article 16(2) of the EU–Vietnam FTA.

This is a serious weakness in the fairness and independence of the Investment Court. Members of the Investment Court must be able to make their own determinations about the facts. Given that investment tribunals have often had to examine the ramifications of new laws not yet tested by the courts (because of the short time frames and waiver of local remedies rules imposed by many investment treaties), many cases will probably rely upon the Investment Court having to apply a “prevailing interpretation” of the legislative measure at issue “made by the authorities of that Party” whose conduct is at issue.

Such a requirement imposed upon the Investment Court severely compromises the ability of the Investment Court to address any independent determination of issues. This limitation on the ability of the Investment Court to properly carry out its functions severely weakens the functionality and integrity of the Investment Court. The absence of a meaningful and robust procedural law raises serious potential concerns about the
workability of dispute settlement under the Investment Court. In addition, the absence of any additional guidance raises even more serious immediate concerns on procedural matters.

2.4 Lex Fori

None of the treaties containing the EU Investment Court proposals provides any guidance on the procedural aspects to be addressed by the Tribunal. This procedural law, often referred to as the *lex fori*, assists the tribunal in how it carries out its business. In his treatise on procedural law in international arbitration, George Petrochilos refers to the *lex fori* as being how a tribunal can:

*determine how a decision will be reached, but not what that decision will be. In this sense, so far as a court is concerned, the *lex fori* supplies the interface between facts and rules*"163

Typical questions would include how to address the law applicable on the merits including the standard and burden of proof, questions of jurisdictional competencies, the authenticity of documents, questions of applicable privilege, questions about the admissibility of claims, and issues addressing finality of judgment.

Precedents from mixed tribunals state that local law may not be substituted as the missing source of procedural law. The US-Mexico Claims Commission ruled in the *Parker Claim* that:

*The Commission expressly decides that municipal restrictive rules of adjudicative law or of evidence cannot be introduced... [*T]he greatest liberality will obtain in the admission of evidence ... As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure.*164

163 George Petrochilos, *Procedural Law in International Arbitration* at §1.16 at 6.
The mixed Claims Commission in the *Shufeldt Claim* was equally clear stating "it is clear that international courts ... cannot be bound by municipal rules in the receipt and admission of evidence."\textsuperscript{165}

Hence, the precedents from the mixed claim commissions are of limited utility as they identify that international law rather than national law should apply. Even if domestic norms could apply here, there is a tremendous diversity in the domestic procedural law amongst its members, let alone with adding additional Treaty Parties such as Vietnam, Canada or the United States. This extreme diversity requires more specificity about procedural rules, rather than less.

With respect to international law, the specific procedural standards are not abundantly clear. There may be good reason to revisit this issue for further clarity in the operation of the Court. There is nothing in the Investment Court proposal on how evidence is to be presented or received by the Investment Court. Also, there is no indication about the powers of the Investment Court to obtain documents or information production from those before it. Moreover, there is no express power to compel witnesses or to address the consequences of non-compliance.

At this point in time these procedural questions are unaddressed by the Investment Court proposal:

1) Who can represent disputing parties, the effects of non-appearance of a party or a witness and the powers of the Investment Court to compel attendance;
2) Whether either level of Investment Court Tribunal can hear Ex Parte motions?
3) What powers does the Investment Court have to address evidentiary matters such as:
   i) the standard and burden of proof;
   ii) The power of the tribunal to order evidence;

iii) admissibility of evidence;
iv) the requirement to obtain evidence from third parties;
v) the approach to evidence (written, interrogatory and viva voce evidence) and formalities regarding evidence.

4) The conduct of witnesses, parties, counsel and third parties before the Tribunal;
5) Will the Court have the power to address parallel proceedings taking place in other venues on the same issues and between the same parties;
6) Matters regarding confidentiality or the production of evidence where there are claims of privilege;
7) Motions and Interim relief including summary motions, determinations of an issue and other interim applications;
8) Formalities regarding the issuance of awards;
9) How to address truncated tribunals if the non-availability of a member of the Tribunal occurs (such as through illness, or death);
10) Powers regarding:
   o Issue recommendations and other orders
   o Order documents and information
   o To address a wide variety of Information Request processes
   o To reprimand, censure or order fines
   o The powers to rectify, revise, correct or interpret awards

Further, it would seem preferable if these rules would be standardized for the Investment Court in dealing with all treaties before it. However, this may not be the case given that each treaty that creates an Investment Court creates a separate Investment Court. The multiplicity of separate Investment Courts is an issue that would be addressed in the event that the Investment Court is multilateralized.

2.5 Interim Measures of Protection & Unfounded Claims

The terms of the TTIP provide guidance on the powers of the Investment Court to address interim measures of protection. TTIP Article 19 gives the Investment Court the power to:
... order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. The Tribunal may not order the seizure of assets nor may it prevent the application of the treatment alleged to constitute a breach.¹⁶⁶

There is also some guidance about summary motions to determine an issue and other interim applications provided by TTIP Articles 16 and 17. Under Article 16, a respondent may file a preliminary objection to the Tribunal “that a claim is manifestly without legal merit.” Under Article 17, a Respondent may file a preliminary question on a matter of law that a claim for damages (under Article 28) cannot be made by the Claimant. The TTIP requires that the entire tribunal proceeding is stopped while this preliminary question is addressed. Article 17 states:

1. Without prejudice to the Tribunal’s authority to address other objections as a preliminary question or to a respondent’s right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article 28 (Provisional Award), even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts, not in dispute.

2. An objection under paragraph 1 shall be submitted to the Tribunal as soon as possible after the division of the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial or statement of defence. An objection may not be submitted under paragraph 1 as long as proceedings under Article 16 (Preliminary Objections) are pending, unless the Tribunal grants leave to file an objection under this article, after having taken due account of the circumstances of the case.

3. On receipt of an objection under paragraph 1, and unless it considers the objection manifestly unfounded, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or provisional award on the objection, stating the grounds therefor.

¹⁶⁶ Similar powers are contained in Article 19 of the EU-Vietnam FTA and Article 8.33 of the CETA.
This provision clarifies that the Investment Court has the authority to make such interim
determinations but this power is prescribed only regarding motions made by Respondents
and not to motions made by all parties to the dispute.

Additionally, TTIP Article 17 does more than simply confirm that the Investment Tribunal
has the power to address preliminary motions. The Article 17 procedure institutes a highly
impractical procedure designed to procedurally favor Respondents while, at the same time,
procedurally harming Claimants. Article 17(3) requires that a Tribunal shall suspend its
proceedings on the merits of a claim and immediately address the Respondent’s objection
that the claim would not result in damages or restitution being ordered under TTIP Article
28 unless the Respondent’s request is “manifestly unfounded.” This Article does not apply to
any objections made by a Claimant that issues raised by a respondent should be struck and
it does not permit any discretion to a Tribunal to consider whether it is practical or fair to
take such issues at this time.

It is unusual to require a tribunal, at the outset of its work, to suspend its ongoing work,
based on a mere allegation by the respondent party that the claimant will not be entitled to
damages, an issue which would be determined in future after the tribunal’s deliberations
are completed. This preliminary motion would be heard well before the evidence
regarding the case has been filed and briefed by the disputing parties. The unilateral nature
of this requirement raises questions about the systemic fairness of the operation of the
Investment Court, and raising issues about due process and fairness to all the parties
before the Court.

On this reading of the preliminary damages motion made under Article 17 appears to
require a Tribunal to make a finding that the Claimant would not obtain damages or
restitution under Article 28. However, Article 28 only contemplates relief taking place on a
request from the claimant after hearing the disputing parties. Article 28(1), entitled
“Provisional Award” states:

1. Where the Tribunal concludes that the treatment in dispute is inconsistent with the
provisions referred to in Article 1(1) alleged by the claimant, the Tribunal may, on the basis
of a request from the claimant, and after hearing the disputing parties, award only:
(a) monetary damages and any applicable interest;
(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution.

To properly determine an Article 17 objection that a claim will not result in an award of damages or restitution, the Tribunal of First Instance will be potentially required to consider the entire case to be in a position to determine whether a breach that will require the payment of damages has occurred.

Another reading of this provision would simply require a tribunal assess if the claims made were for monetary damages, and not other relief, such as repealing a state’s domestic law. However, a concern is that in litigating investment disputes states may argue the former interpretation.

Given this uncertainty as it is currently drafted the Article 17 mandatory preliminary motion non-damages determination is poorly considered. It could make the procedure for determining investment disputes by the Investment Tribunal impractical, unbalanced between the disputing parties and may be abused by Respondents. It also could mean that both disputing parties would be required to file and argue all their evidence on breach and damage in the determination of a preliminary motion rather than in the orderly course. The operation of Article 17 raises questions of balance, fairness, and workability.

2.6 Assistance from National Courts

There are also questions about how the Investment Court will interact with existing domestic courts and tribunals if assistance from national courts is needed. Article 19 provides that the Investment Court does not have the authority to enjoin the treatment at issue in a claim as an interim measure. An Investment Tribunal may need, on its own or at the request of one of the parties to a dispute, to seek assistance from national courts to obtain such relief, such as enjoining measures that are the subject of the dispute, under
those domestic legislative arrangements that enable assistance to foreign courts or tribunals.\(^{167}\)

Such assistance from national courts is routinely required to obtain judicial assistance in the furtherance of the inquisitorial process, or in order to more fully make the Investment Court's jurisdiction complete, such as to obtain injunctive or declaratory relief to preserve evidence or to maintain the *status quo* between the disputing parties pending the determination of a matter. This may involve document production, orders to preserve evidence and property or other actions that would be essential to preserve the power of the Investment Court to make its authority meaningful.

### 2.7 The Absence of Any Binding Sanctions for Breach of Obligations

Neither the TTIP nor the CETA provides the Investment Court with the power to impose any sanctions upon someone engaged in a violation of the rules or a court’s order during the conduct of a claim. It is not clear this would be an inherent power of the Investment Court. Questions that could be posed are whether the Investment Court can and if so, to what extent the Investment Court govern the conduct of lawyers appearing before it or interveners and third parties? What rules apply to the situation where a staff person at the ICSID (a World Bank Group body) or the Permanent Court of Arbitration, with confidential knowledge regarding an active case, departs the World Bank Group and commences work for one of the parties to the dispute or for someone with an interest in the case such as an intervener? This lacuna is surprising given the concerns in the TTIP consultation over the risk of conflict of interest and ethical violations.

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\(^{167}\) The determination of whether the Investment Court is a court or tribunal is important with respect to the issue of judicial assistance and enforcement. This issue is addressed in the section of this Report on Enforcement.
2.8 Intervention & Non-Disputing Parties

A specific power granted to the Investment Court is the power to allow natural or legal persons with a direct and present interest to intervene in the proceedings.\(^{168}\) This power appears to be separately grounded from the powers of the Investment Court under Article 18 to permit *amicus curiae* (friend of the court) briefs. Both result in enhanced transparency for the Investment Court for the public.

Under TTIP Article 23, to obtain status, an intervenor must establish a “direct and present interest in the result of the dispute.” What remains unclear is what intervention means under Article 23. TTIP Article 23 grants an intervenor the right to present a statement of intervention, to attend the hearing and the right to give an oral statement. The TTIP gives no indication about this oral statement or if there are other associated rights that go with intervention.

Third party rights were introduced slowly to the WTO and to investor-state arbitration. In the past, intervenors and amicus curiae have not found investment tribunals to be transparent or open, absent clear direction in a treaty or in a written instrument by the treaty parties. Even the practice from the WTO demonstrates that the amicus process has been haphazard and capriciously applied. Often, the absence of textually-specific binding provisions to permit intervention has resulted in denial of status. For there to be meaningful public participation, as intervenors or as amicus curiae, there must be clear textual rules setting out the ability of the public to participate.

The TTIP text provides no guidance on the role of an intervenor. Is an intervenor permitted to do more than simply present an oral presentation during a hearing? Can an intervenor’s oral statement relate to addressing witness testimony and evidence? These powers are not easily concluded from the limited text. It seems that the permitted statement would not extend to permit an intervenor without leave of the court to call its

\(^{168}\) TTIP at Article 23(1). This provision is not included in the CETA or the EU – Vietnam FTA.
own witnesses, examine witnesses offered by either disputing party, or make information requests from the disputing parties.

To ensure that the Investment Court meets the best practices of open and transparent process, there must be more clarity in the Rules of Procedure to guide public expectations about the meaning of the intervener provisions for the Investment Court.

There must be rules to ensure that the overall issue determination process done by the Investment Court is fair and efficient. On this front, Article 23 imposes no limits on interveners other than specifying that a business creditor does not have a direct and present interest. The Article includes no protections to ensure that intervention is done in the public interest and not for unfairly affecting on the parties to the investment dispute. There are no anti-abuse obligations imposed on interveners, nor are there any disclosure requirements on interveners to prevent interveners who are funded by a disputing party. Practically, these rules provide no guarantee that the Investment Court’s acceptance of an intervener would assist the Investment Court in determining the issues by providing new or independent views.

There is a costs impact on the role of interveners. Questions remain relating to whether the costs of interveners will be a material issue with the issue of posting Security for Costs under TTIP Article 21(1) or in relation to the awards of costs at the end of the dispute. This could be further clarified in the text, or rules of the court to avoid future disputes on this issue.

In addition, non-disputing treaty Parties also have rights to file observations throughout an investment dispute. Similar to other multilateral treaties, non-disputing parties will receive materials via the Respondent, and the “Tribunal shall accept or, after consultation with the disputing parties, may invite written or oral submissions.” In relation to the EU,
a “respondent” may be the EU or a member state.\textsuperscript{171} Given the current wording, the “the Tribunal shall accept” submissions from non-disputing parties, the acceptance of submissions would appear to be drafted in mandatory language. While the TTIP is not yet final, a serious concern relating to non-disputing party submission, is the definition of “non-disputing Party.” The CETA is technically an agreement between Canada and the European Union and its Member States” therefore both the EU and its member states are Parties. One reading of TTIP Article 22 could result in the highly unfair practice of a claimant receiving a statement from every EU Member State, and then being in a position to respond. There is nothing to limit the statements received.

In the NAFTA context, it has become common place for all the non-disputing state parties to make submissions in every dispute. This could cause a burdensome practice, tantamount to another round of pleadings imposed upon the tribunal and the disputing parties. Specifically, the claimant must take significant time and expense in responding to each non-party submission. One possible solution would be to limit non-disputing Party submissions only to the EU itself (which would speak on behalf of all the member states) in a manner consistent with the EU’s competence over international investment policy.

**2.9 Powers of the Court to make awards**

TTIP Article 28 identifies the limits on the Investment Court’s jurisdiction in making awards.

Where the Tribunal concludes that the treatment in dispute is inconsistent with the provisions referred to in Article 1(1) alleged by the claimant, the Tribunal may, on the basis of a request from the claimant, and after hearing the disputing parties, award only:

(a) monetary damages and any applicable interest;
(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 2.5 of Section 2 of Chapter II (Expropriation).

...
The Tribunal may not order the repeal, cessation or modification of the treatment concerned.

What is not clear are associated powers of the Investment Court. Can the Investment Court issue views about the inconsistency of state action with international legal norms?

One point not considered in the draft is whether the Court could be used for purposes above specific investment disputes. One potential additional use could grant the Investment Court the power to provide advisory opinions for the treaty parties about the meaning of the underlying treaty, regarding specific state actions, such a power could be conferred upon the Appellate Tribunal, which could sit as one court to determine such issues.

3. Appeals

One of the central concerns raised by the EU Consultation Process, and contained within the negotiating objectives for the EU, was a requirement there be an appellate body for the investor-state dispute resolution process followed in future treaties such as the TTIP. Given the critical importance of the Appellate Body to the negotiations, it is surprising that there has been so little focus on the actual powers of appellate review within the Investment Court Proposal.

3.1 Appeals Procedure

Other than a 90 days’ time limitation on appeals, the TTIP’s Investment Court proposal contains a limited guidance on appellant procedure. Article 10(10) states that the Appeal Tribunal shall draw up its own working procedures. Similarly, the CETA establishes an Appeal Tribunal, although the CETA contains no express power for its Appellate Tribunal to draw up

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173 TTIP at Article 29(1)
its own working procedures. A disputing party lodging an appeal shall provide security for costs and “for any amount awarded against it in the provisional award.” Including such a provision for both costs and any amount awarded against either party could severely restrict any appeals made by either claimants or respondents because a provisional award may include significant monetary compensation against respondents. This impediment to accessing the appellant division should be revisited and could be changed to reflect the general provision of security for costs stated in Article 21 where security for costs are not a requirement, but discretionary.

There is no test set out for granting an appeal, solely grounds for appeal, which are discussed below. Article 29(2) provides that the Appeal Tribunal “may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded” but there is no legal test articulated in the text to provide any standard for dismissing an appeal on these grounds. Presumably, all appeals that pass such a test will be heard. The security provisions may act as a counter-balance for any appellant considerations, however, such provisions may also deny access to justice. Clarifying a test for granting an appeal, specifically in relating to an error of law is something that could be an addition to the appeal framework.

3.1 Grounds for Appeal

TTIP adopts the grounds for annulment of awards in Article 52 of the ICSID Convention and two additional grounds, the error of law or error of fact. These grounds are set out in article 29(1):

Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are:

(a) that the Tribunal has erred in the interpretation or application of the applicable law;

174 TTIP at Article 29 (4).
(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 of the ICSID Convention, in so far as they are not covered by (a) and (b).

The grounds for appeal of the decisions of the Investment Court are exceedingly narrow. The TTIP has adopted the highly narrow and deferential grounds of annulment from the ICSID to become the bedrock for appeal in Article 29(1)(c). Limiting the powers of review to the highly restricted and narrow annulment grounds adopted by the ICSID is somewhat surprising given the public desire for appellate tribunal.

ICSID Annulment Committees may either reject an application for annulment or grant the annulment in whole or in part. This can only be done on the specific basis of the grounds set out in Article 52 of the ICSID Convention. The Annulment Committee does not make factual determinations or determine the merits of the dispute. If an annulment is granted, decisions may be resubmitted to a new ICSID panel. Article 52 of the ICSID permits annulment on these grounds:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(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.

ICSID Annulment Committees have clarified that Article 52 does not permit an Annulment Committee to correct errors of law, or to address the inconsistency between differing arbitration tribunal decisions.

The European Federation on Investment Law summarized this distinction:
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 concern – 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. Furthermore, while an appeal allows the court to modify 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.”

The wording of the Investment Court proposal merges two conceptions – that of a broad appeal jurisdiction in Article 21(1)(a) and (b) with the much more constrained annulment language in Article 21(1)(c), which incorporates ICSID Convention annulment with its deferential standard requires a demonstration of more than patent unreasonableness. These two standards do not fit well together in creating a coherent or workable appellate jurisdiction for the Investment Court. As the European Federation on Investment Law notes:

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. 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.

This problem is made even more difficult because of the absence of a clear governing law in the Investment Court.

There are significant concerns relating to the ground that the Tribunal “manifestly erred in the appreciation of the facts, including the appreciation of the relevant domestic law. This “manifest error” language standard presents significant concerns about the establishment of a predictable standard of review. It is not clear from this wording if the appellant judges will not be performing a de novo review. To appreciate a “manifest error” of the facts, a

judge must necessarily review the factual record submitted. The current wording would prohibit or limit the Appeal Tribunal to confirming a reasonable appreciation of the facts or substituting factual determinations. The WTO Appellate Body has had to deal with difficulties regarding its ability to remand when there has been a manifest error of facts. The powers of the Appeals Tribunal to address these issues, through an explicit remand to complete certain factual analysis left undetermined by a tribunal of First Instance should be considered to address such functional problems and to make the Appellate Tribunal more effective.

Such a ground for appeal may cause additional pressure on First Instance members to spend considerable additional time in developing and writing of the facts to avoid an appeal on this matter. This may further increase the pressure of conforming to the time limits placed on tribunal members. Finally, there are significant unanswered questions about the extent to which the Appellate Body will emphasize precedent arising from the highly constrained annulment procedure in the ICSID when determining of the applicable standards for appellate review in the Investment Court.

### 3.2 Determining the Appropriate Standard for Review?

Another outstanding question is whether the Appellate Tribunal should give any deference to the decisions of the panels of First Instance. This raises questions that go to the very nature of the role of each level in the Investment Court. On questions of law, TTIP Article 29(1)(a) is clear there will be no deference accorded. All questions in the interpretation or application will be appealable. The situation is different when dealing with questions of fact. TTIP Article 29(1)(b) provides guidance that only the most serious errors of fact can be reviewed. Only manifest errors of fact can be reviewed by the court.

What is not clear is how to deal with the many mixed questions of fact and law. It is likely that many, if not most, questions considered before an Appellate Tribunal will be mixed questions of fact and law. On this important question, the treaty provides no guidance. Instead, there is conflicting guidance from the treaty based on the characterization of the question before the Appellate Tribunal. This lack of clarity is likely to result in serious
operational difficulties for the Appellate Tribunal – namely should the correctness standard applied to law instead of the more deferential standard applied to review of questions of fact? Because the questions arise from the potentially conflicting provisions of the TTIP, this could also result in domestic court action to address what could be an improper exercise of jurisdiction by the Appellate Tribunal.

Such potential conflict should be resolved by the terms of the treaty itself to avoid such ongoing uncertainty about the effectiveness and finality of decisions taken by the Appellate Body.

3.3 Determining the Powers of the Appellate Tribunal?

The Treaty parties to the Investment Court must carefully consider whether the Appellate Tribunal will have authority to make its own determination of facts or whether all questions of fact must be remanded back to the Tribunal of First Instance? The WTO Appellate Body does not have the power to make factual findings, and its only power is to remand the question to the original panel, even if the Appellate Body has concluded that the original panel was unqualified to make the determination. Given the powers of review already conferred on the Appellate Tribunal, it is recommended that the problems of the WTO Appellate Body not be replicated and that the Appeal Body have the power to remand to make factual findings of its own, remand to a new panel at the Court of First Instance or to the original panel.

Also, in appellate review, often new relevant questions will arise that were not considered in the original hearing. In such a circumstance, will the Appellate Tribunal have the power to address issues not raised or submitted from the Tribunal of First Instance.

Finally, there are questions on the authority of the Appellate Tribunal to order interim and interlocutory relief to preserve the status quo pending the determination of the Appeal? The powers are unclear.
**3.4 Award Revision**

TTIP Article 28(7) provides that the Tribunal of First Instance “shall” revise its provisional award if the Appeals Tribunal modifies or reverses it. It is not clear why after a ruling by the Appeal Tribunal, if it modifies or reverses “a 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 Appeal Tribunal.”

It is not clear why the Tribunal of First Instance would need to revise its provisional award. Such a process does not appear to be supported by any other practice of other international courts and tribunals.

In implementing such changes, it does not seem clear why the Tribunal would need to hear from any disputing party. This, in effect could skew any finality that an award from the appellant court would have.

Article 28(7) states the award will become final within 90 days after its issuance, and that the Tribunal “shall seek to issue its revised award within 90 days of receiving the report of the Appeal Tribunal.” Hence, a final award from the appellant tribunal will only become final possibly 180 days after it is issued by the Tribunal. If the Tribunal of First Instance revises its award, this only creates further delays in the enforceability of any award from the appellant body.

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177 TTIP at Article 28(7).
D. Costs

Costs are an important consideration in all forms of dispute settlement. One longstanding concern from users of investor-state arbitration has imposed significant and often prohibitive demands by investor-state tribunals for the payment of costs. When coupled with the costs of legal representation and extensive expert witness testimony, it is not uncommon for costs to run into the millions of dollars per side. The attribution of costs has become an important question in investment treaty arbitration. To assess the Investment Court proposal on costs, it is helpful to consider the existing approach followed under the major arbitration rules on costs in investment arbitration.

1. Cost Allocation Under ICSID, ICC and UNCITRAL Rules

Article 61(2) ICSID Convention gives the arbitral tribunal broad discretion to decide how and by whom the costs of the proceedings shall be paid. These costs include the expenses incurred by the parties for legal representation, the fees, and expenses of the members of the Tribunal and any institutional costs for the facilities of the Centre. No specific guidance is provided in the ICSID Convention as to which principles should be followed to allocate costs (e.g., loser pays or equal sharing of costs).178

Article 37(4) ICC Arbitration Rules merely states that the final award shall fix the costs of the arbitration and decide which of the parties shall bear the costs or in which proportion the costs shall be borne by the parties. According to Article 37(5) ICC Arbitration Rules, the arbitral tribunal may consider any circumstances it considers relevant, particularly the parties’ conduct in the arbitration. The “costs of the arbitration” include fees and expenses of the arbitrators, ICC administrative expenses, fees and expenses of any experts appointed by the tribunal and reasonable legal and other costs incurred by the parties (Article 37(1) ICC Arbitration Rules). The arbitrators’ fees are subject to adjustment by the arbitral tribunal depending on “exceptional circumstances” of the case (Article 37(2) ICC Arbitration Rules).

178 See Christoph H. Schreuer, The ICSID Convention, A Commentary, Article 61, 17 (2nd ed. 2009).
Article 42(1) of the 2010 UNCITRAL Arbitration Rules states that the costs of arbitration “shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion costs between the parties as it determines to be reasonable under the circumstances of the case. Article 40 of the 2010 UNCITRAL Arbitration Rules contains a definition of costs, which includes tribunal fees, arbitrators’ fees and the parties’ legal costs.

The relevant procedural provisions are set out in this table (emphasis added):

<table>
<thead>
<tr>
<th>Art. 61(2) ICSID Convention</th>
<th>Art. 37(4)-(5) ICC Arbitration Rules</th>
<th>Art. 42(1) UNCITRAL Arb. Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”</td>
<td>“4) The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. 5) In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”</td>
<td>“The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”</td>
</tr>
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</table>

2. Cost Allocation in Practice

Investor-state tribunals follow no uniform approach regarding the allocation of costs.\(^{179}\) Several principles of cost allocation have been used:

2.1 Equal Sharing of Costs

Many tribunals have split the fees and expenses of the arbitrators and institutional costs equally among the parties and ordered that both parties bear their own costs.\(^{180}\)

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Alasdair Ross Anderson v. Costa Rica, the tribunal noted that most ICSID tribunals have decided that each party should bear its own costs, unless special circumstances existed, which the tribunal declined in this case.\(^\text{181}\) Similarly, in LG&E v. Argentina, the tribunal pointed out that it adopted an “equitable allocation of costs, i.e., each party was to bear its own costs because both Claimant and Respondent had prevailed on some of their claims and defenses.”\(^\text{182}\)

While equal sharing of costs still seems the “traditional principle of cost allocation, many tribunals have nonetheless recognized other principles of cost allocation, namely the costs follow the event or loser pays rule.”\(^\text{183}\)

### 2.2 Loser Pays

In other cases, tribunals have applied the “loser pays rule and awarded costs against the losing party.”\(^\text{184}\) In ADC v. Hungary, the tribunal held that Claimants were to be fully reimbursed for their legal and other expenses, even though these costs were much higher

\(^{181}\) Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, \(\text{\$\$} 62-64 (“no special circumstances that justify a departure from the accepted and rational practice that each party shall bear its own legal costs and expenses and share equally in the costs and charges of the Tribunal and the ICSID Secretariat”).


\(^{183}\) See, e.g., LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/01/11, Award, 12 October 2005, \(\text{\$} 234 (“On one hand, it is a principle common to both national laws and international law that a party injured by a breach must be compensated for its losses and damages, which include arbitration costs. On the other hand, the loser pays’ principle is not common to all national laws or international law, and in particular is stated in neither the ICSID Convention nor the ICSID Arbitration Rules’); see further Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, 462 (“There is no rule in international arbitration that costs must follow the event. Thus, the question of costs is within the discretion of the Tribunal with regard, on the one hand, to the outcome of the proceedings and, on the other hand, to other relevant factors”) (emphasis added); see further Schreuer, November 2015 text, Article 61, para. 34 (“growing awareness of the principle that the losing party should bear the consequences in terms of costs also.”).

\(^{184}\) See, e.g., Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, 17-20 et seq.
than the costs incurred by Hungary.\textsuperscript{185} In most of the cases that adhere to the “loser pays rule, however, tribunals have awarded only parts of the costs or a higher amount of the overall costs against the losing party.”\textsuperscript{186} For instance, in \textit{PSEG v. Turkey}, the tribunal ordered Respondent to pay 65\% of the overall costs, although Claimants did not prevail on major portions of their claims. The tribunal argued that Claimants did prevail on jurisdiction and had no option but to initiate the proceedings in order to obtain justice.\textsuperscript{187} In \textit{Lemire v. Ukraine}, the tribunal determined that Claimant was the “overall winning party, without having completely prevailed in a single issue and that Claimant should therefore only be allowed to recover his costs partially.”\textsuperscript{188}

\textbf{2.3 Costs as Sanction for Procedural Misconduct}

Tribunals have also awarded costs against a party as a sanction for improper procedural conduct.\textsuperscript{189} In \textit{Generation Ukraine v. Ukraine}, the tribunal found harsh words in awarding costs against the losing Claimant, holding that Claimant’s presentation of its claim was “convoluted, repetitive, and legally incoherent,” and “lacked the intellectual rigour and discipline one would expect from a party seeking to establish a cause of action before a [sic] international tribunal” and further relied on two cases that had been partially annulled, which Claimant did not disclose to the tribunal.\textsuperscript{190} In \textit{Phoenix Action v. Czech Republic}, the tribunal awarded costs against Claimant, because not only did Claimant lose, but in the

\textsuperscript{185} \textit{ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary}, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, 530 \textit{et seq.}, 533 (“In the present case, the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. This was a complex, difficult, important and lengthy arbitration which clearly justified experienced and expert legal representation as well as the engagement of top quality experts on quantum. The Tribunal is not surprised at the total of the costs incurred by the Claimants. Members of the Tribunal have considerable experience of substantial ICSID cases as well as commercial cases and the amount expended is certainly within the expected range. Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole.”) (emphasis added).

\textsuperscript{186} Schreuer, \textit{The ICSID Convention, A Commentary}, Article 61, 20.


\textsuperscript{188} \textit{Joseph Charles Lemire v. Ukraine}, ICSID Case No. ARB/06/18, Award, 28 March 2011, 381.

\textsuperscript{189} See generally Schreuer, \textit{The ICSID Convention, A Commentary}, Article 61, 22 \textit{et seq.}

\textsuperscript{190} \textit{Generation Ukraine, Inc. v. Ukraine}, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶ 24.2, 24.6, 24.7.
tribunal’s view, he engaged in abuse of the BIT and ICSID Convention by initiating the arbitration proceedings.\textsuperscript{191}

\textbf{2.4 Security for Costs}

Although the ICSID Convention does not expressly deal with security of costs, ICSID tribunals have found that—under exceptional circumstances—requiring an advance on costs falls within the tribunal’s power under Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules.\textsuperscript{192} Any such provisional measure under the ICSID Convention requires that

\begin{enumerate}
\item a right in need of protection exists;
\item the circumstances require that the provisional measures be ordered to preserve such right, which necessitates a showing that the situation is urgent and the requested measure are necessary to prevent irreparable harm to the party's right to be protected; and
\item the tribunal in recommending provisional measures must not prejudge the dispute on the merits.\textsuperscript{193}
\end{enumerate}

While most ICSID tribunals have found these requirements were not met, in \textit{RSM Production Corporation v. Saint Lucia}, the tribunal ordered RSM to post security for costs, because the tribunal established—unlike in the previous ICSID cases where tribunals denied security for costs—that RSM did not have sufficient financial resources and was,

\begin{flushleft}
\textsuperscript{191} \textit{Phoenix Action, Ltd. v. Czech Republic}, ICSID Case No. ARB/06/5, Award, 15 April 2009, 151 (“While many ICSID tribunals have ruled that each party should bear its own costs, many have applied the principle that costs follow the event, making the losing party bear all or part of the costs of the proceeding and attorney fees. In the circumstances of this case, the Tribunal intends to employ this principle. The Tribunal has concluded not only that the Claimant’s claim fails for lack of jurisdiction, but also that the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT, and consequently, of the ICSID Convention. It is also to be noted that the Claimant filed a request for provisional measures which was rejected in its entirety by the Tribunal and which added to the costs of the proceeding. The Respondent has been forced to go through the process and should not be penalized by having to pay for its defense.”) (emphasis added).
\textsuperscript{192} See, e.g., \textit{RSM Production Corporation v. Saint Lucia}, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014, 50-51 and note 33 with further references to case law.
\textsuperscript{193} \textit{RSM Production Corporation v. Saint Lucia}, Decision on Saint Lucia’s Request for Security for Costs at ¶ 58.
\end{flushleft}
therefore, unable and/or unwilling to pay the expenses. The decision was highly debated, even among the tribunal, with one arbitrator dissenting and the other concurring in the result, but giving different reasons, suggesting that security of costs should always be granted where Claimant has third party funding, unless Claimant makes a case why security for costs should not be granted. This reasoning lead to an (unsuccessful) challenge of the arbitrator and to fierce criticism by the industry of litigation finance.

2.5 Advance on Costs

Most arbitral rules require the payment of a particular sum that can be used as an advance on costs. This should cover administrative expenses and cover the arbitrator fees. Under Article 43(1) UNCITRAL Arbitration Rules, the arbitral tribunal may request the parties to deposit an equal amount as an advance for the fees and expenses of the arbitrators and for costs of any expert advice and “other assistance that the tribunal may require.” If the deposits are not paid in full and on time, the arbitral tribunal may order the suspension or even the termination of the proceedings.

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194 RSM Production Corporation v. Saint Lucia, at ¶¶53, 82, 87.
195 RSM Production Corporation v. Saint Lucia, Decision on Saint Lucia’s Request for Security for Costs, Assenting reasons of Gavan Griffith, ¶ 18 (“My determinative proposition is that once it appears that there is third party funding of an investor’s claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.”).
196 RSM Production Corporation v. Saint Lucia, Decision on Claimant’s Proposal for the Disqualification of Dr. Gavan Griffith QC, 23 October 2014, ¶¶ 61 et seq.
198 Article 43(1) UNCITRAL Arbitration Rules: “The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c).”; Article 40(2)(a)-(c) UNCITRAL Arbitration Rules: “The term ‘costs’ includes only: (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41; (b) The reasonable travel and other expenses incurred by the arbitrators; (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal.”
199 Article 43(4) UNCITRAL Arbitration Rules: “If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.”
Under Article 36(6) ICC Arbitration Rules when an advance on costs to cover the fees and expenses of the arbitrators and administrative costs (to be borne equally by both Parties) has not been complied with, the Secretary General may direct the arbitral tribunal to suspend the proceedings; after expiry of a set time limit, the claims shall be considered withdrawn.200

3. What Does the EU Proposal Tell Us With Regard to Costs?

Section 3 of the TTIP deals with the proposed Investment Court System. The Commission Proposal contains various provisions and alternative approaches regarding cost allocation before the Tribunal and the Appeal Tribunal.

The following is an overall summary chart of TTIP cost. The different approaches ultimately to be chosen by a “[...] Committee” will be explained below.

200 Article 36(6) ICC Arbitration Rules: “When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding.”
### TTIP Cost Allocation at Tribunal of First Instance

<table>
<thead>
<tr>
<th>Standard Procedure</th>
<th>Alternative Procedure (upon decision by Committee)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Retainer fee per Member (EUR 2,000 per month) to be paid equally by US and EU</td>
<td>• Regular salary of Member instead of retainer fee, other fees and expenses fixed by Committee</td>
</tr>
<tr>
<td>• Per-day fee and expenses of Members: “Loser pays,” subject to reasonableness</td>
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<tr>
<td>• Expenses for Secretariat for Tribunal to be paid equally by US and EU</td>
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</tr>
<tr>
<td>• Costs and expenses of disputing parties: “Loser pays,” subject to reasonableness</td>
<td>• Costs and expenses of disputing parties: “Loser pays,” subject to reasonableness (assuming the provision for Tribunal of First Instance applies here as well)</td>
</tr>
</tbody>
</table>

### TTIP Cost Allocation at Appeal Tribunal

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<tr>
<th>Standard Procedure</th>
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<tbody>
<tr>
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<td>• Regular salary of Members instead of retainer fee and fees for each day worked; remuneration fixed by Committee</td>
</tr>
<tr>
<td>• Expenses for Secretariat for Tribunal to be paid equally by US and EU</td>
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</tr>
<tr>
<td>• Costs and expenses of disputing parties: “Loser pays,” subject to reasonableness (assuming the provision for Tribunal of First Instance applies here as well)</td>
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</tr>
</tbody>
</table>

### 3.1 Costs of Members and Institutional Costs in Proceedings before Tribunal of First Instance

The TTIP offers two alternative approaches regarding costs of the Members of the Tribunal.

The wording of Articles 9(12) to 9(15) sets out a standard procedure used unless the Committee follows the alternative procedure. The ultimate decision on which alternative applies depends essentially on the decision of the Committee.

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201 Article 9(14) of the TTIP: "Unless the [...] Committee adopts a decision pursuant to paragraph 15..."; Article 9 (15): “Upon a decision by the [...] Committee, ...”.
3.1.1 Fees and Expenses of Members

*Standard Procedure: Retainer Fee to be paid by US and EU, Other Fees and Expenses by Losing Disputing Party Retainer Fee*202

In the first—standard—procedure, Members of the Tribunal shall be paid a monthly retainer fee, which is to be paid equally by both Parties to the Agreement, *i.e.* the US and the EU, into an account managed by the Secretariat of “[ICSID/the Permanent Court of Arbitration].”203 The suggested retainer fee is about EUR 2,000 per month, which equals about one-third of the retainer fee for WTO Appellate Body members.204 The President, and if applicable, the Vice-President shall receive the same fee for each day worked as Members of the Appeal Tribunal. CETA and the EU-Vietnam FTA do not state the specific amount to be paid to members of the First Instance Tribunal, leaving it up to the Committees formed under those agreements to establish the retainer rate.205 The EU-Vietnam FTA states that President or Vice President retainer and daily fees shall be paid by both parties, considering their level of development.206 It would be assumed that the retainer fee would also be paid by the Parties, although that is not specifically stated. The CETA text notes that both Parties will pay the fees.207

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202 The pertinent part of Article 9 of the TTIP, which establishes the Tribunal, reads:
“12. In order to ensure their availability, the Judges shall be paid a monthly retainer fee to be fixed by decision of the [...] Committee. [Note: the retainer fee suggested by the EU would be around 1/3rd of the retainer fee for WTO Appellate Body members (i.e. around € 2,000 per month)]. The President of the Tribunal and, where applicable, the Vice-President, shall receive a fee equivalent to the fee determined pursuant to Article 10(12) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.
13. The retainer fee shall be paid equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.”

203 Note that in Article 9(13) and elsewhere, where mention is made of the Secretariat of ICSID, “Inside is in square brackets, which may indicate that this is no more than a suggestion.

204 See TTIP Article 9(12).

205 EU-Vietnam FTA at Article 12(14) and CETA at Article 8.27(12)

206 EU-Vietnam FTA at Article 12(15).

207 CETA at Article 8.27(13).
Other Fees and Expenses

Under this standard procedure, other fees and expenses of the Members shall be those determined under Regulation 14(1) of the Administrative Regulations of the ICSID Convention. These include a per-day fee for participation in the proceedings and reimbursement of certain expenses. These fees and expenses shall be allocated among the disputing parties under TTIP Article 28(4). Both the EU-Vietnam FTA and CETA also include respective rules referencing Regulation 14.

Article 28(4) of the TTIP adopts a “loser pays rule but makes it subject to a reasonableness standard. In deciding the reasonableness of costs, the Tribunal may also take into account whether the successful disputing party has acted improperly in the proceedings, for example by raising frivolous objections. The effect of the procedural misconduct on the allocation of costs has also been recognized and applied by ICSID tribunals. Where a party

208 The pertinent part of Article 9 reads:
“14. Unless the [...] Committee adopts a decision pursuant to paragraph 15 [discussed under (b)], the amount of the other fees and expenses of the Judges on a division of the Investment Tribunal shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 28(4). ”
The pertinent part of Article 28 of the TTIP reads:
“4. The Tribunal shall order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case. Such a determination may also take into account whether the successful disputing party has acted improperly, for example by raising manifestly frivolous objections or improperly using Articles 16 and 17. Where only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims’. ”
209 Article 14(1) of the Administrative Regulations of the ICSID Convention:
“Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of a Commission, a Tribunal or an ad hoc Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (…) shall receive:
(a) a fee for each day on which he participates in meetings of the body of which he is a member;
(b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;
(c) in lieu of reimbursement of subsistence expenses when away from his normal place of residence, a per diem allowance based on the allowance established from time to time for the Executive Directors of the Bank;
(d) travel expenses in connection with meetings of the body of which he is a member based on the norms established from time to time for the Executive Directors of the Bank.
The amounts of the fees referred to in paragraphs (a) and (b) above shall be determined from time to time by the Secretary-General, with the approval of the Chairman. Any request for a higher amount shall be made through the Secretary-General.
210 EU-Vietnam FTA at Article 12(16) and CETA at Article 8.27(14).
succeeds only in parts of its claim, costs shall be awarded proportionally. The Appellant Tribunal shall deal with costs in the same manner.

The fee shifting rule in place here is regarding the costs of the court rather than the costs of the other side to the dispute. Such a cost rule is unprecedented. Is it fair for a claimant to handle the fees of the judicial system when the system is no longer done as an arbitration where the Claimant can name his or her own arbitrator? Public court systems, such as international human rights courts, permit an individual to directly challenge governmental action if it is allegedly not in conformity with international law obligations.

**Alternative Procedure: Transformation of Retainer Fees and Other Fees and Expenses into Regular Salary**

In the alternative procedure, the Committee may decide that both the retainer fee and other fees and expenses of the Members of the Tribunal shall be permanently transformed into a regular salary. This means that the Members will serve on a full-time basis and the disputing parties will not have to reimburse them for their fees and expenses. This is the same in the EU-Vietnam FTA and the CETA.

**3.1.2 Institutional Costs**

In both above procedures, the Secretariat of ICSID shall support the Tribunal in the proceedings, the expenses of which shall be borne by the US and the EU equally. ICSID is also named as the Secretariat in the EU-Vietnam FTA and the CETA.

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211 The pertinent part of Article 9 of the TTIP reads:
"15. Upon a decision by the [...] Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary. In such an event, the Judges shall serve on a full-time basis and the [...] Committee shall fix their remuneration and related organisational matters. In that event, the Judges shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal.

212 EU-Vietnam FTA at Article 12(17). CETA at Article 8.27(15). TTIP at Article 9(15).

213 The pertinent part of Article 9 reads:
"16. The Secretariat of [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally."
3.2 Costs of Members and Institutional Costs in Proceedings before Appeal Tribunal

3.2.1. Fees and Expenses of Members of Appeal Tribunal

Members of the Appeal Tribunal of the Investment Court, which is established by Article 10 of the TTIP, shall be paid a monthly retainer fee and a daily fee for participation in the proceedings. The retainer fee is suggested to be around EUR 7,000 per month, which equals the fee for WTO Appeal Tribunal members. The per-day fee is to be determined by the Committee. The remuneration of the Members of the Appeal Tribunal shall be paid equally by both Parties, i.e., the US and the EU, into an account managed by the Secretariat of ICSID.

Unlike in the standard procedure for cost allocation before the Tribunal of First Instance, the disputing parties are not liable to cover fees and expenses of the Members of the Appeal Tribunal. Unlike Article 9(14), Article 10 lacks any reference to Article 28(4) of the Commission Proposal, which contains the “loser pays” rule.

Again, as for the costs of Members in the Tribunal of First Instance, the remuneration of Members of the Appeal Tribunal may be permanently transformed into a regular salary.

214 The pertinent parts of Article 10 of the TTIP read:
12. The Members of the Appeal Tribunal shall be paid a monthly retainer fee and receive a fee for each day worked as a Member, to be determined by decision of the [...] Committee. [Note: the retainer and daily fee suggested by the EU would be around the same as for WTO Appeal Tribunal members (i.e. a retainer fee of around € 7,000 per month)]. The President of the Appeal Tribunal and, where applicable, the Vice-President, shall receive a fee for each day worked in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section.
13. The remuneration of the Members shall be paid equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.
14. Upon a decision by the [...] Committee, the retainer fee and the fees for days worked may be permanently transformed into a regular salary. In such an event, the Members of the Appeal Tribunal shall serve on a full-time basis and the [...] Committee shall fix their remuneration and related organisational matters. In that event, the Members shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal.

215 See TTIP Article 10(12).
In CETA and the EU-Vietnam FTA remuneration for members of the Appellate Tribunal will be set by the Committee.\footnote{CETA at Article 8.28(7).}

### 3.2.2. Institutional Costs\footnote{The pertinent part of Article 10 of the TTIP reads: “15. The Secretariat [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.”}

The allocation of institutional costs of the Appeal Tribunal is the same as for the Tribunal of First Instance. The ICSID Secretariat shall provide support to the Appeal Tribunal, the cost of which shall be equally borne by the US and the EU. The ICSID is not specified as the designated Secretariat in the CETA, although given it is specified for the Tribunal of First Instance, it would be the likely choice. The CETA Committee must decide in relation to “administrative support” and “provisions related to the costs of appeal.”\footnote{CETA at Article 8.28(7).} At the time of writing it is not clear which institution will support appeals under the EU-Vietnam Agreement.

### 3.3 Costs and Expenses for Legal Representation of Parties

Costs and expenses that the disputing parties incur for legal representation are subject to the “loser pays” rule of Article 28(4) of the Commission Proposal.\footnote{See quote in supra note 30.} Article 28 deals with the rendering of a provisional award by the Tribunal of First Instance. Apparently, there is no separate provision in the Commission Proposal that deals with the disputing parties’ costs for legal representation in the proceedings before the Appeal Tribunal. A similar provision is in place in the EU-Vietnam Agreement and the CETA.\footnote{EU-Vietnam FTA at Article 27(4) and CETA at Article 8.39(5).} The CETA also includes a provision noting that the Committee may consider supplemental rules for claimants that are natural persons or small and medium-sized enterprises.\footnote{CETA at Article 8.39(6).}
3.4 Security for Costs

Upon request, the Tribunal of First Instance may order Claimant to post security for costs if “reasonable grounds” exist that Claimant is at risk of not being able to honor a possible decision of costs against it. TTIP Article 21(1) provides:

For greater certainty, upon request, the Tribunal may order the claimant to post security for all or part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.

This provision raises significant access to justice concerns. Often, a party bringing an investor-state claim may have made a significant investment in the host state but that investment has been frozen or even destroyed because of expropriation or discriminatory action. Under Article 21(1), an investor whose assets had been taken by a state would still have to establish that it had additional (and unspecified) capital to satisfy an award made against it.

TTIP Article 21 makes no explicit mention of a need for “urgency” and “irreparable harm,” which have been required in ICSID case law for an order of security of costs.

Compare the words of Article 21(1) with the wording of TTIP Article 28(4) on costs. Article 28(4) states:

A tribunal shall order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case.

222 TTIP Article 21 states:

“1. For greater certainty, upon request, the Tribunal may order the claimant to post security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.
2. If the security for costs is not posted in full within 30 days after the Tribunal's order or within any other time period set by the Tribunal, the Tribunal shall so inform the disputing parties. The Tribunal may order the suspension or termination of the proceedings.”
TTIP Article 28(4) adds the words “unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case.” These words are not used here.

The Tribunal may order the suspension or termination of the proceeding if security of costs is not fully posted within 30 days of the Tribunal’s order. The EU-Vietnam FTA has a nearly identical provision, although interestingly the CETA contains no specific security for costs provision.

This rule raises significant access to justice questions because often a case being adjudicated will relate to a very serious or total loss suffered by a claimant. In such circumstances, it’s difficult to demonstrate the sufficiency of assets. There is no wording assisting a tribunal in its determination – such as disproportional effect upon access to justice. Further, it seems unusual to impose a cost rule upon a claimant when such a similar rule is imposed upon the respondent.

**3.5 Costs in Mediation Proceedings**

The TTIP promotes the amicable resolution and use of Alternative Dispute Resolution mechanisms to solve disputes which might arise. These mechanisms include Mediation (Article 3) and Consultations (Article 4) among the disputing parties. Mediation and consultations also form part of the EU-Vietnam FTA and the CETA.

Annex I of Section 3 of the TTIP deals with the Mediation mechanism. Interestingly enough, the principle of cost allocation for mediation proceedings differs from arbitration proceedings. In mediation proceedings, each disputing party shall bear its own expenses.

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223 EU-Vietnam FTA at Article 22.
224 Article 8 of Annex I of Section 3 of the TTIP states:
1. Each disputing party shall bear its own expenses derived from the participation in the mediation procedure.
2. The disputing parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be in accordance with that foreseen for Members under Article 9 of Section X [3, as of now] (Resolution of Investment Disputes and Investment Court System).". 
and share equally with the other disputing party the expenses for organizational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be under that of the members of the Tribunal of First Instance. The same principles are included the EU-Vietnam FTA\textsuperscript{225} and CETA,\textsuperscript{226}

\textsuperscript{225} EU-Vietnam FTA at Annex I, Mediation Mechanism for investment disputes, Article 8.

\textsuperscript{226} CETA at Annex 29-C, Rules of Procedure for Mediation.
E. Enforcement

Article 30 of the Investment Court text governs the “Enforcement of Awards.” Its provisions borrow references from both the 1958 New York Convention and the ICSID Convention (the 1965 Treaty of Washington). By its terms, awards issued by the Investment Court would be enforceable within the states covered by the treaty, namely: United States, Canada, Vietnam and the member states of the European Union. Enforcement of Investment Court awards in states not within the territory covered by the TTIP will be more contentious and uncertain.

1. Is the Investment Court a court or an arbitration tribunal?

The fundamental question to be determined is what entity is the Investment Court under existing international enforcement mechanisms. Is the Investment Court an arbitral body (in which case the New York Convention can apply) or is it a Court, which requires a process of recognition and enforcement before domestic courts?

Michael Goldhaber has succinctly identified why the uncertainty over the characterization of the Investment Court will likely be the basis for continued dispute, stating:

Finally, when the winner of a big award asks a national court to enforce their "arbitration," the loser can simply argue that it's not an arbitral award. "TTIP decouples from the New York Convention and then says the New York Convention applies," snipes an observer. "Any lawyer can see this is highly risky. The first thing I'd do in enforcement is say, 'This is not an arbitration.'"

The EU's approach raises fresh philosophical questions on the difference between adjudication and arbitration. For instance, is the hallmark of a "court" the permanence of its judiciary, or its power to change national law? "You may say something is arbitration," notes [Robert] Hunter, "but that doesn't mean that it is."227

Courts and tribunals are both essential parts of the international law order but they have different roles and prerogatives. The Investment Court manifests elements of both a court and a tribunal.

There is a question whether the Investment Court is a court, or if it is a permanent international arbitral tribunal? Determining this simple question not only settles questions of procedure and functioning of the court, but, extends to other matters such as judicial assistance of national courts and enforcement as well.228

The questions of whether the Investment Court is a court or a standing arbitral tribunal have been considered in a paper by Professors Kauffman-Kohler and Potestà. In reviewing the arbitration features of the Investment Court Proposal, Professors Kauffman-Kohler and Potestà summarized key features of an arbitration:

(i) it is a dispute settlement mechanism; (ii) it is based on the parties’ voluntary submission; (iii) it is a private mechanism in the sense that the decision-maker is not part of the judiciary and arbitration is instituted in derogation from the State judicial system; (iv) the outcome is binding on the parties; furthermore, because of the consensual nature it is often considered that (v) the parties must play a role in the selection of the arbitrators.229

In analyzing whether the Investment Court System is a court or arbitral tribunal, Kauffman-Kohler and Potestà note:

- In both the CETA and EU-Vietnam treaties there is no mention of the word “court”;
- Arbitration rules will apply;
- That the Respondent’s consent under the treaty satisfies Article II of the New York Convention, and;
- The UNICTRAL Transparency Rules, should apply to arbitrations.230

228 This question about the characterization of the court is also addressed in Section 5 below with respect to the issue of enforcement.
230 Kauffman-Kohler & Potestà at 35.
These authors further note there is no permanent secretariat or registry created and the costs of the individual disputes are borne by the parties. These factors would support an argument that the Investment Court may be deemed to be an arbitral tribunal.

Kauffman-Kohler and Potestà also identify several indicia that support the conclusion that the Investment Court is a court. These include that “the dispute settlement mechanisms created under those treaties also have typical court-like features:

- The disputing parties have no role in the appointment of the individuals composing the panels and
- The tribunal is composed of tenured members, appointed by the Contracting States for a specific term, to whom disputes are assigned in a “random and unpredictable way. Those members are paid a retainer fee, which may in the future be converted into a salary.”

There are additional indicia that also support the conclusion that the Investment Court is a court. The TTIP itself refers to the Investment Court System in its text and it was described as a judicial institution. The EU Commission Concept Paper, states that the Investment Tribunals in the Investment Court would be a court “like other international judicial institutions”. The paper said:

By contrast, ISDS tribunals - like other international courts - only decide on the compatibility of state actions (including all state actors) with international investment rules. This distinction is particularly relevant where the rules in the international agreement are not directly incorporated into domestic law, as is the case for most international trade and investment agreements in particular in the US, Canada, and the EU. This puts ISDS tribunals on the same footing as other international judicial institutions in the sense that cases before them are not in legal terms appeals from domestic law, but rather the application of international rules.

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231 Kauffman-Kohler & Potestà at 35.
232 Kauffman-Kohler & Potestà at 35.
The Investment Court should also be considered a court because it is staffed by “publicly appointed, independent professional judges” and its goal is to maintain “consistency of judicial decisions.”

Additional support for categorizing the Investment Court as a court can be seen in the EU Parliament Recommendation to the Commission on the negotiation objectives of the TTIP. It clarifies that the existing investor-state dispute resolution system will be replaced with a new system of “publicly appointed, independent professional judges” and where there will be an “appeal mechanism, where consistency of judicial decisions is ensured”. The full guidance states the following:

(xv) ... 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 appeal 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.

To assist this analysis, it is possible to look at other standing decision-making bodies to ascertain the nature of the Investment Court. Here, the Investment Court could be compared to other international courts and tribunals such as the International Court of Justice or US-Iran Claims Tribunal.

1.1 The International Court of Justice

The International Court of the Justice (ICJ) is an international court. The ICJ is a creation of the United Nations through the Statute of the International Court of Justice. It is a dispute
settlement for states based on the voluntary consent of the state to be bound (much like an arbitral tribunal). The International Court of Justice has jurisdiction to decide cases remitted to it and to give advisory opinions. The Court is a permanent body sitting at the Peace Palace at The Hague. Its fifteen members are appointed to nine-year terms by the United Nations through a complex selection system, while ad hoc judges may be appointed by a disputing party if a judge of their nationality is not sitting on the bench. The Judges may be reappointed. There is no appeal of decisions rendered by the International Court and the International Court of Justice has the power to make binding decisions and to award restitution, monetary damages, and other relief. While ICJ decisions are binding and complied with, enforcement significantly differs from other international institutions.

1.2 The US – Iran Claims Tribunal

The US-Iran Claims Tribunal was established by way of an international agreement between the Untied States and Iran known as the Algiers Accord. It hears disputes between states and individuals under procedural rules based on the UNCITRAL Arbitration Rules. The judges of the US-Iran Claims Tribunal are state appointed and the members are styled as Judges rather than as arbitrators.

The Tribunal was created as a limited purpose institution to resolve claims stemming from incidents between two states throughout a specified time period. It required no full court structure or permanency. This Tribunal is considered a tribunal and not a court.

The US-Iran Claims Tribunal paid no great deal of attention to enforcement of awards (and on its nature as a court or tribunal) simply because it created its own primary mechanism to enforce its award. The US-Iran Claims Tribunal is an arbitral tribunal determining issues under international law. The Algiers Accord established an independent appointing

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238 Kauffman-Kohler & Potestà at 38.
authority and a Security Account which held Iranian funds through an escrow agreement with the government of Algeria acting upon the direction of the Claims Tribunal.239

David Caron writes that the adoption of the UNCITRAL Arbitration Rules in the Algiers Accord resulted in making the US-Iran Claims Tribunal subject to the national law of the place of arbitration. He states:

The UNCITRAL Rules chosen by the drafters of the Accords demonstrate both by their general structure and by Article 1(2) specifically that it can be "taken for granted that there is an applicable national law." Article 1(2) provides that "[t]hese Rules shall govern the arbitration except that where any of the Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." Thus, these internal rules of arbitration through Article 1(2) automatically adjust to the non-derogable provisions of the governing municipal arbitration law. Indeed, Article 1(2) assumes that a governing municipal arbitration law exists. In this sense, the presumed intent of parties adopting the UNCITRAL Rules calls for municipal review as clearly as if the choice instead had been the American Arbitration Association Rules or the ICC Rules. However, the presumed intent in the case of the Accords is merely presumptive because the Accords envisioned that their implementation might require modification of the Rules by the state parties or the Tribunal.240

There was a significant dispute in the Netherlands whether the US-Iran Claims Tribunal was an international tribunal or a tribunal subject to Dutch law. The Government of Iran sued to the Dutch Courts in 1983 to set aside awards of the US-Iran Claims Tribunal, claiming that the awards were subject to Dutch Law.241 The US opposed this position and argued that international law applied. This matter was resolved when Iran withdrew the set-aside application.242

241 George Petrochilos notes that the US –Iran Claims Tribunal rules (articles 32(7) and 34(3)) required compliance with any requirement of registration imposed by the law of the state where an award is made. However, he suggests that this is a weak indicator of applicable law. See George Petrochilos, Procedural Law in International Arbitration at 243.
242 George Petrochilos, Procedural Law in International Arbitration at 245.
The US government later modified its own views when in 1988 it filed an amicus brief to the US Court stating that US-Iran Claims Tribunal "awards appear to be valid and enforceable under Dutch law and therefore may be considered Dutch awards."\(^{243}\)

Whether the US – Iran Claims tribunal was an international tribunal or a foreign tribunal makes little difference to its status under the New York Convention, which applies to either.

The question of whether the US-Iran Claims Tribunal was covered by the New York Convention has been answered differently in different states. As the Security Account only satisfied claims made by Americans against the Government of Iran, claims made against the US Government required enforcement under existing mechanisms of international law. Iranian nationals brought claims against the US seeking enforcement under the New York Convention. The 9\(^{th}\) Circuit Court of Appeals determined that awards made by the US-Iran Claims Tribunal are properly enforceable under the New York Convention.\(^{244}\) However, the High Court of England in Dallal v. Bank Mellat concluded that US – Iran Claims Tribunal awards were not enforceable because there was an absence of an agreement in writing which was a requirement to enforce an arbitration award under the New York Convention.\(^{245}\)

1.3 The Investment Court

It is not yet possible to reach a definitive conclusion on whether the Investment Court is a court or a permanent arbitration tribunal. Under the TTIP the United States has yet to provide any comments on the formation, procedure or functionality. Hence, any conclusion made at this stage regarding the proposed TTIP text would be premature. Nevertheless, from the EU TTIP proposal and the text of CETA and the EU-Vietnam FTA several insights may be made.


\(^{244}\) Ministry of Defense of Islamic Republic of Iran v. Gould, Inc., 887 F.2d 1357 (9th Cir.1989).

\(^{245}\) Dallal v. Bank Mellat, 1 All E.R. 239 (Q.B.1986).
Some commentators have suggested that, notwithstanding TTIP Article 30(5), courts in third-party states might refuse to apply the New York Convention to enforce TTIP awards on the theory that the New York Convention applies only to arbitral awards and that awards rendered by a body described as a “court” in a proceeding in which the parties do not choose their decision-makers might really be court judgments by another name. Court judgments are not enforceable under the New York Convention and are ordinarily enforceable internationally only through burdensome proceedings and as a matter of comity. Although this view may have currency, another view is that the New York Convention, at Article I(2) already contemplates the possibility that awards may be issued by “permanent arbitral bodies to which the parties have submitted.”

The essential nature of the Investment Court is an important question regarding enforcement of its awards. If the Investment Court is a permanent arbitral tribunal, then its awards may qualify for enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, if the Investment Court is a court, then its decisions are not eligible for enforcement under the New York Convention.

246 See, e.g., Sophie Nappert, 2015 EFILA Inaugural Lecture: Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism (Nov. 26, 2015) at 8 (“A valid argument can be made that, as the process currently contemplated is not arbitration, the decisions rendered by the Tribunal are not arbitration awards – no matter what label is put on them – and therefore not covered by the New York Convention.” See also id. at 6 (suggesting that arbitration is in part “distinguished from adjudication by . . . ‘the nomination of the arbitrators by the parties concerned.’” (citing Advisory Committee of Jurists, Documents Presented to the Committee relating to Existing Plans for the Establishing of a Permanent Court of International Justice at 113 (1920)). The complete EFILA lecture is available at: http://efila.org/wp-content/uploads/2015/11/Annual_lecture_Sophie_Nappert_full_text.pdf. Compare European Commission Concept paper “Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court” (May 5, 2015) at 7 (asserting the objective to “break the link’ between the parties to the dispute and the arbitrators”), available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

If one assumes that the Investment Court is an arbitration tribunal, there are differences whether the Investment Court would constitute a Court (which cannot have enforcement under the *New York Convention*) or an arbitration tribunal. Professors Kauffman-Kohler and Potestà state that the proposal would qualify as a permanent arbitral body under the *New York Convention* because the US-Iran Claims Tribunal constituted an arbitration tribunal. This question has been considered regarding the dispute over whether the US-Iran Claims Tribunal was a court or a permanent arbitral tribunal.

Controversy surrounds this issue, including competing determinations of courts because of the lack of clarity of the applicable law in the *Algiers Accord*. We are not of the view that the example of the US – Iran Claims Tribunal can be relied upon to establish enforceability unless more clarity in the treaty were to be forthcoming.

There are key elements in the wording of the TTIP in particular which make it difficult to automatically assume that the Investment Court will be considered an arbitration tribunal rather than a court. This uncertainty in enforcement is highly problematic and worthy of immediate governmental attention.

A key issue relating to this determination is that the claimant, not being a state party to the treaty, has no say in the appointment of the members of the panel. The ASIL – ICCA Joint Task Force Report on Issue Conflicts commented on the role of investors to select a party-appointed arbitrator and its effect on the dispute determination process. The Joint Task Force Report concluded that the party’s choice of the arbitrator was a “fundamental structural feature” of investor-state arbitration. The Joint Task Force Report states:

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177. \text{Ultimately, the parallel rise of reform proposals and of concerns about inappropriate prejudgment is not a coincidence. What sets potential prejudgment in Investor-State arbitration apart from potential prejudgment in national courts or other international tribunals is the fact that, in Investor-State cases, the majority of the tribunal is typically nominated by the parties. This creates the perception that the selection of arbitrators is, in fact, a means of rigging the game unfairly in the nominating party’s favor. Members of}
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\[248\] Kauffman-Kohler and Potestà, at 54-60.
standing bodies are not inherently less susceptible to prejudgment than investment arbitrators. Unsettled legal principles, a small, élite pool of decision-makers and the “revolving door” between practice and service as adjudicator apply with more or less equal force to other fields of adjudication. But standing tribunals have the imprimatur of one or more States, and thus enjoy a legitimacy that Investor-State tribunals are not seen to share.

178. A party's choice of arbitrator, however, is a fundamental structural feature of the Investor-State arbitration system. For parties to a dispute, the opportunity to have a say in the quality and suitability of the decision maker is one of the foremost advantages of international arbitration over domestic litigation. The parties’ participation in the appointment process also contributes to the legitimacy and acceptance of the resulting award.249

The architecture of the Investment Court is structured like a court system. The court comprises standing judges, paid by the state with jurisdiction to rule on disputes submitted to them under the treaty. The Court also follows rules of precedent and has an appellate body with a court of first instance. Finally, the public pronouncements of the EU were expressed in various forms confirming that the EU wished to end investor-state arbitration and replace it with a court.250 If the drafters intended the Investment Court to be a Tribunal, they could have so specified in its text.

While the Investment Court appears similar to a permanent tribunal, the essential court-like elements allow strong arguments to be raised to support either conclusion that the Investment Court is an arbitral tribunal or a court.

From a civil society point of view, creating a permanent arbitral institution as opposed to a court may appear to be antithetical to the EU’s overarching goal of creating a public international investment court system. This is something that should be considered when addressing this issue.

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250 E.g. the EU current trade policy: European Commission, “Trade for All: Towards a more responsible trade and investment policy” 2015.
This requires further clarity from TTIP Parties (as this agreement is still under negotiation), given the potential impact of wording in this treaty on the functioning of the Investment court. While in practice the differences between labeling the investment court an international court, or a permanent arbitral tribunal may appear inconsequential, this difference can have clear legal meaning and will affect the court’s procedure and functioning. A clear statement in the TTIP and other subsequent treaties, that stating that the Investment Court is a permanent arbitral tribunal and not a court would create more clarity and certainty on this point. A subsequent protocol between the treaty parties on the CETA and the EU – Vietnam Treaty would also assist in clarifying this matter.

A final option would be to consider the Investment Court as a hybrid. For certain circumstances, it could be considered a court and for other situations, it could be considered an arbitral tribunal. For the purposes of municipal law, the Investment Court may well be considered a court, but for enforcement under the New York Convention, the Investment Court may be being a permanent arbitral tribunal. The difficulty of such speculation is there is no treaty text or other guidance to assist in this overall determination.

2. Enforcement of TTIP Investment Awards in the TTIP Party States

TTIP Article 30(1) states that “[f]inal awards” issued by the proposed investment dispute mechanism “shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.” While Article 30(1) states that awards are not subject to appeal, this provision must logically refer to proceedings other than the treaty’s appellate review mechanism. Parties to a dispute appear to be under a primary obligation to honor final awards without further steps having to be taken by a successful claimant. This resembles Article 53(1) of the ICSID Convention, which provides

\[251\] TTIP Article 29.
that parties to an ICSID arbitration “shall abide by and comply with the terms of the award” without the need for any further proceedings.252

TTIP Article 30(2) provides for the possibility that a disputing party might fail to honor an award. Article 30(2) accordingly provides that “[e]ach Party” to the TTIP “shall recognize . . . as binding” an award issued by the investment court system and enforce the pecuniary obligation imposed “within its territory as if it were a final judgment of a court in that Party.” Unlike Article 30(1), this provision binds all parties to the TTIP, not just the disputing parties. Article 30(2) appears modeled on Article 54(1) of the ICSID Convention, which similarly obliges all parties to the ICSID Convention to enforce the pecuniary obligations imposed by an ICSID award as if they were “a final judgment of a court in that State.” Article 30(3), reproduces Article 54(3) of the ICSID Convention almost verbatim, providing that “[e]xecution of the award,” once recognized and enforced, “shall be governed by the laws concerning the execution of judgments or awards in force where such execution is sought.”253

Within the territory of the Parties to the treaties, enforcement should in principle be no different from that of a traditional ICSID award. Set-aside proceedings and New York Convention-based defenses to enforcement would be inapplicable because, as in the ICSID system, all challenges to an award would take place within a self-contained appellate

252 ICSID Convention, Article 53(1) (“(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”). Article 30(1) of the Proposal traces the first sentence of ICSID Convention Article 53(1), but not the second, which states that parties shall “abide by and comply” with awards. Professor Schreuer observes that the latter obligation imposed by ICSID Convention Article 53(1) is “a logical consequence of its binding nature” and that this obligation operates “independent of any enforcement proceedings.” See Christoph H. Schreuer, The ICSID Convention: A Commentary (2d ed. 2009) at 1106. It is difficult to imagine that the Commission’s proposal means otherwise, but explicit reference to a duty to “abide by and comply” with a final award in a final text of the TTIP could help to foreclose any uncertainty on this point.

253 ICSID Convention, Article 54(3) (“Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.”).
review mechanism built into the TTIP before an award reached national courts. The role of national courts would be limited. National courts would presumably be, as under the ICSID system, “restricted to ascertaining the award’s authenticity,” and, where necessary, executing the awards under the national law.

Colin Brown, the EU’s deputy chief negotiator on the Investment Court, addressed at the June 2016 ABA – ASIL panel why there should be limited concerns over the enforceability of Investment Court awards. He stated:

The Investment Court System still operates on the basis of existing multilateral rules (such as the ICSID Convention or the New York Convention). It has been carefully designed to ensure that awards coming out of the system are enforceable under either the New York Convention or the ICSID Convention. Much thought has gone into this.

As regards the New York Convention, there should be little doubt that awards flowing from the system qualify under the Convention as arbitral awards. It is suggested that the awards would be comparable to those of the Iran-US Claims Tribunal which have been recognized as “arbitral awards” in the sense of the Convention.

Similarly, as regards the ICSID Convention, the Court system works on the basis that an appeal is made against a provisional award, not a final award. The result of the appeal is that the provisional award is corrected and issued as a final award. Our view is that this means that it can be regarded as an ICSID award.

As a condition to bringing the dispute, both disputing parties have to agree not to seek to set-aside or annul the award. So the only scenario where a third country court in which enforcement is sought could question enforcement is where it does so of its own volition. In such circumstances, we would consider it highly unlikely that it would not enforce an award.

3. Enforcement under ICISD

Enforcement of a TTIP award under the ICSID Convention presents additional questions. The ICSID Convention only can be applied by members of the ICSID. So while the vast majority of EU states are members of the ICSID, if the EU is the respondent, then the ICSID

254 TTIP Article 29.
255 Schreuer at 1139.
256 Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.
Convention procedure cannot apply. Another complication is that designating a respondent occurs after a claim is issued, so a Claimant could not know for sure that the ICSID Convention rules would apply when it files its claim. If the EU becomes the Respondent, then the ICSID Convention rules (and the ICSID Convention process for enforcement) cannot apply as the EU is not a party to the ICSID Convention.

Where the member state is the Respondent, TTIP Article 30(6) begins by observing that its provisions are intended “[f]or greater certainty.” Article 6(2)(a) allows the submission of a claim pursuant the ICSID Convention. TTIP Article 6(2) refers to the ICSID Convention as one of several “sets of rules” available to govern proceedings under the TTIP, while Article 6(3) warns that the choice of ICSID Convention or other “rules” is “subject to the rules set out in [the TTIP], as supplemented by any rules” to be adopted by an unspecified Committee, the Tribunal, or the Appeal Tribunal. It is not entirely clear whether Article 6(2)(a) contemplates a modified ICSID arbitration or a unique TTIP proceeding in which the ICSID Convention is borrowed to serve as a set of rules unless it contradicts the TTIP framework.

Though Article 30(6) seems to insist on the former “for greater certainty,” The ICSID Convention, at Article 54(1), obliges third-party states to enforce as a final judgment of their own courts only “an award rendered pursuant to this [the ICSID] Convention.” An award issued under the hybridized ICSID Convention approach under the Investment Court Proposal might not be enforced as an award issued “pursuant to” the ICSID Convention. National courts in a third-party state may well treat these awards as non-ICSI Convention awards as the Investment Court Proposal rejects key elements of the ICSID Convention.

257 This language may be in connection to the confusion that arises when TTIP Articles 30(6) and 6(2)(a) are read together with Section 6 (Articles 53-55) of the ICSID Convention.
258 While the language of Article 6(2)(a) is not very clear, the TTIP appears to make the ICSID Convention available only “where the conditions for proceedings pursuant to” the Convention apply. See TTIP Article 6(2)(b) (making the ICSID Additional Facility available where such conditions “do not apply”). This appears to be a cryptic way of stating that the ICSID Convention, albeit as modified by the TTIP, is available only where both the claimant’s state and the respondent state are parties to the ICSID Convention. This would be consistent with Article 25(1) of the ICSID Convention which defines ICSID jurisdiction as extending to disputes “between a Contracting State . . . and a national of another Contracting State”.)
framework – most notably annulment and party-driven arbitrator selection. The TTIP’s appeal mechanism is Article 53(1) of the ICSID Convention, which provides that ICSID awards “shall not be subject to any appeal or to any other remedy except those provided [e.g., annulment]” in the ICSID Convention.

4. Enforcement of TTIP Investment Awards in the Non-TTIP Party States

The picture is more complicated, however, regarding enforcement of awards in states which are neither party to the dispute nor to the TTIP and other Investment Court treaties. Articles 30(1) and 30(2) accordingly have no application here.

The Investment Court Proposal anticipates enforcement of awards in third party states under either the New York or ICSID Conventions. TTIP Article 30(5) provides that “[f]or the purposes of Article 1 of the New York Convention,” the final awards issued by the TTIP Investment Court mechanism “shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.”

This language appears intended to confirm that TTIP awards fall within Article I(2) of the New York Convention, which defines “arbitral awards” to include not only those made by arbitrators selected by the parties to a case, “but also those made by permanent arbitral

259 See e.g. Kauffman-Kohler & Potestà at 53. Kauffman-Kohler and Potestà state that if this is to be considered admissible that such a solution “could only have effect between the ITI contracting parties as an agreement to modify the ICSID Convention inter se in accordance with Article 41 of the Vienna Convention on the Law of Treaties (VCLT), provided the conditions of Article 41 are met. It could, however, not bind other ICSID Contracting States, for whom the ITI Statute would be res inter alios acta.”

260 It has been suggested that the TTIP parties could potentially modify the ICSID Convention “as between themselves” consistent with Article 41 of the Vienna Convention on the Law of Treaties which allows “two or more of the parties to a multilateral treaty” to “modify the treaty as between themselves” provided that the modification in question is not prohibited by the treaty, does not affect other parties to the treaty and does not work a change “incompatible with the effective execution of the object and purpose of the treaty as a whole.” See "could potentially allow" TTIP parties to modify the ICSID system as among themselves. See Vienna Convention on the Law of Treaties, Article 41, opened for signature May 23, 1969, 1155 U.N.T.S. 331. See also C. Lévesque, “The European Union Commission Proposal for the creation of an 'Investment Court System'.”

261 This is consistent with the Proposal’s provision for claims to be submitted to the TTIP Tribunal or “court” under variously, the ICSID Convention, the ICSID Additional Facility (where the ICSID Convention is unavailable), the UNCITRAL Arbitration Rules, or other rules agreed by the disputing parties. See TTIP Article 6.
bodies to which the parties have submitted.” TTIP Article 30(6) provides that “a final award issued pursuant to Article 6(2)(a)” [which allows claimants to submit claims to the TTIP Tribunal for decision according to the ICSID Convention, as modified by the TTIP] “shall qualify as an award under Section 6” of the ICSID Convention, governing recognition and enforcement of awards.262

Frequently, state parties voluntarily agree to implement their investment treaty decisions. However, there are often times where enforcement proceedings have taken place. These enforcement actions have taken place in third countries (that is not the territory of the Respondent or the Claimant).263

The convention invoked in an enforcement proceeding would presumably depend on the identity of the respondent. Most EU member states and the United States are parties to both the ICSID and New York Convention, but the European Union itself (which can be a respondent under the Proposal)264 and Poland are not parties to the ICSID Convention.265 Where successful claimants have a choice, they will probably prefer to seek enforcement under the ICSID Convention to avoid the New York Convention’s various defenses to recognition and enforcement.266

262 Strictly speaking, there are two parts of the ICSID Convention labelled “Section 6.” TTIP almost certainly refers here to Chapter IV, Section 6 of the ICSID Convention, which deals with recognition and enforcement of awards. Chapter I, Section 6 of the ICSID Convention, by contrast, deals with the “Status, Immunities and Privileges” of ICSID itself. Clarifying revisions might be included in a final TTIP text.


264 See TTIP Article 5 (procedures for determining whether European Union or a member state is the appropriate respondent to an investor’s claim).


266 Some commentators have suggested that because the New York Convention provides greater defenses to enforcement than the ICSID Convention, the EU will enjoy advantages as a respondent that member states
Note that while Article 30(1) of the Investment Court Proposal provides that final awards “shall not be subject to appeal, review, set aside, annulment or any other remedy,” this language appears to be directed at challenges to a final award akin to an attempt to have the award set aside at its seat, and does not foreclose TTIP respondents from resisting enforcement under the *New York Convention*.

that are also ICSID Contracting Parties will not. See Task Force Paper regarding the proposed International Court System (ICS), European Foundation for Investment Law and Arbitration (Feb. 2, 2016) at 18 (“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.”).
F. Transparency

Concerns about the lack of transparency and the holding of non-public proceedings resulting in international awards have greatly contributed to the “legitimacy crisis” over investor-state arbitration. This is one area where, at least outside of ICSID itself, there have been significant efforts to address the critics, and with some success. The NAFTA is perhaps the clearest example, with open hearings and publication of written pleadings early on having become a practice often, eventually being institutionalized through an agreement between the NAFTA parties. The UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration are a major step forward at the multilateral level.

The investment court model, as presented in CETA, builds explicitly on the UNCITRAL Rules on Transparency, incorporating them subject to explicit modification in the CETA itself. The UNCITRAL Rules on Transparency would prevail over any other arbitral rules such as those of ICSID, for any conflict.267

Article 8.36,1-2 of CETA goes further than Rule 3 of the UNCITRAL Rules on Transparency by requiring that additional kinds of documents be provided to the public, such as requests for consultations and actual exhibits. Rule 3 of the UNCITRAL Rules on Transparency notably already include publication of written submissions of the parties and third parties and the notice of arbitration. The CETA leaves it open to the tribunal to determine how hearings will be accessible to the public. Arguably, this should include webcasting to assure that the financial and other barriers to physical presence at a hearing do not unduly and arbitrarily limit public access.

The CETA does not modify in any way the UNCITRAL Rules on Transparency regarding amicus curiae briefs. The provisions in the UNCITRAL Rules on Transparency allow for the submission of such briefs at the discretion of the tribunal, provided certain procedural requirements, including disclosure requirements, and that parties should have a

267 Rule 7 of the UNCITRAL Rules on Transparency
reasonable opportunity to address the briefs.²⁶⁸ Amicus practice in the WTO and NAFTA Chapter Eleven has been hampered by the lack of a requirement that party submissions be provided to the public in a timely fashion; amici can be more pertinent if they can address specific elements in the parties' briefs, and avoid duplicating arguments already there but focus on gaps. In this respect, the Investment Court model, in incorporating the UNCITRAL Rules on Transparency regarding the public availability of party submissions, offers the potential of more meaningful amicus participation than has typically been seen in international economic law proceedings. Also, by going further than UNCITRAL Rules on Transparency and requiring public disclosure of exhibits, the CETA investment court model allows amici with the specific factual expertise to question evidence being offered in the proceeding.

While acceptance of amicus briefs is contemplated as at the discretion of the tribunal the interpretation of the law regarding such submissions, as incorporated from the UNCITRAL Arbitration Rules is, arguably, appealable to the Appellate Tribunal. The CETA Investment Court model gives no party denied the opportunity to submit a brief a right to appeal, however, nothing would prevent the Appellate Body from entertaining a question of law raised by such a denial.

Of real concern in incorporating the UNCITRAL Rules on Transparency in the CETA investment court model is 7.2.c of the UNCITRAL Rules on Transparency, which creates an exception to transparency for any information that the respondent state's own law protects from disclosure. The generality of this exception, in theory, would allow a state to substantially backtrack from transparency through the device of domestic law. Further, the exceptions to transparency for some states would be considerably broader than for others if definable purely against this domestic law standard. It is questionable whether a respondent state should be able to rely on a purported public judicial proceeding on

²⁶⁸ Rule 5 of the UNCITRAL Rules on Transparency.
information that its own laws keep secret from its own population, absent justification that is reviewable on the international plane (national security, human rights, etc.).
G. Multilateralization

The EU Investment Court model envisages the eventual creation of a multilateral investment court. Efforts in this direction will be pursued as a parallel track to the establishment of the bilateral courts envisaged under CETA, the EU-Vietnam Free Trade Agreement, and any others the EU may conclude.

The EU Commission issued an Initiative Impact Assessment regarding the Establishment of a Multilateral Investment Court for investment dispute resolution. The Impact Assessment Report discloses that the Investment Court System is actively under consideration in other EU negotiations:

The ICS also forms part of the EU negotiations with the US, China, Myanmar, Tunisia, Morocco, Japan, Philippines and Mexico, and planned negotiations with Indonesia, Australia, New Zealand and Chile, etc.

Both the CETA and the EU FTA with Vietnam include provisions anticipating the transition from the bilateral system included in the FTA to the permanent Multilateral Investment Court. To ensure policy coherence at EU level and support by EU’s contracting partners, similar transitional provisions will also be proposed in the context of other trade and/or investment negotiations.269

The two-track strategy raises obvious issues of how the bilateral courts would relate to the multilateral effort, and what kind of transitional arrangements would be appropriate to transfer the jurisdiction of the bilateral judiciaries to the multilateral institution.

The EU has identified the challenge of operating separate Investment Courts rather than having one multilateral Investment Court System. The Impact Assessment states:

Having numerous ICS operating in parallel is sub-optimal in terms of policy effectiveness and increases the risk of creating inconsistencies in the application of substantive investment protection provisions. In addition, maintaining and managing 10-15 or more ICSs in EU trade and/or investment decreases the cost efficiency of these systems. The Commission, on behalf of the EU, will need to manage the establishment and future operation of the ICS including the selection and appointment procedures of judges to the

269 Impact Assessment at page 3.
First Instance Tribunal and members of the Appeal Tribunal in multiple ICS. It will also need to manage the associated budgetary and administration requirements.

The current ad hoc ISDS system implies high costs and administrative burden for the EU and EU Member State governments when challenged by foreign investors. This adds to the lack of predictability and risk of inconsistency of decisions rendered against the EU or EU Member States.\(^{270}\)

The Impact Assessment continues to identify the problems with operating multiple Investment Courts:

First, it does not provide an effective solution to the continued existence of numerous EU Member State BITs with unreformed ad hoc ISDS provisions and the ECT. As for the conclusion of new EU trade and/or investment agreements with investment protection and ICS, it should lead to the replacement of the corresponding Member State BITs, but this process is likely to take many decades and there is no guarantee that it will eventually cover all Member State agreements. Moreover, it would not be realistic to attempt to negotiate an ICS into every Member State BIT, as this would likely be both too complex and disproportionate to its likely use per BIT.

In addition, the ICS in EU agreements consists of judges/members appointed by the EU and its trade and/or investment agreement partner to the Tribunal of First Instance and the Appeal Tribunal. Judges/members will be remunerated through a combination of retainer fees covered by the Parties to the agreement and daily fees paid by the disputing parties (i.e. the investor and the state involved in a dispute). This ensures the availability of highly qualified judges for the ICS in each trade and/or investment agreement without however paying them a full salary. This system of remuneration has been agreed in the interest of ensuring sound management of EU public money, in particular as it is impossible to predict how much the ICS will be used in each trade and/or investment agreement.

However, operating a large number of ICSs is likely to give rise to a number of operational challenges, in particular in terms of the costs and administrative complexity for the EU as opposed to having one single court. Similar considerations have also been advanced by a number of the EU’s trade and/or investment agreement partners, in particular developing countries and countries in transition.

Finally, although the new EU policy of negotiating an ICS in each EU level trade and/or investment agreements has responded to the concerns raised by the EU Member States, the European Parliament, and European stakeholders, legitimacy can be further improved through a single, permanent multilateral court with full-time judges/members, and which is subscribed to by both developed and developing countries.\(^{271}\)

\(^{270}\) Impact Assessment at page 3.
\(^{271}\) Impact Assessment at page 4-5.
The EU is pursuing a “coalition of the willing” approach to multilateralization. The EU will enter discussions, and may have already done so on a preliminary basis, with states that have an interest in creating a multilateral investment court. The multilateral court might be launched by these states without drafting the multilateral convention or statute that would only come into force once it is ratified by many states. It would be multilateral in the sense of being open to any state willing to accept the jurisdiction of the court and related obligations, such as sharing the costs of the court.

There is no obvious existing multilateral forum in which to pursue this exercise. While some have suggested that the jurisdiction of the WTO Appellate Body might be expanded to play a role regarding investment, this would require the amendment of the WTO Dispute Settlement Understanding, as the Appellate Body and the Dispute Settlement system of the WTO is only permitted under the DSU to hear matters that involve claims of violation of the WTO covered agreements. Introducing investor protection into the WTO is highly controversial, and was strongly resisted by many developing countries during the Uruguay and Doha Rounds. Introducing investment dispute settlement would be seen by these countries perhaps as a slippery slope toward introducing substantive norms of investor protection.

The International Court of Justice is devised on a purely state to state model and any innovation toward claims by non-state actors would require amendment of the Court’s Statute. Although the Permanent Court of Arbitration plays some role in facilitating investor-state arbitration, the founding Convention of the Court is ill-adapted to the innovation of a court for investor-state dispute settlement. The entire approach of ICSID is antithetical to judicialization of Investor-State Dispute Settlement and amendment to the Washington Convention is notoriously difficult. The level of controversy in ICSID even over some version of appellate review indicates that consensus will never be found there to support a more fundamental innovation such as an investment court.

This being said, the preparatory work for a multilateral court could be undertaken with, for example, the joint support of OECD and UNCTAD, both organizations having active work
programs on investor protection and an expanding interest in reform of Investor-State Dispute Settlement. The OECD has a strong track record of private sector consultation and participation and UNCTAD is a forum where developing country perspectives can be given strong voice. A joint OECD/UNCTAD working group on an investment court would offer the possibility of injecting many perspectives in the exercise of creating a multilateral investment court. The involvement of the International Law Commission might also be considered; however, the rather formal and often gradual way it operates argues against a substantive as opposed to an advisory role.

The Impact Assessment developed options regarding multilateralization of the Investment Court. The most developed option was the creation of a multilateralized Investment Court through a new and separate international law instrument.

Option 5: work with other interested countries toward the establishment of a permanent Multilateral Investment Court with both a First Instance Tribunal and an Appeal Tribunal with full-time judges/members. This builds further on the approach taken in the World Trade Organisation. In terms of scope, the Court would be designed to be competent to hear disputes brought under both EU trade and/or investment agreements, EU Member States investment agreements and under agreements between third countries. The mechanism to achieve coverage of both existing and future agreements would be comparable to that permitting the application of the UNCITRAL Transparency Rules for Treaty-based Investor-State Arbitration to existing agreements. Under this mechanism, the Multilateral Investment Court would deal with disputes under an agreement between countries A and B when both countries have ratified the agreement establishing the Multilateral Investment Court and both countries have agreed that the bilateral investment agreement between them should be subject to the Multilateral Investment Court (through a negative or positive list – the UNCITRAL Convention works on the basis of a negative list). If the Court were to apply to all of the EU and the EU Member States’ agreements, coverage of half of the world’s existing investment agreements would already be achieved.272

A multilateral court offers the promise of moving away from a model where cases are decided primarily by judges from the specific parties of the dispute to an autonomous judiciary. Mechanisms to appoint judges will be key and the recent controversies over

272 Impact Assessment at page 7.
politicization of appointments to the WTO Appellate Body suggests the complexity of designing an appointments process that cannot be dominated or manipulated by a state or states determined to politicize it, accepting only judges favorable to their point of view. Involving distinguished panels of jurists, domestic and international, in the selection process may be desirable. A multilateral court would also be a solution to the rather awkward ad hoc in the EU’s existing agreements with Canada and Vietnam, and its TTIP proposal, where existing arbitration rules such as those of ICSID, ill-fitted to a judicial system, are adopted provisionally as default rules for the bilateral courts. The sooner that a set of rules is devised that is specifically designed for judicial settlement of investment disputes at the international plane the better.

Besides offering access to the court to its member states, a multilateral investment court might also be provided for other disputes ad hoc, provided those who use the court in this way pay a part of the costs. States and investors might be free to designate the court as the forum in the forum selection clauses in investment contracts. Full membership in the court should not be required to experiment with its use, provided that free riding is avoided. The court should be designed as a forum both for state-to-state and investor-state dispute settlement, though obviously, the jurisdictional clauses must be worded in a somewhat different fashion and some issues regarding process and costs might be rather different. Use of the multilateral investment court to settle disputes would always be voluntary. It would have no compulsory jurisdiction except if such jurisdiction is provided through compressor clauses in investment or other treaties or forum selection clauses in investment contracts, or by compromise.

Transitional arrangements could include the possible transfer of judges from the bilateral tribunals to the multilateral investment court to complete their initial term of office, or availability of those judges to decide disputes in the multilateral court between investors and parties to the bilateral agreements that already have a judicial mechanism.
IV. Conclusion and Recommendations

It is beyond the work of the Task Force to conclusively resolve the future of investment treaty arbitration in this Report. Instead, the Task Force makes specific observations and recommendations about the Investment Court system. The Task Force expresses its desire these observations and recommendation can further the discussion and understanding about investment treaty dispute settlement and the Investment Court.

A. Is the Investor-State Dispute Settlement System Broken?

Michael Goldhaber considered the public debate over the legitimacy for investor-state arbitration to resolve international investment treaty arbitration problems. Mr. Goldhaber noted that:

As early as 2002, the prolific arbitrator Charles Brower of 20 Essex Street proclaimed "A Crisis of Legitimacy" in The National Law Journal, because investor-state arbitration lacks the elements of a classic judicial system needed to maintain public confidence. "A crisis has undoubtedly fallen upon us," he wrote. Whether "it will destroy the system, however, remains a subject for debate." 273

Apparently, Judge Brower’s clarion call about the crisis was heard almost fifteen years later. Judge Schwebel, in his remarks to the ABA – ASIL panel on the Investment Court, raised a “fundamental objection” that the Investment Court would replace "a system that on any objective analysis works reasonably well" with "a system that would face substantial problems of coherence, rationalisation, negotiation, ratification, establishment, functioning and financing." 274 In his view, the existing investor-state dispute settlement system worked reasonably well and the case for replacing it was weak.

While the investor-state dispute system is still in effect for thousands of existing treaties, the approach to dispute resolution is in trouble in the court of public opinion. The critics of investor-state arbitration did a good job at raising public concern while the supporters of investment arbitration performed a much less adequately in responding to concerns about

the international investor-state dispute resolution process. Public enmity to the investor-state process is widespread and rather than abating, it continues to grow, demonstrating impact on electoral politics in the Parties to investment protection treaties such as the members of the EU and the United States.\footnote{Prof. Sornarajah contends that the Investment Court would weaken the democratic rights of states, by extending the power to investment treaties and providing the process with greater legitimacy. He states:}

Professor Sornarajah contends that the Investment Court would weaken the democratic rights of states, by extending the power to investment treaties and providing the process with greater legitimacy. He states:

> The establishment of an Investment Court would dissociate that Court from democratic control. As in the case of other permanent international tribunals, the Court would arrogate additional powers and create regimes through precedents in the area in which it operates. Academic opinion supports such creative expansion into the constitutionalization of fragmented law. The danger is that neoliberal principles will become set in stone beyond the power of democratic processes. To date, there is no doctrine of precedent in investment arbitration. This will not be so when there is a permanent judicial body.\footnote{Colin Brown, the EU's deputy chief negotiator on the Investment Court, discussed the objectives of Investment Court as being neutral, effective, legally predictable and coherent, stating:}

Colin Brown, the EU’s deputy chief negotiator on the Investment Court, discussed the objectives of Investment Court as being neutral, effective, legally predictable and coherent, stating:

> Let me start from the proposition that the EU’s policy approach first and foremost takes its cue from what investors and states need at the end of the process, namely access to a neutral, effective, legally predictable and coherent investment dispute settlement system protection and its enforcement.\footnote{When examined on this basis, the Investment Court meets some of its goals, but in other}

The Investment Court proposal is a clear reaction to public concerns with investor-state dispute settlement. Does the Investment Court meet the stated objectives of the EU, and practically will it fairly address the protections conferred by international investment treaties using the Investment Court?

When examined on this basis, the Investment Court meets some of its goals, but in other

\footnote{The authors of this Working Group Report have not addressed whether these concerns raised by critics are well-taken. This Working Group Report only addresses the operation of the Investment Court itself.}
areas, the objectives of the Investment Court are simply not reached. The Task Force has attempted to provide specific and helpful recommendations with these objectives in mind.

B. The Investment Court

1. Composition of the Court

The Investment Court has the potential to create an independent and legitimate system for investment treaty dispute settlement, but this can only occur where the process for establishing the court is done in a fair and neutral manner. The members of the court have sufficient knowledge and resources to carry out their duties, and due process, fairness and the rule of law must be paramount.

The qualifications of members to sit on the Investment Court is another area where further consideration is merited. To meet the criteria for appointment to the Tribunal of First Instance and Appeal Tribunal, candidates must be qualified to hold judicial office or be a jurist of recognized competence and have demonstrated expertise in public international law. Notably, the qualification shifts slightly for members or the Appeal Tribunal, where members must be qualified for the “highest office,” although, as noted, this distinction may be meaningless given that this is not a strict requirement, and appeal members may still be appointed as jurists of recognized competence. Persons qualified to hold judicial office in their home jurisdiction are often specialists in domestic law and are often with no demonstrated expertise in public international law. A requirement that a member of the court meets the qualifications for judicial office does not, of itself, result in any guarantee that the candidates will be qualified to decide investment disputes. The Investment Court requires that all members, for each level of court, demonstrate expertise in public international law. However, this knowledge of public international law may not be enough for the Investment Court to carry out its functions. Many recent cases being determined

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278 Note that there may be significant differences regarding the qualifications for judicial offices between the different EU Member States. In some Member States, freshly graduated lawyers can qualify for judicial office, whereas in others additional training and qualifications are required. See Koorosh Ameli et al., EFILA Task Force Paper Regarding the Proposed International Court System (ICS), at 15, (February 1, 2016), available at: http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf. (hereinafter EFILA Report)
involved the consideration of applying fairness in governmental regulatory systems. While the requirement that the candidates know international law is helpful, there may well be benefits from requiring a knowledge of comparative administrative and constitutional law besides the knowledge of international public law and international investment treaty law.

Concerns remain about ensuring diversity in the composition of the court and the process for addressing challenges to judges. The Investment Court might be improved by specifying that best effort should be taken to achieve diversity in the membership of the Tribunals, to which could avoid the Investment Court from becoming as unrepresentative, as ad-hoc investor-state tribunals. The excellent progress on diversity made by the International Criminal Court should be singled out which requires its judges:

(i)  The representation of the principal legal systems of the world;

(ii)  Equitable geographical representation; and

(iii)  A fair representation of female and male judges.

2. Enforcement of Awards made by the Investment Court

EU Investment Court negotiator Colin Brown suggested that the awards made by the Investment Court would be enforceable. At a public forum sponsored by the American Bar Association, Mr Brown explained:

The practical objectives of the new EU Investment Court policy were outlined by the EU Investment Court negotiator as “the incorporation of well-functioning International and domestic systems for dispute resolution as the WTO.” The goal was to produce awards which can be enforced under the New York Convention or the ICSID Convention.279

279 Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016. Mr. Brown said:

The basic idea is the incorporation of core characteristics of well-functioning international and domestic systems for dispute settlement such as the WTO as a means to increase the legitimacy of the investment dispute settlement system without losing its effectiveness in protecting investments.

The essence of that policy is the creation of a tribunal of first instance, composed by persons nominated by the Parties to the agreement, and chosen at random by the President of the Tribunal for hearing a particular
On the basis of these objectives, the EU has had mixed success. It is likely that an award issued by the Investment Court pursuant to the ICSID Convention could be enforced as an ICSID award. It is also likely that an award from the Appellate Tribunal will be enforceable if the final award is to be enforced within the member states who signed the treaty under which the dispute was considered. Enforcement in the territory of parties to the treaty will be a matter of primary obligations under the treaty itself of the member states of the Investment Court. Such enforcement would resemble the enforcement of ICSID awards and would not depend on access to enforcement frameworks established in other multilateral treaties.

As a practical matter, enforcement in third-party states may not be essential to investors bringing claims against the United States, Canada, the European Union and EU member states. It would be far more important in claims brought against states with less robust legal systems and economies. Yet, the potential for complications to arise may exist in the event of enforcement of awards in non-Investment Court member states under the New York Convention.

It is likely that persons resisting enforcement in non-TTIP party states will argue that TTIP awards do not qualify for enforcement under either the New York or the ICSID Convention. This argument is strengthened by the EU Parliament’s and the Commission’s frequent early references to the TTIP’s investment dispute architecture as establishing a “court” may have contributed to this uncertainty. This has prompted one commentator’s claim that the Commission’s Proposal “walks away from the international arbitration format and consequently the application of the New York Convention.”

This uncertainty greatly weakens the expectation of commercial predictability that should arise from an investment protection treaty. Given the central importance of enforcement to the overall success of the Investment Court, the state parties to the Investment Court should try to clarify the status of the Investment Court, to specifically and unequivocally...

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See Nappert, at 3.
determine the Investment Court’s status, be it a “court” or an arbitral body. This is an essential clarification that must be clearly addressed by the Treaty Parties in an unequivocal and binding manner if the Investment Court is to be effective.

While it is not obvious that a court in a country that is a party to the ICSID Convention, but not to the TTIP, would care to obstruct enforcement where the respondent and the claimant’s states had agreed by treaty to be bound by an award as if it were an ICSID award, the status under the ICSID Convention of TTIP awards based on Article 6(2)(a) of the Proposal remains relatively unclear. The Treaty Parties may accordingly wish to consider clarifying the basis on which TTIP awards may be enforced as ICSID awards despite having been rendered by a process different to that contemplated by the ICSID Convention.

3. Procedural Concerns

It is difficult to provide definitive recommendations regarding the procedures for the Investment Court. At a minimum, the Investment Court must meet the objectives set out by the EU negotiators it be neutral, effective, legally predictable and coherent in its dispute settlement system protection and its enforcement.

At the outset, it is noticeable that the Investment Court has instituted no Users Council or another consultative process to engage with investment treaty practitioners. Many courts and some arbitration associations have such a structure and this interaction has proven practical and valuable. However, several current procedural aspects expressed in the Investment Court treaties give rise to concerns about the Court’s eventual effectiveness, neutrality, and coherence.

According to the Investment Court negotiators, the Investment Court is fair and neutral. The Investment Court treaties do not explicitly require the Investment Court to act with due process, with fairness to the disputing parties and under natural justice and the rule of law. Such general references assist the court in carrying out its functions in a neutral and fair manner and have been included in investment protection agreements such as the NAFTA or in procedural rules such as the UNCITRAL Arbitration Rules.
Many of provisions in the Investment Court treaties manifest a lack of balance between the disputing parties. The Task Force Report has considered several provisions which give significant procedural advantage only to government respondents and not to both parties to a dispute. Unbalanced procedural provisions erode confidence in the neutrality of the Investment Court and offend natural justice, due process, and fairness. Conceptually, such unbalanced procedures should not be a part of the Investment Court.

One particular example of these unbalanced procedures in the current TTIP Article 6 that permit the member governments, through the Committee, to modify the binding procedural rules of the Investment Court without notice. Such modifications could apply even to disputes where that member state (or the EU) was a respondent and where the new rule would apply immediately (or even retroactively).

Procedures before the Investment Court are also made murky as the Investment Court treaties permit the EU or a member state to be the Respondent in any claim. This substitution may have a substantial procedural effect, as not all EU member states are members of the ICSID, and the EU itself is not a member of the ICSID. A lack of membership in ICSID would mean that the ICSID Treaty may not apply in such a claim despite the Claimant bringing the case under the ICSID Convention rule to the Investment Court.

Many concerns that resulted in creating the Investment Court were in relation to the need for transparency and public engagement. Clear and direct provisions must be placed into the treaty and the procedural rules to ensure that meaningful interventions are permitted, subject only to the responsibility of the Investment Court to ensure that the rights of the disputing parties to have an orderly and fair hearing is not compromised.

As Investment Court procedural rules have not been released, the following procedural questions remain unanswered:

1) Questions about who can represent disputing parties to a claim, the effects of non-appearance of a party or a witness and the powers of the Investment Court to compel attendance:

2) Whether the Court of First Instance or the Appellate Tribunal may consider Ex Parte motions?
3) What powers does the Investment Court must address evidentiary matters such as?
   a) the standard and burden of proof;
   b) The power of the tribunal to order evidence;
   c) admissibility of evidence;
   d) the requirement to obtain evidence from third parties;
   e) the approach to evidence (written, interrogatory and *viva voce* evidence) and;
   f) formalities regarding evidence.

4) The conduct of witnesses, parties, counsel and third parties before the Tribunal;

5) Will the Court have the power to address parallel proceedings taking place in other venues on the same issues and between the same parties;

6) Matters regarding confidentiality or the production of evidence where there are claims of privilege;

7) Motions and Interim relief including summary motions, determinations of an issue and other interim applications;

8) Formalities regarding the issuance of awards;

9) How to address truncated tribunals if the non-availability of a member of the Tribunal occurs (such as through illness, or death);

10) Powers regarding:
    i) issue recommendations and other orders;
    ii) order documents and information;
    iii) to address a wide variety of Information Request processes;
    iv) To reprimand, censure or order fines;
    v) The powers to rectify, revise, correct or interpret awards.

These procedural rules should be standardized across the Investment Court.
4. Ethical Considerations

The desire to enhance the ethical conduct of those persons deciding investment disputes was central to the development of the Investment Court. The EU’s deputy chief Investment Court negotiator referred to the concerns over pre-disposition bias in the appointment of court members in the following manner:

Some have raised a concern on the alleged risk of pro-state bias in the selection by the Contracting Parties of tribunal members for the court system.

From a government perspective, it would be counterintuitive to push for state biased tribunal members. What we want and need is that the standards negotiated in agreements are upheld, even in the face of powerful sovereigns. The EU, or the US or China are not immune from acting inconsistently with international agreements. There are plenty of examples of that, for example in the WTO context. Purely pro-state tribunal members will not be appointed because governments will be anticipating such scenarios.

The selection process of tribunal members will be highly scrutinized, thus making the risk that overtly pro-state individuals - or overtly pro investor for that matter – are appointed rather unlikely. Moreover, the EU and its negotiating partner need to agree on all tribunal members, so the possibility that one side might "pack" their tribunal members with pro-state individuals is slight. 

Imposing clear and binding rules that prohibit the judges from engaging in legal counsel work on similar cases conclusively addressed one of the key concerns. The Investment Court rules remove a majority of interests that the arbitrators under the current Investor-State Dispute System may have to secure re-appointment and to make decisions that would be favorable to the clients they continue to represent as counsel in other disputes.

However, different issues relating to the members remain a concern. That treaty parties exclusively appoint judges, renew their terms and pay their salaries, creates a real and appreciable risk of the individuals selected to be judges will be perceived to be “pro-State” in their sympathies. Trust in the independence and impartiality of the Investment Court may largely depend on the transparency of the process by which those individuals are selected.

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281 Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.
The selection of judges should be done through a transparent process that involves consideration of the interests of relevant stakeholders (including investors).

A further technical concern arises over the statement in footnote 6 to TTIP Article 11(1) that “government officials” and “individuals who receive an income from the government” are not ineligible for appointment as judges. This acknowledgement of connection between judges and national governments that could be involved in a dispute raises serious concerns. This textual note should be revised to ensure that the overriding requirement that Investment Court judges be independent of the governments of any EU members state, the EU, and any other treaty Party.

In addition, the Investment Court may also wish to follow the practice of the WTO in consulting with the disputing parties before final empanelment of a tribunal to ensure that egregious concerns are addressed at an early point in time. In the event of a conflict, a more independent and transparent process should be adopted to address challenges to members of a Tribunal. To enhance transparency and independence, a third party, and not the President of the Tribunal, should adjudicate such challenges. For there to be public confidence in the Investment Court, it is essential for there be enhanced transparency and public disclosure about challenges made to members of the Investment Court. Public access must be unequivocally established to preserve confidence and independence.

Last, as a practical matter, the Investment Court ethical rules do not address the real risk of bias presented by the potential for re-appointment of members of the Investment Court. To reduce any notion of the possibility of bias, one practical and simple enhancement to the Investment Court would be to ensure that Investment Court judges only are eligible for appointment to one term. This step would remove the risk of any reasonable perception of bias that could arise in connection with reappointment to the Investment Court by sitting members.

5. Costs

In its Concept Report, the EU placed great emphasis on the consideration of costs and imposing costs upon an unsuccessful party.
One question that may be posed is whether it appropriate for a claimant to handle the costs of a public judicial system? In this context, the claimant cannot name an arbitrator and the procedural rules, which greatly affect costs, are tilted to increase the procedural costs at the behests of the respondent. Arbitrators and domestic judges are permitted to consider such considerations in the apportionment of costs. An additional question is what is to be considered reasonable “reasonable costs” according to Article 28(4)?

The costs issue identifies yet again the central role of the Committee, as the Committee is to determine the “maximum amount of costs of legal representation.” The Committee has the power to modify the procedural rules of the arbitration, even when members of the Committee are disputing parties to ongoing disputes affected by the rule changes. The Committee also has an important role regarding costs. There is a lack of transparency about who sits on the Article 9 “Committee” and regarding the level of transparency that will take place for Committee meetings. There is no discussion about how persons are appointed to sit on the Committee or whether this Committee has already been established before the ratification of the treaty.282

The costs issues raise concerns about access to justice maintained for small and medium-sized disputes and for disputes that might be brought by non-profit actors. The impact of costs impositions might be unconscionable in bona fide but impecunious claimants. The administration of justice could be brought into disrepute by rules which fail to consider the overall context of the circumstances of any dispute.

Further, the TTIP does not address the question of who pays the regular salary of judges in the event that the Committee permanently transform the Judges’ fees (retainer fees, other fees, and expenses) into a regular salary? While presumably, the state parties will cover these costs this is not specified in the proposal.

282 Note that in Article 3(3), further reference is made to an “article on Services and Investment Committee” and an “article on Trade Committee.”
The TTIP includes strict security for costs provisions. The Tribunal may order the suspension or termination of the proceeding if security of costs is not fully posted within 30 days of the Tribunal’s order. The EU-Vietnam FTA has a nearly identical provision, although interestingly the CETA contains no specific security for costs provision.

The security for costs provision raises access to justice concerns which disproportionately harm small and medium-sized claimants. A claimant may have made a significant investment in the host state but because of the dispute, the underlying investment may be frozen or destroyed because of the discriminatory or expropriation action. Under the security of costs rule in TTIP Article 21(1), an investor whose assets had been taken on a discriminatory basis by a state, must still establish that it had additional (and unspecified) capital to satisfy any future possible award made against the claimant. TTIP Article 21 makes no explicit mention of a need for “urgency” and “irreparable harm,” which have been required in ICSID case law for an order of security of costs. It also fails to consider the circumstances, such as any general equitable jurisdiction of the court to consider the fairness and appropriateness of the awarding of security for costs. The consideration about the administration of justice is missing. The only test is if “reasonable grounds exist that Claimant is at risk of not being able to honor a possible decision of costs against it.”

This rule raises significant access to justice questions because often a case being adjudicated will relate to a very serious or total loss suffered by a claimant. In such circumstances, it’s difficult to demonstrate the sufficiency of assets.

The Investment Court must have the power to ensure that it is independent, effective, legally predictable and neutral. Modifications are necessary to ensure that the Court can act in such a manner based on its assessment of the merits of the situations before it.

Finally, the security for costs rules is unequal. They only apply to Claimants and not to Respondents. A neutral and efficient Investment Court should have rules that treat all

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283 EU-Vietnam FTA at Article 22.
disputing parties before it fairly. It seems both unusual and unfair to only impose a cost rule upon a Claimant when such a similar rule is imposed upon the Respondent.

C. Conclusion

The Investment Court, if adopted, will have a significant impact on the operations of resolving investment treaty disputes. Despite the critical importance of having dispute resolution processes in international investment treaties, the dispute resolution procedures of the Investment Court are inchoate and often, incoherent. Procedurally, the Investment Court is not a complete and finished process. As this Working Group Report has addressed, often, many details of the Investment Court appear to not have been fully considered.

This Report has set out concerns regarding the membership of the Investment Court. This includes significant concerns over the need for the Investment Court to follow best practices regarding diversity in the appointment of the membership of the Investment Court and for the avoidance of reasonable perception of bias and issue predetermination.

In many respects, the process would be improved by consultation and by the adoption of general principles which protect the concepts of fairness, transparency and the rule of law.

Many procedures of the Investment Court have been relegated to an EU “Committee” of undisclosed members. Some rules have been set out sporadically in the Investment Court treaties but the bulk of the rules are undisclosed. If there are clear and codified rules and procedures, they have not been transparently shared with the public.

Overall, the Investment Court must be carefully considered before its implementation if it is to be as effective as the Investor-State dispute settlement system. Replacing a workable arbitration system with an unworkable Investment Court must be avoided, and can still be.
The Working Group has done its best to analyze the Investment Court based on the information made available to the public. It is the sincere wish of the Working Group that the information in this Working Group Report can meaningfully contribute to the ongoing discussion of these important international investment treaty issues among all interested stakeholders.

14 October, 2016

On behalf of the Investment Treaty Working Group

Barry Appleton  Sean Stephenson

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