

*Judicial Review of International Adjudicatory Decisions:  
A Cross-Regime Comparison of Annulment and Appellate Mechanisms*

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## I. Introduction

Domestic adjudication regularly offers parties the option to have a judgment of a first instance court reviewed by a court of appeal, and possibly even to challenge the appeal decision before a supreme court. In international dispute settlement, judicial review long formed the exception: arbitral awards, such as those of the Permanent Court of Arbitration (PCA) or the Iran-US Claims Tribunal, like judgments of the International Court of Justice (ICJ), are final – no appeal is possible, although there is limited provision for revision. More recently established forms of international adjudication however, do allow for appeal: for example, the proceedings before the World Trade Organization (WTO), the International Criminal Court or the Court of Justice of the EU (the latter two, perhaps not incidentally, dealing with public/private disputes). Also in investor-State arbitration, it is possible to oppose ‘objectionable’ decisions. Litigants have three possibilities to challenge an award that has been rendered in an investor-State dispute settlement (ISDS) procedure: they can actively seek to have the award set aside by the courts of the seat of the arbitration; they can oppose any enforcement action, hoping that the courts of third States will refuse to enforce the award; or, against awards under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention),<sup>2</sup> they can apply for annulment. These ‘status quo’ mechanisms offer relatively little solace because they do not allow for any substantial review. Grounds for intervention are narrow and generally do not extend to the merits of awards.<sup>3</sup>

Some commentators criticise the fact that it is impossible to appeal arbitral decisions on the international legality of possibly sensitive State measures, even though ISDS tribunals may have

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<sup>2</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

<sup>3</sup> A comparative analysis of these mechanisms is published as Baetens, F., ‘Keeping the Status Quo or Embarking on a New Course? Setting Aside, Refusal of Enforcement, Annulment and Appeal’, in: Kulick, A. [Ed.], *Reassertion of Control over the Investment Treaty Regime* (CUP forthcoming).

ignored relevant elements or misapplied the law.<sup>4</sup> Another criticism relates to the perceived absence of consistency in the jurisprudence of arbitral tribunals established under different arbitration institutions and rules.<sup>5</sup> One proposed remedy would be to replace the existing *ad hoc* arbitration system with a standing court for international investment issues, including an appellate mechanism to allow for a substantial review. This article offers a cross-regime comparison of the constitutive elements of three existing review mechanisms: the *ad hoc* annulment procedure of the International Centre for the Settlement of Investment Disputes (ICSID), the WTO Appellate Body and the Optional Appellate Rules of the American Arbitration Association (AAA). This will help to evaluate the review models currently being developed in international investment law (the anticipatory model and a standing appellate tribunal, as advocated by the European Commission in its proposal for an Investment Court System (ICS)).<sup>6</sup> Finally, this article will provide an outlook on the relationship of a new appeal process with existing review mechanisms and the potential of a multilateral appellate tribunal in investment disputes.

## II. Constitutive elements of international review mechanisms

In this Part, the three selected comparator mechanisms and the new review models are briefly explained, then scrutinised in light of their constitutive elements: the legal consequences of a successful application; the scope and standard of review; the composition of the review panel; and provisions limiting the duration and cost of review proceedings. These four elements have been selected for comparative study because they shape the functioning and impact of an international

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<sup>4</sup> TTIP Public Consultation: European Commission, Report - Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD (2015) 3 final, 13 January 2015 (hereafter EC Report on TTIP Public Consultation); K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* 349-350, 381-382 (2013); C.J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure* (2006); D.A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 *Vanderbilt Journal of Transnational Law* 39 (2006).

<sup>5</sup> UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2, June 2013, available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf); J. Zhan, *International Investment Law and Development*, in M-C Cordonier Segger *et al.*, *Sustainable Development in World Investment Law* 13 at 18-19 (2011); A.K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in C.B. Picker *et al.* *International Economic Law: The State and Future of the Discipline* 265 at 266 (2008).

<sup>6</sup> 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', 5 May 2015, available at: [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) ['European Commission Concept Paper 2015']; European Commission Press Release, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations', 16 September 2015, available at: [http://europa.eu/rapid/press-release-IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release-IP-15-5651_en.htm)

judicial review system, determining its coherence, consistency, efficiency and, ultimately, (the public perception of) its legitimacy.<sup>7</sup>

#### A. *Selected comparator mechanisms*

##### 1. ICSID *ad hoc* annulment procedure

The ICSID Convention's earliest draft, a 1962 World Bank document entitled "Working Paper in the Form of a Draft Convention", made no provision for annulment.<sup>8</sup> In 1963, the annulment provisions of the International Law Commission Draft Convention on Arbitral Procedure<sup>9</sup> were inserted into the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States.<sup>10</sup> The decision to provide for an annulment procedure did not give rise to much debate but the specific grounds for annulment were discussed at length at a series of Regional Consultative Meetings, leading to the 1964 First Draft Convention, and at Legal Committee Meetings, resulting in the 1964 Revised Draft which was submitted for consideration by the Executive Directors of the World Bank.<sup>11</sup> While further changes were made to other provisions of the Revised Draft, Article 52 (dealing with the grounds for annulment) remained unchanged.

In the last two decades, steadily rising numbers of losing parties have applied for annulment, relative to the increasing number of ICSID Convention awards rendered (including awards embodying a settlement). Before 1985, only one application for annulment was decided while six awards had been rendered by an original tribunal resulting in an approximate average rate of 17% (amount of annulment applications / amount of original awards rendered).<sup>12</sup> In the period between 1985 and 1989, three 'first' annulment cases were conducted, followed by two 'second' annulment

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<sup>7</sup> No doubt the public perception of legitimacy may significantly diverge from the fact (see Baetens, F., *The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators are under Fire and Trade Adjudicators are not: A Response to Joost Pauwelyn*, 109 AJIL Unbound (2016) 302). They are, however, treated together here.

<sup>8</sup> ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. I-IV (1970) Vol. II, 19.

<sup>9</sup> Documents of the Fifth Session Including the Report of the Commission to the General Assembly, [1953] 2 *Yearbook of the International Law Commission* 211, UN Doc. A/CN.4/SER.A/1953/Add.1

<sup>10</sup> ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. I-IV (1970) Vol. II, 184.

<sup>11</sup> *Id.*, 573-574.

<sup>12</sup> These averages are approximations because, although the timeframe within which an application for annulment can be filed, is only 120 days, it is possible that annulment applications concerning awards rendered at the end of the period, were filed in the next period.

cases between 1990 and 1994.<sup>13</sup> Between 1995 and 1999, no annulment applications were registered. Between 1985 and 1999, sixteen awards were rendered of which fourteen were original awards under the ICSID Convention and two were resubmission awards leading to an approximate average rate of 32%. Between 2000 and 2004, ten ‘first’ annulment cases were instituted out of twenty-nine original ICSID Convention awards, resulting in an approximate average rate of 35%. During the period of 2005 to 2009, twenty-one annulment cases were instituted: twenty ‘first’ annulments,<sup>14</sup> and one ‘second’ annulment. Concurrently, sixty awards were rendered: fifty-nine original awards under the ICSID Convention and one resubmission award resulting in an approximate average of 35% of original awards against which an annulment application was filed.

Between 2010 and 2014, forty annulment cases were instituted, all of which were ‘first’ annulment cases.<sup>15</sup> Eighty-four original awards under the ICSID Convention were rendered leading to an approximate average rate of 48%. Finally, in the ongoing period, 2015 to April 2016, thirteen annulment cases were instituted, all of which were ‘first’ annulment cases. During this period, thirty-three original awards under the ICSID Convention were rendered. This represents a drop in annulment applications back to an average of approximately 39%. Over the course of ICSID’s fifty years of existence, a total of ninety annulment cases were conducted,<sup>16</sup> with over 90% of being brought in the last fifteen years. Nevertheless, this increase seems largely due to the growing number of investment disputes brought before ICSID tribunals, as the average number of awards against which annulment is sought, has only increased slightly in the last twenty years (notwithstanding a peak between 2010 and 2014).

Investors initiated thirty-six annulment cases (all ‘first’ annulment) versus forty-nine annulment cases initiated by States (forty-eight ‘first’ annulments and one ‘second’ annulment); five annulment cases were initiated by both parties. Twenty annulment cases have been settled or discontinued while eighteen are pending.<sup>17</sup> Of the remaining fifty-two cases, the application was entirely dismissed in thirty-seven decisions (of which fourteen were initiated by investors, twenty-one by States, two by both); ten decisions partially annulled the challenged award (two brought by investors, six by States and two by both); and, five decisions annulled the challenged award in its entirety (three were initiated by investors and two by States). Discounting jointly brought applications, States have filed the majority of annulment applications (58% of all applications) and

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<sup>13</sup> The two ‘second’ annulment cases were the result of five applications for annulment (two filed by investors and three by States - in one case, the State filed two separate applications).

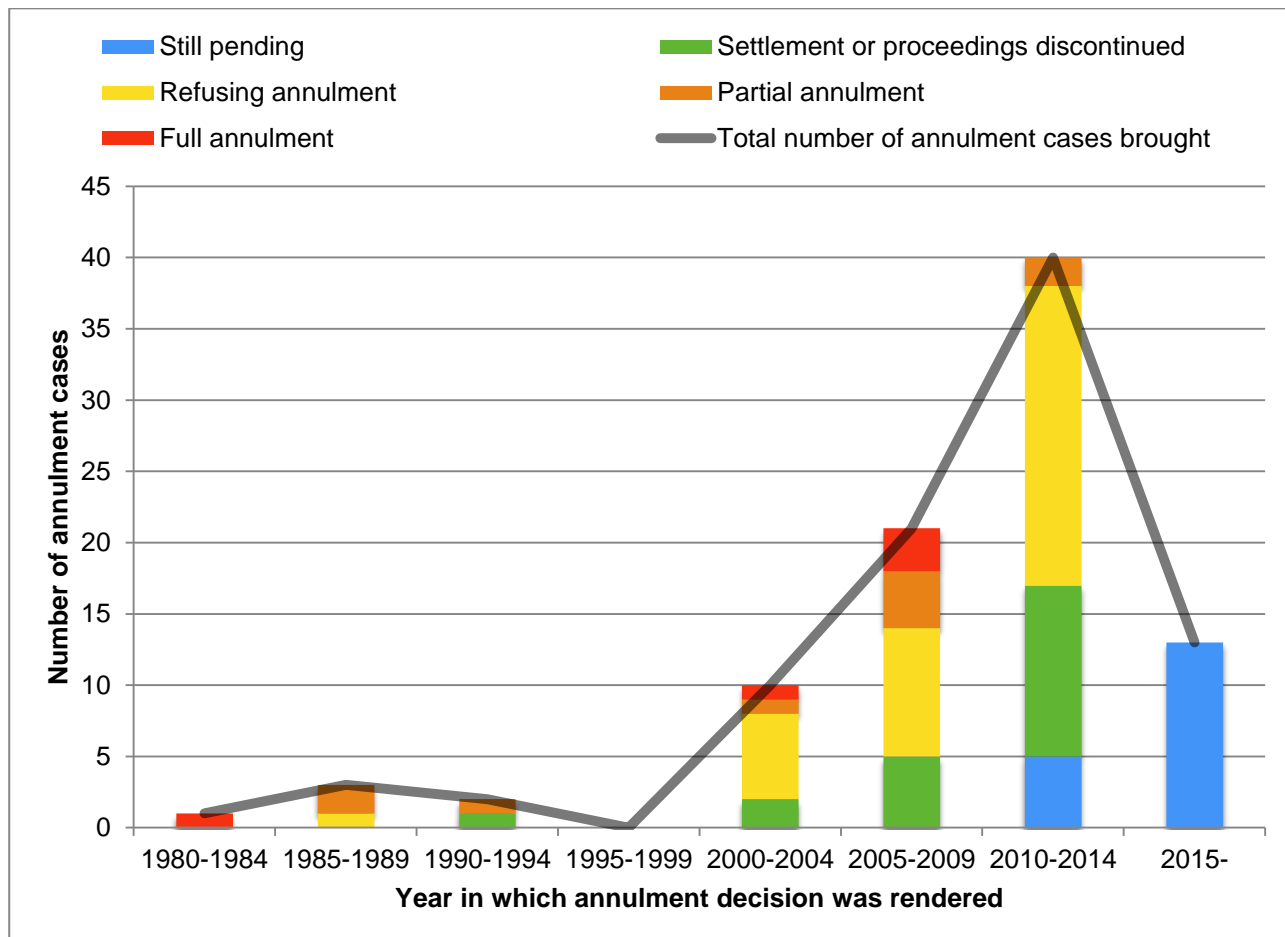
<sup>14</sup> Resulting from twenty-two applications.

<sup>15</sup> Resulting from forty-one applications.

<sup>16</sup> Resulting from ninety-six applications.

<sup>17</sup> As at 15 April 2016.

they have also been more successful (62% of all annulments were in response to State applications). Furthermore, discounting pending and discontinued cases, about 29% of annulment proceedings have resulted in a partial or full annulment,<sup>18</sup> although the number of successful annulment applications seems to be decreasing: between 2010 and 2016, only three awards were partially annulled and there were no full annulments.<sup>19</sup>



**Table 1. Overview of ICSID annulment applications (based on ICSID data)**

In sum, the ICSID *ad hoc* annulment procedure continues to be relatively popular with both claimants and respondents so that it may seem to be functioning as a semi-appeal mechanism. Because the creation of any appellate structure in investment law will be building on this experience, the ICSID annulment system has been selected for the present analysis.

<sup>18</sup> Bearing in mind that no annulment application is filed against about 65% of awards, the number of partial and full annulments represents only about 7% of the total number of awards rendered; however, as the reasons for not applying for annulment may not be related to whether the losing parties agree with the tribunal’s application of the law, it is impossible to know whether an Annulment Committee would have upheld the awards against which no annulment application was filed.

<sup>19</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11) Decision on Annulment of the Award (2 November 2015); *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) Decision on Annulment of the Award (18 December 2012); *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Decision on Annulment of the Award (5 April 2016).

## 2. WTO Appellate Body

The 1947 GATT stipulated that the contracting parties themselves, acting jointly, had to deal with disputes between individual Members:<sup>20</sup> at first, they were decided by the Chairman of the GATT Council. Later, disputes were referred to Working Parties composed of representatives from all interested contracting parties, including the disputing parties, which adopted their reports by consensus. These Working Parties were, in turn, replaced by panels made up of independent experts, unrelated to the disputing parties, who wrote independent reports with recommendations for resolving the dispute. Only upon approval by the GATT Council, did these reports become legally binding on the disputing parties. As this procedure implied that the losing party had to join in the approval, no appeal procedure was needed. Remedying the inherent problems in the GATT dispute settlement system was given high priority on the agenda of the Uruguay Round negotiations, which resulted in a reversal of the approval procedure: a report was henceforth approved, unless the entire WTO membership (including the winning party) agreed to reject it. This was seen as necessitating the establishment of the Appellate Body in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>21</sup>

The number of appeal requests submitted to the WTO Appellate Body displays a decreasing trend. Relative to the total number of panel reports rendered (other than those established pursuant to DSU Article 21.5),<sup>22</sup> one can see that between 1995 and 1999, between 75% and 100% of panel reports were appealed (twenty-three out of twenty-eight reports, or average: 82%).<sup>23</sup> Between 2000 and 2004, this was the case for 45% to 75% of panel reports (thirty-four out of fifty-five reports, or average: 62%).<sup>24</sup> The number stayed more or less stable between 2005 and 2009 (twenty-seven out of forty-one reports, or 50% – 75%; average: 66%)<sup>25</sup> and went down again between 2010 and 2014 (thirty-one out of forty-eight reports, or 40% to 63% with an exceptional peak of 85% in 2014; average: 65%).<sup>26</sup> In the ongoing period, 2015 to the present, eight appeal proceedings were initiated

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<sup>20</sup> Article XXIII:2 of the General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187.

<sup>21</sup> GATT Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 33 ILM 1226.

<sup>22</sup> Panel reports pursuant to DSU Article 21.5 procedures have been excluded from the scope of this assessment as they relate to disagreements as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of a panel or Appellate Body report on the merits.

<sup>23</sup> Taking into account the simultaneous consideration of multiple appeals by the Appellate Body as listed on the WTO website ([https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm)), 28 applications for appeal were filed, relating to 23 reports, resulting in 22 Appellate Body decisions.

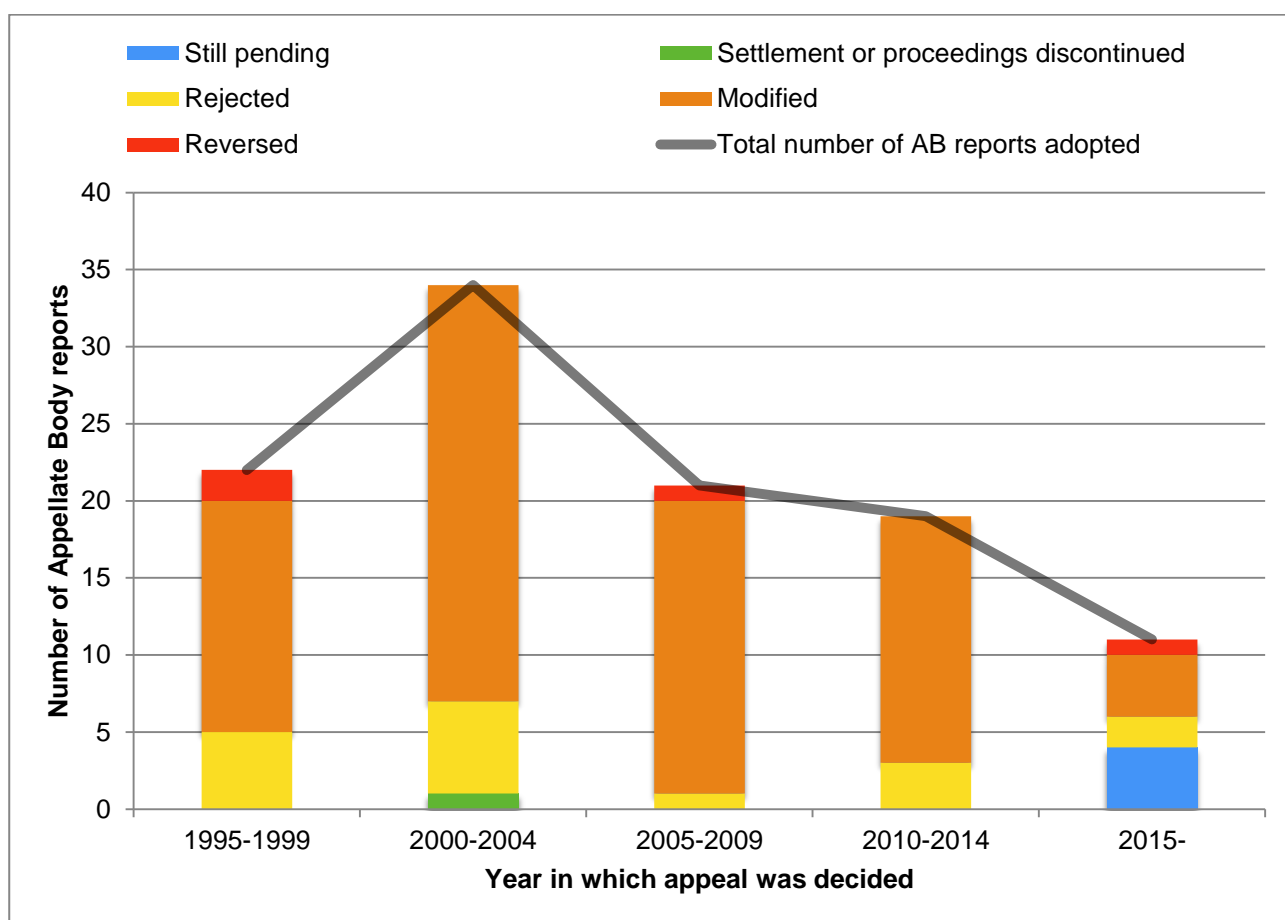
<sup>24</sup> 32 applications for appeal were filed, relating to 34 panel reports.

<sup>25</sup> 24 applications for appeal were filed, relating to 27 panel reports, resulting in 21 Appellate Body decisions.

<sup>26</sup> 26 applications for appeal were filed, relating to 31 panel reports, resulting in 19 Appellate Body decisions.

while thirteen panel reports were adopted (average: 62%) – bringing the total number of appealed reports to one hundred-twenty-three out of one-hundred eighty-five and confirming the existing trend. The average number of panel reports that are appealed, remains high: about two out of three (66%).

Looking at the outcome of these appeal procedures:<sup>27</sup> leaving aside pending and discontinued cases, seventeen Appellate Body reports fully upheld the panel reports at issue, four Appellate Body reports entirely reversed the panel reports and eighty-one Appellate Body reports modified the panel reports. This means that in a staggering 80% of appealed panel reports,<sup>28</sup> the Appellate Body found that the panel did not (entirely) get it right.



**Table 2. Overview of WTO appeals (based on WTO data)**

<sup>27</sup> The numbers of panel reports appealed (e.g. 23 in 1995-1999) are listed on the WTO website by date of Appellate Body report adoption, whereas the database of Appellate Body reports issued in a time period (e.g. 26 in 1995-1999) includes those adopted later (e.g. in the year 2000) but pertaining to an earlier panel report (e.g. 1999). Taking this into consideration and re-adjusting the figures, makes the figures either the same (for 2000-2004) or leaves less Appellate Body reports than panel reports appealed (1995-1999; 2005-2009; 2010-2014).

<sup>28</sup> Bearing in mind that about 34% of panel reports are not appealed, the number of modified or reversed reports represents only about 53% of the total number of reports; however, as the reasons for not appealing a report may not be related to whether the respondent Members agree with the panel’s application of the law, it is impossible to know whether the Appellate Body would have upheld the non-appealed reports.

In sum, as the WTO Appellate Body offers a good example of an often-used international appellate mechanism and as it is the main model on which the European Commission has chosen to base its ICS Appellate Tribunal proposal, it has been selected as a comparator for the present analysis.

### 3. AAA Optional Appellate Rules

Due to the narrowly-defined statutory grounds used by domestic courts to set aside or reject the enforcement of an arbitral award, the American Arbitration Association (AAA) saw a need to provide an appeal option within the commercial arbitration process itself. As a response, in 2013, the Optional Appellate Rules were published by the International Centre for Dispute Resolution (ICDR), the international arm of the AAA.<sup>29</sup> Unfortunately, no statistical data are available with regard to the practice under these Appellate Rules. Nevertheless, as the AAA/ICDR Rules form one of the very few illustrations of an appellate mechanism in international arbitration, this mechanism has been selected as a comparator for the present analysis.

### 4. Models for appellate mechanisms in investor-State dispute settlement

#### *a. Anticipatory model: rendez-vous clauses*

Envisaging the establishment of an appellate mechanism is not a wholly novel evolution in the context of ISDS. Several US Free Trade Agreements (FTAs) contemplate the creation of a standing body to hear appeals from investor-State arbitral panels, but this has not yet materialized in practice. The drafters of the US-Chile FTA (2003) were the first to follow this ‘anticipatory model’ when they incorporated a provision stipulating that an appellate mechanism could be developed in the future, if this were to be created under a distinct multilateral agreement.<sup>30</sup> The Dominican Republic-Central America-US FTA (CAFTA) (2004) went slightly further through the insertion of a *rendez-vous* clause requiring the institution of a Negotiating Group to develop an appellate body or similar mechanism,<sup>31</sup> considering, among other things, the nature and composition of an appellate mechanism, the applicable scope and standard of review, transparency, the legal effect of decisions on appeal, and the relationship of the appellate review with other applicable rules. In spite of these clauses, no such negotiations have been publicized and no draft text regarding the establishment of any appellate mechanism has been announced.

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<sup>29</sup> American Arbitration Association, *Optional Appellate Arbitration Rules* (2013), available at: <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218>

<sup>30</sup> Article 10.19(10) of the US-Chile FTA.

<sup>31</sup> Annex-F of CAFTA.

According to the leaked “Directives for the negotiation on the Transatlantic Trade and Investment Partnership” adopted by the EU Council in 2013, “[c]onsideration 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”.<sup>32</sup> The European Parliament also repeatedly expressed its wish that an appellate mechanism be created, albeit without further specification.<sup>33</sup> The first drafts of FTAs with an investment chapter negotiated by the EU (the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and the EU-Singapore FTA) also followed the anticipatory model. In a Press Release of 29 February 2016, however, the European Commission made public that the EU and Canada were adopting a new approach on dispute settlement under CETA:

While the original CETA text foresaw the possibility to establish an appeal mechanism in the future, the updated CETA text establishes at the entry into force of the Agreement an Appellate Tribunal. It also addresses the relationship between the decisions of the Appellate Tribunal and the Tribunal. The EU and Canada will promptly adopt a decision of the CETA Joint Committee which will include further technical elements necessary to make the Appellate Tribunal operational.<sup>34</sup>

In the current version of the FTA with Singapore, a *rendez-vous* clause is still incorporated, committing the Contracting Parties to look into the possibility of establishing an appellate mechanism.<sup>35</sup> This clause has not yet been re-negotiated, but it is likely that this will occur after the Court of Justice of the EU has issued its Opinion on this FTA.<sup>36</sup>

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<sup>32</sup> Council of the EU: Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013, ST 11103/13 RESTREINT UE/EU RESTRICTED. Available at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

<sup>33</sup> The Parliament’s 2011 Resolution on the EU’s International Investment Policy also contained a reference to the need to create the possibility for appeals, as did the Commission’s Communication of 2010 [European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI), at J. 31; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels, 7.7.2010 COM(2010), 343 final, p. 10]; European Parliament, Resolution of 8 July 2015 containing the European Parliament’s recommendation to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) para. 2 d) (xv).

<sup>34</sup> European Commission, Press Release, ‘CETA: EU and Canada agree on new approach on investment in trade agreement’, 29 February 2016, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468>. See Article 8.28 of the updated CETA text, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf); previous version: Article X.42 of the Consolidated CETA Text, Published on 26 September 2014, available at: [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

<sup>35</sup> Article 9.30(1), EU-Singapore Free Trade Agreement. Authentic text as of May 2015, available at: [http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc\\_152844.pdf](http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf).

<sup>36</sup> Opinion 2/15, Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, OJ [2015] C332/45.

*b. ICS model: a standing Appellate Tribunal*

The creation of a standing Appellate Body for investment matters is envisaged by the European Commission as a process which would “ensure consistency and increase the legitimacy of the system by subjecting awards to review”.<sup>37</sup> In addition to its incorporation in the revised CETA, this model has also been adopted in the EU–Vietnam FTA,<sup>38</sup> and forms part of the text which the European Commission is currently negotiating with the US in the framework of the Transatlantic Trade and Investment Partnership (TTIP).<sup>39</sup> Even though none of these treaties has entered into force yet, their main characteristics will be evaluated below in light of the other review mechanisms. The TTIP and EU–Vietnam FTA provisions in this regard are more comprehensive than those in the CETA: where no reference to CETA is included in the footnotes, this means that no equivalent CETA provision exists.

**B. Legal consequences of a successful application**

1. Existing mechanisms

*ICSID Annulment* – There is a fundamental difference between a successful appeal and an annulment: an ICSID *ad hoc* Annulment Committee cannot substitute its own judgment on the merits for the decision of the original tribunal and moreover, “annulment is concerned only with the legitimacy of the process of decision. It is not concerned with the substantive correctness of the decision. Appeal is concerned with both”.<sup>40</sup> Thus, if an *ad hoc* Committee annuls an award, the latter is effectively (totally or partially) removed from the legal order. To that extent, either party may submit the dispute to another ICSID tribunal which will then take a new decision both on the facts and the law, insofar as the original decision has been annulled.<sup>41</sup> Enforcement while an annulment proceeding is pending is in principle allowed, unless a stay of enforcement is issued by the *ad hoc* Committee.

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<sup>37</sup> European Commission Fact sheet: Investment Protection and Investor-to State Dispute Settlement in EU agreements, Nov. 2013, at p. 9, available at: [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf)

<sup>38</sup> EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, available at [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154210.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf).

<sup>39</sup> European Commission, *Draft Text TTIP – Trade in Services, Investment, E-Commerce* (12 November 2015) available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) [hereafter Draft TTIP Investment Chapter].

<sup>40</sup> C. H. Schreuer, L. Malintoppi, A. Reinisch & A. Sinclair, *The ICSID Convention: A Commentary*, (2<sup>nd</sup> ed.) (CUP 2009), p. 901.

<sup>41</sup> Article 52.6 ICSID Convention.

*WTO Appellate Body* – The WTO Appellate Body is established to “hear appeals from panel cases”.<sup>42</sup> While the appeal is pending, the panel report does not need to be implemented.<sup>43</sup> The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.<sup>44</sup> The Dispute Settlement Body (DSB) and the parties are considered to have accepted the report by the Appellate Body without amendment unless the DSB decides by consensus not to adopt it.<sup>45</sup> Once the report has been accepted, it becomes binding upon the parties to the dispute, replaces the original panel’s report and has to be implemented within a reasonable time period.<sup>46</sup>

*AAA/ICDR Optional Appellate Rules* – Parties may use the AAA/ICDR Optional Appellate Arbitration Rules only in mutual agreement, either by contract or stipulation, regardless of whether the underlying award was conducted pursuant to the AAA/ICDR Rules.<sup>47</sup> An Appeal Tribunal may uphold the underlying award, replace it with its own award (incorporating those aspects of the underlying award that are not vacated or modified), or request additional information.<sup>48</sup> By contrast there is no provision for the Appeal Tribunal to order a new arbitration hearing or to send the case back to the original tribunal for correction or further review. The time period for commencement of judicial enforcement proceedings is suspended while the appeal is pending.<sup>49</sup>

## 2. ICS proposal

When an appeal procedure is initiated, the Appeal Tribunal has three possible courses of action. First, it may “dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded”.<sup>50</sup> Secondly, the Tribunal may reject the appeal, in which case the “provisional award” becomes final.<sup>51</sup> Thirdly, if the appeal is well-founded, the Appeal Tribunal may modify or reverse the provisional award in whole or in part, specifying “precisely how it has modified or reversed the

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<sup>42</sup> Marrakesh Agreement Establishing the World Trade Organization (opened for signature 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3, Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401.

<sup>43</sup> Congressional Research Service (United States), *Dispute Settlement in the World Trade Organization (WTO): An Overview*, November 26, 2012, page 10, available at: <https://www.fas.org/sgp/crs/misc/RS20088.pdf>; Y. Guohua et al., *WTO Dispute Settlement Understanding: A Detailed Interpretation* (Kluwer Law International 2005) 191.

<sup>44</sup> Article 17.13 DSU.

<sup>45</sup> Article 17.14 DSU.

<sup>46</sup> P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 291-292 (2013).

<sup>47</sup> Article A-1 of the Optional Appellate Rules.

<sup>48</sup> Article A-19 of the Optional Appellate Rules.

<sup>49</sup> Article A-2 (a) of the Optional Appellate Rules.

<sup>50</sup> Article 29(2), Section 3, of the Draft TTIP Investment Chapter; Article 28(2), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>51</sup> Article 29(2), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(9)(c)(ii) of the CETA; Article 29(2), Section 3 of the EU-Vietnam FTA Investment Chapter.

relevant findings and conclusions of the Tribunal”.<sup>52</sup> Notwithstanding such specification, the case will then be referred back to the original Tribunal which, after hearing the parties if appropriate, must revise its provisional award to reflect the findings and conclusions of the Appeal Tribunal, which are binding upon the original Tribunal.<sup>53</sup> The use of the term “provisional award” when referring to the award of the original Tribunal would seem to indicate that it will not be possible to exact enforcement of an award as long as the period to appeal has not expired, or, while the appeal is pending. This would seem the best option, which has been adopted in the appeal mechanisms under the WTO and the ICDR/AAA. An alternative possibility would be for a successful claimant before the original Tribunal to enforce this award at its own peril, subject to a stay of execution: if the Appeal Tribunal modifies or reverses the original award, any compensation already received would need to be repaid and additional ‘reparation costs’ might be due.

The provision that the Appellate Tribunal, upon finding the appeal well-founded, remands the case to the original Tribunal (presumably with the original composition) seems unnecessarily complicated and a waste of time and resources for all parties involved. Under the ICSID annulment rules, a similar system exists and as the jurisprudence shows, this may pave the way towards increased interpretative discord and, potentially, even a second annulment procedure.<sup>54</sup> Even though the decision on appeal in the proposed system would be binding for the original Tribunal, there risks being disagreement as to whether the revised provisional award accurately reflects the findings and conclusions of the Appeal Tribunal. In such case, it is not clear whether a second appeal would be possible, but even if it were, it would not be desirable for reasons of procedural efficiency. As the Appeal Tribunal has to indicate precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal, it could easily (partially) replace the original award with its own decision, as is the prerogative of the WTO Appellate Body and the Appeal Tribunal under the Optional Appellate Rules of the ICDR/AAA.

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<sup>52</sup> Article 29(2), Section 3, of the Draft TTIP Investment Chapter; Article 28(3), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>53</sup> Article 28(7), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(7)(b) and Article 29(4), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>54</sup> See e.g., *Amco Asia Corporation v Republic of Indonesia* (ICSID Case No. ARB/81/1) Annulment decision of 16 May 1988; Annulment decision of 17 December 1992; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Annulment decision of 3 July 2002; Annulment decision of 20 August 2007; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2) Annulment decision of 3 May 1985; Annulment decision of 17 May 1990.

### C. *Scope and standard of review*

#### 1. Existing mechanisms

*ICSID Annulment* – All ICSID awards are final and binding but they can be annulled on grounds exhaustively enumerated in Article 52 of the ICSID Convention:

- a. Improper constitution of the tribunal
- b. Manifest excess of powers by the tribunal
- b. Corruption of a tribunal member
- c. Serious departure from a fundamental rule of procedure
- d. Failure to state reasons by the tribunal

Parties have primarily invoked the grounds of manifest excess of powers, failure to state reasons, and serious departure from a fundamental rule of procedure.<sup>55</sup> Frequently all three grounds, or two out of the three, have been invoked together.

*WTO Appellate Body* – According to the DSU, an appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.<sup>56</sup> After two decades of jurisprudence, the common view is that the Appellate Body has remained within this mandate: allegations concerning *ultra vires* rulings are rare.<sup>57</sup>

*AAA/ICDR Optional Appellate Rules* – Under the Rules, the Appeal Tribunal applies a standard of review more expansive than that which is allowed by existing US federal and state statutes to vacate an award. Parties are permitted to appeal on the grounds that the underlying award is based on “(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous”.<sup>58</sup>

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<sup>55</sup> V. Balaš, *Review of Awards*, in P. Muchlinski *et al.* (Eds.) *The Oxford Handbook of International Investment Law* 1125 at 1146-1150 (2008); C. Knahr, ‘Annulment and its Role in the Context of Conflicting Awards’, in M. Waibel *et al.* (Eds.) *The Backlash Against Investment Arbitration: Perceptions and Reality*, 151 at pp. 153-160 (2010).

<sup>56</sup> Article 17.6 DSU.

<sup>57</sup> See e.g. P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 235-241 (2013).

<sup>58</sup> Article A-10 of the Optional Appellate Rules; see R. B. Jacobs, “Examining the Elusiveness of Finality in Arbitration, and the New Avenues of Appeal” *Alternatives to the High Cost of Litigation: The newsletter of the International Institute for Conflict Prevention and Resolution*, Vol. 33 no. 1 January 2015, p. 11-12.

## 2. ICS proposal

A permanent Appeal Tribunal is to be established to hear appeals from the awards issued by the Tribunal,<sup>59</sup> on the grounds

- (a) that the Tribunal has erred in the interpretation or application of the applicable law;
- (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
- (c) provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).<sup>60</sup>

This represents an extension of the applicable scope set out in the earlier proposal of the Commission, in which the Appellate Tribunal could only hear “appeals on issues of law covered in the Tribunal’s decision or award and legal interpretations developed by the Tribunal”.<sup>61</sup> Furthermore, the currently proposed Appeal Tribunal would be able to draw up its own working procedures,<sup>62</sup> while the provisions on third-party funding, transparency, interim decisions, discontinuance and the role of non-disputing parties to the proceedings apply *mutatis mutandis*.<sup>63</sup> The formulation of the second ground, *i.e.* manifest error in appreciation of the facts, raises new questions: how is ‘manifest’ to be interpreted? Should the erroneous appreciation have been in itself determinative of the outcome of the decision, or is it sufficient that it was one of the contributing elements? If the former, this risks severely limiting the scope of appeal since virtually every decision will be based on multiple grounds, which are unlikely to be all erroneous. For this reason, the latter interpretation would seem preferable but in that case the question becomes: what distinguishes manifest from non-manifest contributing factors?

Furthermore, as the Appeal Tribunal can also hear appeals on the grounds provided for in Article 52 of the ICSID Convention,<sup>64</sup> it would be useful to clarify how exactly ‘manifest excess of powers by the tribunal’ and ‘serious departure from a fundamental rule of procedure’ are to be understood as the case law is divergent in this regard.<sup>65</sup> For example, what is the difference between

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<sup>59</sup> Article 10(1), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(1) of the CETA; Article 13(1), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>60</sup> Article 29(1), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(2) of the CETA; Article 28(1), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>61</sup> Public consultation on modalities for investment protection and ISDS in TTIP, at 43-44, available at: [http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152280.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf)

<sup>62</sup> Article 10(10), Section 3, of the Draft TTIP Investment Chapter; Article 13(10), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>63</sup> Article 29(5), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(6) of the CETA (on transparency and the role of non-disputing party); Article 28(7), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>64</sup> Article 52(b) of the ICSID Convention.

<sup>65</sup> For a detailed discussion on case law, see Timmer, Laurens J.E., Manifest Excess of Powers as a Ground for the Annulment of ICSID Awards, 14 *Journal of World Investment and Trade* 5 (2013) 775-803; Bishop, R. Doak,

‘manifest’ and ‘serious’? Alternatively, if they are to be regarded as synonymous, does this mean that the departure of a fundamental rule of procedure by definition must have resulted in a different decision than would otherwise have been the case? Again, such strict interpretation would render this ground very difficult to invoke so the Appellate Tribunal should tread carefully when providing much-needed clarification in this regard. One risk is that the Appellate Tribunal’s decisions may in turn create conflict with the ICSID *ad hoc* Annulment Committees’ interpretations of the same provisions. Also, which rules of procedure are fundamental? Perhaps the most straightforward option would be to exhaustively list such procedural rules in the treaty itself.

Contrary to the equivalent provision under the DSU, ‘the appreciation of relevant domestic law’ has been added to the scope of review in recognition of the often crucial role of national law in international adjudication. For example, the assessment of whether a property title exists under domestic law, can determine whether an investment is covered by an international investment agreement. More generally, the proposed scope of review seems to be broader than that of both the WTO Appellate Body (“issues of law covered in the panel report and legal interpretations developed by the panel”) and the Appeal Tribunals under the ICDR/AAA (“errors of law that are material and prejudicial and/or on determinations of fact that are clearly erroneous”) as neither of these systems refer to, *e.g.*, improper constitution of the tribunal, manifest excess of powers, corruption or serious departure from procedural rules.

The EU intends to include a provision allowing for joint statements of the States parties on how particular treaty provisions should be interpreted, which will be binding on the Tribunal and the Appellate Tribunal<sup>66</sup> – similar to the interpretative powers of the Free Trade Commission (FTC) under NAFTA. A point of concern is the Commission’s assertion that “[t]hese binding

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Annulment under the ICSID Convention (OUP 2012); Scherer, Matthias, ICSID Annulment Proceedings based on Serious Departure from a Fundamental Rule of Procedure: (Article 52(1)(d) of the ICSID Convention), in: *The Relationship between Constitutional Values, Human Rights and Arbitration* / ed. Alexander J. Bělohávek, Naděžda Rozehnalová (Juris 2011) 211-226.

<sup>66</sup> Article 13(5), Section 3, of the Draft TTIP Investment Chapter: ‘Where serious concerns arise as regards matters of interpretation relating to [the Investment Protection or the Resolution of Investment Disputes and Investment Court System Section of this Agreement], the [] Committee may adopt decisions interpreting those provisions. Any such interpretation shall be binding on the Tribunal and the Appeal Tribunal. [...]’ [footnote omitted]; Article 8.31(3) CETA: “Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.”; Article 16(4), Section 3 of the EU-Vietnam FTA Investment Chapter: “Where serious concerns arise as regards issues of interpretation which may affect matters relating to this Chapter, the Trade Committee may adopt interpretations of provisions of this Agreement. Any such interpretation shall be binding upon the Tribunal and the Appeal Tribunal. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.”

interpretations can also be made with respect to on-going ISDS cases. The ability for the Parties to the agreement to adopt binding interpretations is a safety valve in the event of errors by the tribunals.”<sup>67</sup> Similarly, “[t]he [] Committee may decide that an interpretation shall have binding effect from a specific date” – without specifying whether such date could also lie in the past.<sup>68</sup> One may wonder whether the drafters have thought through the legal implications of such powers. For example, could it not be seen as a breach of the principle of fair trial, if the ‘rules of the game’ can change while the ‘game’ is ongoing? In other words, should a party to a dispute have the power to impose its own interpretation of the applicable law? Admittedly, all parties to the treaty (including those not party to the dispute) have to agree to issue such a binding statement, but it would not be unheard-of for a home State *not* to support its own national for political or other reasons.<sup>69</sup> Also, when speaking of a “safety valve in the event of errors by the tribunals” – does this mean that such a *post-factum* interpretation could invalidate an existing award and effectively pre-empt the powers of the Appeal Tribunal? Or would this only be binding upon future tribunals in other disputes?

Particularly in the context of an appeals mechanism, the question arises whether a decision could be successfully appealed on the basis of a Tribunal’s interpretation of a certain provision (entirely within the scope of plausible interpretations at the time of its making), which became the object of a joint statement after the original award was rendered. It may be noted that the interpretative statement of the FTC concerning Article 1105 NAFTA (fair and equitable treatment) created less, rather than more, legal predictability, as some tribunals regarded this statement as a binding interpretation (albeit one subject itself to interpretation), whereas others saw it as venturing beyond interpretation into an (unlawful) amendment, and hence did not consider themselves bound.<sup>70</sup> Neither under the WTO nor under the ICDR/AAA Appellate Rules could such situations occur – and it should also be avoided in the context of the new investment appellate mechanism.

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<sup>67</sup> 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* (5 May 2015) p. 2, available [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF).

<sup>68</sup> Article 13(5), Section 3, of the Draft TTIP Investment Chapter; Article 8.31(3) of the CETA; Article 16(4), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>69</sup> E.g., *The Renco Group, Inc. v. The Republic of Peru*, (ICSID Case No. UNCT/13/1) Non-Disputing State Party Submission of the United States of America (10 September 2014); *KBR, Inc. v. United Mexican States*, (ICSID Case No. UNCT/14/1) Non-Disputing State Party Submission of the United States of America (30 July 2014).

<sup>70</sup> The interpretation is within the FTA’s mandate: *Loewen Group, Inc. v. United States*, (ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. 2003), Award, (26 June 2003), 125-26; *United Parcel Service of America, Inc. v. Canada*, (NAFTA Ch. 11 Arb. Trib. 2002), Award on Jurisdiction, (22 November 2002), 97; *Mondev Int’l Ltd. v. United States*, (ICSID Case No. ARB(AF)/99/2; NAFTA Ch. 11 Arb. Trib. 2002), Award, (11 October 2002), 120-21. The interpretation is outside of the FTA’s mandate: *Pope & Talbot, Inc. v. Canada*, (NAFTA/UNCITRAL Tribunal), Final Award, (11 March 2002), paras. 39-42; *Methanex Corp. v. United States*, (NAFTA Ch. 11 Arb. Trib. 2005), Final Award, (7 August 2002), pt. IV, ch. C, 18.

#### D. *Composition of the review panel*

##### 1. Existing mechanisms

*ICSID Annulment* – On receipt of the annulment application, the President of the World Bank (‘Chairman’) appoints from the Panel of Arbitrators an *ad hoc* Committee of three persons. Extensive limitations apply to the composition of this *ad hoc* Committee, excluding, among others, nationals of either the home or host State of the investor as well as the States of nationality of the original Tribunal members.<sup>71</sup> ICSID designees have to be “persons of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment”.<sup>72</sup> Before or at the first session, each member has to sign a declaration disclosing any potential conflicts of interest.<sup>73</sup> A party may file a request with the ICSID Secretary-General to disqualify one or more Committee members “on account of any fact indicating a *manifest lack* of the [required] qualities”.<sup>74</sup> The challenged member(s) may furnish explanations and unless the proposal relates to a majority of the members, the other members will promptly consider and vote on the proposal in the absence of the member concerned.<sup>75</sup> Based on the (limited) case law, it would seem that this high threshold is almost never considered to be met.<sup>76</sup> The exercise of ancillary activities is not restricted and there is no ICSID-specific Code of Conduct, but in challenge decisions, reference is often made to relevant non-binding international standards.<sup>77</sup>

*WTO Appellate Body* – The Appellate Body is composed of seven members with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, who are appointed for a term of four years (with possible reappointment for another four-year term).<sup>78</sup> The Appellate Body sits on each case in a division of three members. The members of each division are randomly selected and there is no prohibition against Appellate Body members sitting on cases

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<sup>71</sup> Limitations on the membership of the committee are set out in Article 52.3 of the ICSID Convention, according to which: [...] None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. [...].

<sup>72</sup> Article 14.1 of the ICSID Convention; see also sections 2 and 5, Chapter IV of the ICSID Convention.

<sup>73</sup> Rule 6(2) of the ICSID Arbitration Rules.

<sup>74</sup> Article 57 of the ICSID Convention [emphasis added].

<sup>75</sup> Rule 9(3)-(4) of the ICSID Arbitration Rules.

<sup>76</sup> See e.g., *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on the challenge of to the President of the Committee (3 October 2001); *Nations Energy Corporation, Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama* (ICSID Case No. ARB/06/19) Decision on the Proposal for the Disqualification of a Member of the Annulment Committee (7 Sept. 2011); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01) Decision on the Argentine Republic’s proposal to disqualify Ms. Teresa Cheng (26 Aug. 2015).

<sup>77</sup> E.g., IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council (23 Oct. 2014): [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) [2014 IBA Guidelines on Conflicts of Interest].

<sup>78</sup> Article 17.3 DSU.

involving the State of which they are a national.<sup>79</sup> After the oral hearing, which is attended only by the three members of the division, the written pleadings in each case are discussed amongst *all* members of the Appellate Body, although the final decision is to be made by the three-member division. This practice, known as ‘collegiality’, aims at ensuring that regional or legal culture differences in a particular case are fully understood.<sup>80</sup> All persons serving on the Appellate Body have to be available at all times and on short notice, and stay abreast of WTO dispute settlement activities and other relevant activities.<sup>81</sup> WTO Appellate Body members are prohibited from being affiliated with any government and they cannot participate in the consideration of any disputes that would create a direct or indirect conflict of interests.<sup>82</sup>

*AAA/ICDR Optional Appellate Rules* – The *ad hoc* Appeal Tribunal is selected from the AAA’s Appellate Panel, or, if it concerns an international dispute, from its International Appellate Panel.<sup>83</sup> The AAA Panels consist of former federal and state judges and neutrals with strong appellate backgrounds. If the parties have not appointed an Appeal Tribunal and have not provided for any other method of appointment, the AAA sends each party an identical list of ten names of persons chosen from its (International) Appellate Panel.<sup>84</sup> The parties are encouraged to agree to the Appeal Tribunal based on the submitted list, otherwise, each party has to strike the names of persons it objects to, number the remaining names in order of preference, and return the list to the AAA, which will then appoint the three members of the Appeal Tribunal itself,<sup>85</sup> unless the parties have agreed to utilize a single arbitrator. The AAA also appoints the Chairperson of the Tribunal.<sup>86</sup> The Appeal Tribunal members are subject to the applicable code of ethics and to disclosure obligations.<sup>87</sup> Under the ICDR/AAA rules, appeal tribunal members also have to comply with the ethical code, in particular its disclosure obligations, but there are no limitations to their ancillary activities; on the contrary, serving on an appeal tribunal is, for most list members, an ancillary job itself.

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<sup>79</sup> Rule 6(2) WTO Working Procedures for Appellate Review; J. Hillman, *Moving Towards an International Rule of Law? The Role of the GATT and the WTO in its Development*, in G. Marceau, *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* 60 at 70 (2015).

<sup>80</sup> Rule 4 WTO Working Procedures for Appellate Review; P. Delimatsis, *Institutional Transparency in the WTO*, in A. Bianchi & A. Peters (Eds.) *Transparency in International Law* 112 at 122-123 (2013); A. Alvarez-Jimenez, *The WTO Appellate Body’s Decision-Making Process: A Perfect Model for International Adjudication?* 12 *Journal of International Economic Law* 289, at 301ff (2009); D.P. Steger, *Improvements and Reforms of the WTO Appellate Body*, in F. Ortino (Ed.) *The WTO Dispute Settlement System, 1995-2003* 40 at 43-44 (2004).

<sup>81</sup> Article 17.3 of the WTO DSU.

<sup>82</sup> Article 17.3 of the WTO DSU.

<sup>83</sup> Article A-4 (a) of the Optional Appellate Rules.

<sup>84</sup> Article A-5 (a) of the Optional Appellate Rules.

<sup>85</sup> Article A-5 (b) of the Optional Appellate Rules.

<sup>86</sup> Article A-5 (c) of the Optional Appellate Rules.

<sup>87</sup> Article A-4 (b) of the Optional Appellate Rules.

## 2. ICS proposal

The Appeal Tribunal is to be composed of six members: two nationals of a Member State of the European Union, two nationals of the United States and two nationals of third countries.<sup>88</sup> The Contracting Parties are to each propose three candidates, two nationals and one non-national, to serve as members of the Appeal Tribunal.<sup>89</sup> A Committee would be empowered to “increase the number of the Members of the Appeal Tribunal by multiples of three”, to be appointed on the same (two–one) basis.<sup>90</sup> The Appeal Tribunal members are to be appointed for a six-year term, renewable once.<sup>91</sup> The President and Vice-President are to be selected by lot for a two-year term among the members that are nationals of third countries.<sup>92</sup> As the standard composition entails that there are only two such members, it would seem that they are to swap roles every other year. If ICSID-type nationality limitations had applied to an Appeal Tribunal established under the new investment agreements, this would have entailed that the large majority of people with relevant expertise would have been prohibited from serving. Instead, the Commission has followed the DSU provision which allows members of the Appellate Body to sit on cases involving the State of which they are a national. Similarly, no nationality restrictions are in place for members of Appellate Tribunals under the ICDR/AAA Rules. Allowing nationals of States Parties to serve as members of the Appellate Body may also contribute to reassuring them that their interests and particular sensitivities will be taken into account – akin to the ICJ procedure whereby States can ask for a judge of their nationality to be appointed to the bench on an *ad hoc* basis in disputes to which they are parties, if this is not yet the case.<sup>93</sup>

Candidates for membership of the Appeal Tribunal have to

possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in

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<sup>88</sup> Article 10(2), Section 3, of the Draft TTIP Investment Chapter; Article 13(2), Section 3 of the EU-Vietnam FTA Investment Chapter; Article 8.28(7)(f) of the CETA.

<sup>89</sup> Article 10(3), Section 3, of the Draft TTIP Investment Chapter; Article 13(3), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>90</sup> Article 10(4), Section 3, of the Draft TTIP Investment Chapter; Article 13(4), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>91</sup> Article 10(5), Section 3, of the Draft TTIP Investment Chapter, as a transitory arrangement, “the terms of three of the six persons appointed immediately after the entry into force of the agreement, to be determined by lot, shall extend to nine years.” Also, “[v]acancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.”; *Cf.* Article 13(5), Section 3 of the EU-Vietnam FTA Investment Chapter (four-year term; the terms of three of the six persons appointed immediately after entry into force extend to six years).

<sup>92</sup> Article 10(6), Section 3, of the Draft TTIP Investment Chapter; Article 13(6), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>93</sup> Article 31(2), United Nations, Statute of the International Court of Justice (18 April 1946) 33 UNTS 993.

international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.<sup>94</sup>

This formulation raises more questions than it answers: a concept such as ‘recognised competence’ is very much open to interpretation: recognised by whom and for what purpose? Furthermore, in a highly technical matter such as international investment and trade law, it is not merely ‘desirable’ that judges have experience, it should be mandatory in order to guard the quality of the judgments, to create a level-playing field between the members of the Appeal Tribunal and to avoid that specific judges can exert more influence on decisions than others due to differences in expertise. This has been recognised, for example, in the rules concerning the constitution of the WTO Appellate Body, where members need demonstrated expertise in law, international trade and the subject matter of the covered agreements, as well as in the ICDR/AAA Rules where panel lists only include people with ample relevant expertise. Similarly, ICSID Annulment Committee members need to have “recognised competence in the fields of law, commerce, industry or finance”.<sup>95</sup> Making subject-matter expertise a mandatory requirement is hence (rightfully) the rule rather than the ‘desirable’ exception and one way to guarantee this would be to allow for challenges of members, not only for conflicts of interests, but also for lack of relevant expertise.

A valid point of critique on the current ISDS system, including the ICSID annulment procedure, is that the pool of regularly appointed arbitrators is too limited and not sufficiently diverse. When detailing how the roster of (Appeal) Tribunal members will be compiled, the Commission has regrettably omitted any specification as to whether and how adequate gender and geographical distribution (for example, representation of the smaller EU Member States) will be ensured. This consideration is equally absent from the provisions on composition of Appellate Tribunals under the ICDR/AAA Rules as well as for the WTO Appellate Body (although members should be “broadly representative of membership in the WTO”).<sup>96</sup> In order to increase efficiency, the Appeal Tribunal is to hear appeals in divisions consisting of three members chaired by the third-country national.<sup>97</sup> This division is to be established by the President of the Tribunal on a rotation basis, yet simultaneously ensuring that “the composition of each division is random and unpredictable, while giving equal opportunity to all Members to serve”.<sup>98</sup> This is similar to the

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<sup>94</sup> Article 10(7), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(4) of the CETA; Article 13(7), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>95</sup> Article 14.1 of the ICSID Convention; see also see sections 2 and 5, Chapter IV of the ICSID Convention.

<sup>96</sup> Article 17.3 DSU.

<sup>97</sup> Article 10(8), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(5) of the CETA; Article 13(8), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>98</sup> Article 10(9), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(5) of the CETA; Article 13(9), Section 3 of the EU-Vietnam FTA Investment Chapter.

organisation of the WTO Appellate Body, although it is recommended that the ‘collegiality practice’ whereby all Appellate Body members are involved in the deliberations of each case, also be adopted in order to guarantee optimal consistency and predictability of appellate decisions. This practice is absent in the ICDR/AAA appellate mechanism, but as these cases concern disputes between private parties, the public interest in the development of a *jurisprudence constante* may be viewed as less essential.

Finally, like WTO Appellate Body Members, all members of the Appeal Tribunal are to be available at all times, on short notice and be abreast of other dispute settlement activities under the relevant investment chapter.<sup>99</sup> No similar provision can be found in the ICSID Convention and Arbitration Rules or the ICDR/AAA Appellate Rules (presumably because the pool of potential members contains far more persons so it is not necessary that all are available at all times). It is not required, however, that members of the Appeal Tribunal renounce all ancillary activities, as long as they refrain from taking on work “as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law”<sup>100</sup> and comply with the Code of Conduct.<sup>101</sup> Like WTO Appellate Body Members, Members of the Appeal Tribunal “shall not be affiliated with any government” and “shall not take instructions from any government or organisation with regard to matters related to the dispute”.<sup>102</sup> However, a footnote is added, stating that “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.”<sup>103</sup>

In terms of interpreting a term in accordance with its ordinary meaning, it would seem impossible to view government officials and those paid by a government as ‘not affiliated with any government’. In order to ensure (the perception of) impartiality, such persons ought to be excluded from serving on the Appeal Tribunal bench. As a comparison, under the International Bar Association Guidelines on Conflicts of Interest, the non-waivable ‘red list’ includes situations in which an arbitrator has a significant financial interest in one of the parties (for example, receiving remuneration from one of the parties) or regularly advises a party or an affiliate of a party, and

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<sup>99</sup> Article 10(11), Section 3, of the Draft TTIP Investment Chapter; Article 13(3), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>100</sup> Article 11(1), Section 3 of the Draft TTIP Investment Chapter.

<sup>101</sup> Annex II (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators), Section 3, of the Draft TTIP Investment Chapter; Article 8.44(2) of the CETA (code of conduct to be adopted by the Committee on Services and Investment) and Article 8.28(4) of the CETA; Annex II (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>102</sup> Article 11(1), Section 3 of the Draft TTIP Investment Chapter.

<sup>103</sup> Footnote 6 to Article 11(1), Section 3 of the Draft TTIP Investment Chapter.

receives a significant financial income therefrom.<sup>104</sup> This means that there are justifiable doubts as to this person's impartiality and independence, so (s)he is disqualified from adjudicating the case. As an alternative solution to a standing ICS Appellate Tribunal, a roster of unpaid 'available and qualified arbitrators' could be compiled from which adjudicators could be drawn if/when a dispute arises. This would suffice to handle the workload and be most cost-effective.

The Commission envisages that at some point in the future, the members of the Appellate Tribunal might serve on a full-time basis, in which case they will not be "permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal".<sup>105</sup> Unless this Appellate Tribunal would be put in charge of adjudicating appeals from a great number of investment treaties, it seems doubtful that this would ever be necessary. If this were to happen, its composition (three EU judges, three US judges and three third-country nationals) would need to be revised: all Contracting State Parties would presumably wish to appoint three of their nationals to the Appellate Tribunal, which would in turn significantly decrease the number of cases that each member would have to deal with. Hence, even in such a case, serving on the Appellate Body would not require full time employment.

### *E. Duration and cost limits*

#### 1. Existing mechanisms

*ICSID Annulment* – An ICSID annulment application must be made within one hundred-twenty days of the rendering of the original award.<sup>106</sup> Time limits on the process of annulment and the submission of the claim to a new tribunal are not set out in the ICSID Convention but between mid-2007 and mid-2012, the average annulment proceeding that resulted in a decision on the merits took twenty-six months from the registration to the issuance of the decision.<sup>107</sup> In most ICSID annulment proceedings to date, the *ad hoc* Committee also ordered the parties to share equally costs incurred

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<sup>104</sup> Article 1.3 and 1.4, Part II, of the 2014 IBA Guidelines on Conflicts of Interest.

<sup>105</sup> Article 10(14), Section 3, of the Draft TTIP Investment Chapter; Article 13(17), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>106</sup> Article 52.2 ICSID Convention. As an exception, when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

<sup>107</sup> ICSID Secretariat, *Background Paper on Annulment for the Administrative Council of ICSID*, 27 ICSID REV. 443, ¶ 62 (2012), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11>, see also A. Raviv, 'Achieving a Faster ICSID', in *Reform of Investor-State Dispute Settlement: In Search of A Roadmap*, 11 TDM 1 (2014) 1-49.

by the Centre (including fees and expenses of the *ad hoc* Committee), and to bear their own expenses.<sup>108</sup>

*WTO Appellate Body* – The disputing party must notify the DSB of its decision to appeal before the adoption of the panel report (between the twentieth and the sixtieth day after circulation of the panel report).<sup>109</sup> The Appellate Body in turn delivers its report within sixty days (or, exceptionally, ninety days) from the date a party to the dispute formally notifies its decision to appeal<sup>110</sup> – a deadline which is respected in almost 90% of the cases.<sup>111</sup> Following the circulation of the Appellate Body report, the DSB has thirty days to decide by consensus *not* to adopt it.<sup>112</sup> The DSU does not contain any specific provisions to limit the additional costs which an appeal entails: disputing parties carry their own legal representation costs but there is no fee for initiating or participating in appeals. The costs of the Appellate Body are borne by the WTO Members; its budget amounting to approximately two percent of the overall WTO Secretariat budget.<sup>113</sup>

*AAA/ICDR Optional Appellate Rules* – The Optional Appellate Arbitration Rules anticipate a process that can be completed in about three months.<sup>114</sup> Appeals will usually be determined on the written documents submitted by the parties, with no oral argument.<sup>115</sup> Due to the confidentiality of the procedures, no specific data are available with regard to the ICDR/AAA appellate procedures. The Appellant/Cross-Appellant may be assessed the appeal costs, and other reasonable costs of the Appellee/Cross-Appellee, including attorneys' fees, incurred after the commencement of the appeal if the Appellant/Cross-Appellant is not determined to be the prevailing party by the Appeal Tribunal.<sup>116</sup>

## 2. ICS proposal

The proposal puts forward strict time limits, although it is unclear what the repercussions would be if these deadlines are not met. The original Tribunal has to issue its provisional award within eighteen months of the submission of the claim, or adopt a decision specifying the reasons for the

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<sup>108</sup> To the contrary: *CDC Group plc v. Republic of Seychelles*, (ICSID Case No. ARB/02/14) Decision on Annulment (29 June 2005) para 89; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10) Decision on Annulment (8 January 2007) paras. 86-88.

<sup>109</sup> Article 16 DSU.

<sup>110</sup> Article 17(5) DSU.

<sup>111</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) p. 218.

<sup>112</sup> Article 17.14 DSU.

<sup>113</sup> P.F.A Macrory et al., *The World Trade Organization: Legal, Economic and Political Analysis*, p. 1289 (2005).

<sup>114</sup> Article A-19 of the Optional Appellate Rules.

<sup>115</sup> Article A-15 (a) of the Optional Appellate Rules.

<sup>116</sup> Article A-11 of the Optional Appellate Rules.

delay.<sup>117</sup> Either disputing party “may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance”.<sup>118</sup> The appeal proceedings are not to exceed one-hundred-eighty days from the date of formal notification of the appeal, unless the Appeal Tribunal informs the disputing parties of the reasons for the delay together with an estimate of the period within which it will issue its decision.<sup>119</sup> In no case should the proceedings exceed two-hundred-seventy days. If the Appeal Tribunal modifies or reverses the original decision, the case is remanded to the Tribunal, which “shall seek to issue its revised award within 90 days of receiving the report of the Appeal Tribunal”.<sup>120</sup> This would, in principle, mean that any procedure could last at most thirty months from the date of submission of the claim. In comparison with the shorter WTO Appellate Body deadline, but bearing in mind the duration of the ICSID annulment procedures, one-hundred-eighty days from notification to decision on appeal seems reasonable – although the inclusion of some form of ramification should this deadline not be met, in the absence of deliberate delaying tactics on the part of the parties, could be considered.

Costs for the proposed Appeal Tribunal are delimited as well: its members are to be paid a monthly retainer fee and a fee for each day worked as a member, about the same as for WTO Appellate Body members (being a retainer fee of around €7,000 per month).<sup>121</sup> In case the members of the Appeal Tribunal were to serve on a full-time basis, these fees would be transformed into a regular salary.<sup>122</sup> Similar to the WTO system, the retainer fee of the members as well as expenses for support from a Secretariat are to be paid equally by the Contracting Parties into an account managed by the ICSID or PCA Secretariat.<sup>123</sup> Whether the remuneration per day of meetings or other work performed in connection with the proceedings (currently set at US\$3,000, or about €2,600)<sup>124</sup> as well as subsistence allowances and reimbursement of travel expenses, will be allocated among the disputing parties is unclear. The TTIP draft text only provides that “[t]he

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<sup>117</sup> Article 28(6), Section 3, of the Draft TTIP Investment Chapter; Article 27(6), Section 3 of the EU-Vietnam FTA Investment Chapter; Cf. Article 8.39(7) of the CETA (24 months).

<sup>118</sup> Article 29(1), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(9)(a) of the CETA; Article 28(1), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>119</sup> Article 29(3), Section 3, of the Draft TTIP Investment Chapter; Article 16(4), Section 3 of the EU-Vietnam FTA Investment Chapter; See also Article 8.28(7)(b) of the CETA.

<sup>120</sup> Article 28(6), Section 3, of the Draft TTIP Investment Chapter; Article 29(4), Section 3 of the EU-Vietnam FTA Investment Chapter; See also Article 8.28(7)(b) of the CETA.

<sup>121</sup> Article 10(12), Section 3, of the Draft TTIP Investment Chapter; Article 13(14), Section 3 of the EU-Vietnam FTA Investment Chapter; See also Article 8.28(7)(d) of the CETA.

<sup>122</sup> Article 10(14), Section 3, of the Draft TTIP Investment Chapter; Article 13(17), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>123</sup> Article 10(12), (13) and (15), Section 3, of the Draft TTIP Investment Chapter; Cf. Article 13(15), Section 3 of the EU-Vietnam FTA Investment Chapter (“paid by both Parties taking into account their respective levels of development”); See also Article 8.28(7)(e) of the CETA.

<sup>124</sup> ICSID Schedule of Fees (effective 1 January 2013), para. 3.

remuneration of the Members shall be paid equally by both Parties”,<sup>125</sup> without further specifying whether this includes both the retainer fee and the fee for days worked. Since such specification has been included with regard to the first instance ICS Tribunal,<sup>126</sup> it would seem that all costs of the Appeal Tribunal are to be carried by the Contracting Parties, and none by the investor. In the EU–Vietnam FTA, on the other hand, it has been clearly stipulated that, like under the ICDR/AAA Rules, “such fees and expenses shall be allocated by the Tribunal among the disputing parties”.<sup>127</sup> Remuneration of CETA Appeal Tribunal members is one of the issues still left to be decided by the CETA Joint Committee.<sup>128</sup>

In any case, a disputing party lodging an appeal will have to “provide security for the costs of appeal and for any amount awarded against it in the provisional award”.<sup>129</sup> This could be hard on the applicant on appeal, particularly if this is the respondent State, as it might have to provide a large sum at the outset, which may negatively affect its decision to appeal, even if it has strong grounds for doing so.

#### *F. Assessment*

The selected annulment and appellate mechanisms were scrutinised above in light of four constitutive elements which shape the functioning and impact of international judicial review systems. The question is: how has this determined their coherence, predictability, efficiency and, ultimately, (the public perception of) their legitimacy?

*ICSID Annulment* – The ICSID annulment system is increasingly being criticised for a number of reasons. In terms of predictability, it has been suggested that several *ad hoc* Committees overstepped the boundaries of their mandate so as to “improperly re-examine [...] the merits of a case, thereby effectively transforming an annulment proceeding into an appeal”.<sup>130</sup> It is not desirable from the viewpoint of creating a stable legal environment that some *ad hoc* Committees seem willing to point out errors in the application of the law, while others refuse to annul even

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<sup>125</sup> Article 10(12), Section 3, of the Draft TTIP Investment Chapter.

<sup>126</sup> Article 9(14), Section 3, Draft TTIP Investment Chapter; Article 8.27(14) CETA; Article 12(16), Section 3, the EU-Vietnam FTA Investment Chapter.

<sup>127</sup> Article 13(16) EU-Vietnam FTA.

<sup>128</sup> Article 8.28(7) CETA.

<sup>129</sup> Article 29(4), Section 3, of the Draft TTIP Investment Chapter; Article 28(6), Section 3 of the EU-Vietnam FTA Investment Chapter “security, including the costs of appeal, as well as a reasonable amount determined by the Appeal Tribunal in light of the circumstances of the case”; See also Article 8.28(7)(e) of the CETA.

<sup>130</sup> Burgstaller, M., Rosenberg, C.B., Challenging International Arbitral Awards: To ICSID or not to ICSID?, 27 *Arbitration International* 1 (2011) 91-108; Thomas W. Waelde, ‘ICSID “Annulment Committee”’ in (2004) 1(1) *Transnational Dispute Management* (February); Emmanuel Gaillard, ‘A Black Year for ICSID’ in (2007) *New York LJ* 2; Christoph Schreuer, ‘Three Generations of ICSID Annulment Procedures’ in *Annulment of ICSID Awards* (2004)

when concluding that the original tribunal applied the law wrongly.<sup>131</sup> In view of the fact that annulment applications have led to a (wholly or partially) different decision in response to almost a third of the applications, question marks can be placed on awards that cannot withstand even a very restricted review.<sup>132</sup> The unwillingness of the State to comply with awards that are apparently open to serious criticism is understandable.<sup>133</sup> Moreover, due to the *ad hoc* character of the system, no safeguards for coherence are built into the system and as recourse to annulment procedures becomes more popular, arbitration's reputed efficiency in terms of limited duration and costs is suffering. It is clear that, at the moment, its standard of legitimacy is rather negatively perceived by the majority of the public – all of which strengthens the call for a 'real' appellate review.

*WTO Appellate Body* – The dispute settlement system of the WTO in general, and of the Appellate Body, in particular, is a central element in providing security and predictability to the multilateral trading system.<sup>134</sup> The fact that four out of five appeal procedures lead to a modified or reversed report demonstrates the undisputable necessity of an appeal procedure (and raises valid questions as to the quality of the panel reports).<sup>135</sup> Also, the distribution of adjudicator appointments in the WTO seems to be more evenly spread out compared to ICSID. That being said, the majority of the WTO Appellate Body Members have previously been affiliated with one of the WTO Member governments, thus potentially raising concerns regarding their political independence. Impartiality should, however, be considered as outweighing overall given the fixed-term appointments of the WTO Appellate Body Members (although this is arguably under dispute at the moment due to the US opposition to the renewal of the Korean Appellate Body member).<sup>136</sup> Despite calls for the increase of the number of Appellate Body Members, such a possibility could negatively affect the practice of collegiality which is closely connected with its small membership.<sup>137</sup> In terms of substance, the WTO Appellate Body's adherence to previous case law has contributed to

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<sup>131</sup> Baetens, F., 'To ICSID or not to ICSID is not the question', in T. Weiler & I. Laird (Eds.), *Investment Treaty Arbitration and International Law*, Juris Arbitration Series, Vol. 5, Juris New York 211, at 215-216 (2012).

<sup>132</sup> Yen Kong Ngangjoh-Hodu and Collins C. Ajibo, 'ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration' 6 *Journal of International Dispute Settlement* 3 (2015) 308–331.

<sup>133</sup> See, in general, C. Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and its Interpretation in Case Law and Literature* (2010).

<sup>134</sup> Article 3.2 DSU.

<sup>135</sup> J. Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are From Mars, Trade Adjudicators Are From Venus*, 109 *AJIL* 4 (2015) 761.

<sup>136</sup> M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 36 *University of Pennsylvania Journal of International Law* 1, at 29 (2014); see also S. Cho and J. Kurtz, 'Converging Divergences: A Common Law of International Trade and Investment' <<http://papers.ssrn.com/abstract=2546326>>; <http://www.twn.my/title2/wto.info/2016/ti160519.htm>.

<sup>137</sup> D.P. Steger, *Improvements and Reforms of the WTO Appellate Body*, in F. Ortino & E-U. Petersmann (Eds.), *The WTO Dispute Settlement System 1995-2003*, 40 at 44 (2004).

jurisprudential coherence and predictability.<sup>138</sup> Finally, when it comes to the consideration of non-trade-related interests, the WTO Appellate Body has striven (with varying degrees of success)<sup>139</sup> to strike a balance, so that none of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members. The location of the line of equilibrium is not fixed and unchanging; it moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.<sup>140</sup> The Appellate Body's exemplary record in terms of restricting the duration and cost of proceedings attests to its efficiency. On balance, the WTO Appellate Body system is widely perceived as successful in executing its tasks, thereby affirming its legitimacy.<sup>141</sup>

*AAA/ICDR Optional Appellate Rules* – As the ICDR Optional Appellate Rules are applied in confidential disputes between private commercial parties, the lack of available data prevents any assessment of the coherence and predictability of its decisions. At least on paper, these Rules do provide a model to incorporate an appeals mechanism in an arbitration context, while maintaining the advantages of, first and foremost, the flexibility and efficiency, of arbitral procedures. To date, the practical relevance of the ICDR Optional Appellate Rules seems to be limited. Indeed, to the best knowledge of the author, so far such appellate awards have not been sought to be judicially enforced. While the appeal of this mechanism to commercial parties remains to be seen, it could be a “net good” given the fair balance struck between the opportunity of an additional review of a potentially incorrect award, on the one hand, and efficiency and finality, on the other.<sup>142</sup>

*ICS proposal* – The broad scope of grounds for review might allow for the development of coherent and predictable jurisprudence, although clarification with regard to the interpretation of the ICSID grounds would be welcome. The absence of nationality restrictions would seem to make sense and might even serve to improve the public acceptance of resulting decisions. Imposing time limits will

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<sup>138</sup> See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, § 107, WT/DS8/AB/RW (Oct. 22, 2001); Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, § 188, WT/DS268/AB/R (Nov. 29, 2004); Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, § 160, WT/DS344/AB/R (Apr. 30, 2008).

<sup>139</sup> See, for example, D. Nicol, *Business Rights as Human Rights*, in T. Campbell *et al.* (Eds.) *The Legal Protection of Human Rights: Sceptical Essays*, 229 at 238-239 (2011); H. Grosse Ruse-Khan, *Assessing the Need for a General Public Interest Exception in the TRIPS Agreement*, in A. Kur (Ed.) *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* 167, at 203-204 (2011).

<sup>140</sup> E.g., Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, § 159 (Dec. 12, 1998).

<sup>141</sup> J. Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are From Mars, Trade Adjudicators Are From Venus*, 109 *AJIL* 4 (2015) 761.

<sup>142</sup> J.M. Hosking & C.D. Guevara, *Appellate Arbitration Mechanisms: The AAA/ICDR Optional Rules – A New Trend in International Arbitration?*, in A.V. Asoskov *et al.* (Eds.), *Novye gorizonty meždunarodnogo arbitraža*, 78 at 109-110 (2014).

support the efficient rendering of decisions but this would even be improved if the Appeal Tribunal were to be allowed to replace an overturned decision with its own judgment, rather than requiring the case to be re-argued before a new Tribunal. This would also aid towards limiting the costs – about which much ambiguity remains. It is to be regretted that nothing in the treaties currently ensures access for small and medium-sized companies (who arguably need this system most), for example, in the form of linking the costs to the amount of the claim. In light of the fact that an Appeal Tribunal will be established for each treaty separately (at least initially, until agreement on a multilateral tribunal can be reached), it does not seem cost-beneficial to pay retainer fees to potentially dozens of judges and Appellate Tribunal members who may have few or no cases at all to decide. Worrying elements include the possibility for Contracting Parties to intervene and influence ongoing cases via joint statements, as well as the assumption that persons remunerated by a government would nevertheless be seen as non-government affiliated, impartial and independent. Finally, the absence of a requirement for Appeal Tribunal members to have extensive expertise in the subject-matter as well as the lack of any guarantee for adequate gender and geographic distribution ought to be remedied. Addressing these defects in the current ICS proposal for an Appeal Tribunal would significantly contribute to improving the (public perception of) the legitimacy of this dispute settlement system as a whole.

### III. Outlook

#### A. *Relationship between a new appeal process and existing review mechanisms*

One issue that has remained under dispute thus far in the discussions concerning the establishment of appeal options under various treaties concerns the relationship between the appeal mechanism and the existing review mechanisms (setting-aside, refusal to enforce and annulment). Would it be possible for example, for a State to simultaneously appeal and seek to have the original decision set aside by the domestic courts in the place of arbitration? Would it be possible for an investor to apply for enforcement of a decision which is being appealed? Although the European Commission frequently refers to ICSID throughout its draft Investment Chapters, it is unclear how the EU could appear as a party in an ICSID dispute,<sup>143</sup> seeing that the ICSID Convention and the Additional Facility Rules only allow for State participation.<sup>144</sup> Should this somehow be made possible, the question is whether a decision can simultaneously be appealed against and the subject of an annulment procedure. The same questions arise with regard to the appeal decision itself: can it form

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<sup>143</sup> Baetens, F., 44 *Legal Issues of Economic Integration* 4 (2016 - forthcoming).

<sup>144</sup> Article 25 of the ICSID Convention.

the object of setting-aside, refusal to enforce or annulment? If nothing is stipulated to the contrary in the relevant agreement, there is arguably no legal obstacle to answering ‘yes’ to all these questions. However, from a procedural economy perspective, this would be undesirable – as has been recognised by the European Commission which proposes that final ICS awards cannot be subject to further “appeal, review, set aside, annulment or any other remedy”.<sup>145</sup> Any Contracting Party has to recognize these awards rendered as binding and “enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party”,<sup>146</sup> but execution remains governed by the domestic laws concerning the execution of judgments in force where such execution is sought.<sup>147</sup>

For the benefit of all parties involved, a solution ought to be worked out to prevent extensive litigation at the enforcement stage before domestic courts as seen in, for example, the Russian opposition to the *Yukos* award and the Ecuadorian non-compliance with the *Chevron* award (both rendered by a PCA tribunal).<sup>148</sup> Once a State has undertaken certain international obligations as well as chosen to subject itself to a dispute settlement mechanism; and after this independent and impartial body (in first instance and on appeal) has found a State in breach of these obligations, it would make a mockery of the judicial process if such State would nevertheless be able to lawfully refuse to comply. The European Commission’s answer to this conundrum is to stipulate that all awards rendered under the proposed system would automatically be deemed in conformity with the New York Convention as well as the ICSID Convention.<sup>149</sup> It is, however, difficult to see how domestic courts in third countries would be bound by this *ex ante* stamp of approval, when faced with a request of enforcement. One, rather cumbersome, option would be to conclude a series of bilateral agreements with States in which enforcement is likely to be sought. A recognition provision could in any case be inserted as a matter of course in all EU agreements with an investment chapter so that at least the EU’s contracting partners all have to enforce decisions resulting from the new ICS.

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<sup>145</sup> Article 30(1), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(9)(b) of the CETA; Article 31(1), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>146</sup> Article 30(2), Section 3, of the Draft TTIP Investment Chapter; Article 31(2), Section 3 of the EU-Vietnam FTA Investment Chapter; See also Article 8.28(9)(d) of the CETA.

<sup>147</sup> Article 30(3), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(9)(d) of the CETA; Article 31(5), Section 3 of the EU-Vietnam FTA Investment Chapter.

<sup>148</sup> C/09/477160 / HA ZA 15-1 (Russia v. Veteran, Yukos & Hulley) District Court The Hague (20 Apr. 2016); 13/04679 (Ecuador v. Chevron) Hoge Raad Nederland (26 Sept. 2014); Yu, Hong-Lin; Giupponi, Belen Olmos, Road to Nowhere?: a Comparative Legal Analysis on the Enforcement of Yukos Awards, 18 *International Arbitration Law Review* 4 (2015) p 80-94; Baetens, Freya, ‘Clarifying the meaning of ‘investment’ and the temporal scope of treaties: *Republiek Ecuador v Chevron Corporation (USA) en Texaco Petroleum Company, Hoge Raad (Dutch Supreme Court), Judgment (26 September 2014)*’, 17 *JWIT* (2016) 463-470;.

<sup>149</sup> Article 30(5)-(6), Section 3, of the Draft TTIP Investment Chapter; Article 8.28(9)(d) of the CETA; Article 31(7)-(8), Section 3 of the EU-Vietnam FTA Investment Chapter.

### **B. Towards a multilateral appellate mechanism?**

An appellate mechanism should preferably be developed at the multilateral level in cooperation with the relevant arbitral institutions, because a situation in which each IIA has its own appeal mechanism risks leading to even greater unpredictability. However, in view of the debacle of the Multilateral Agreement on Investment (MAI),<sup>150</sup> a multilateral institution may still be out of political reach. Bearing in mind that more than half of the world's IIAs currently in force involve EU Member States, the EU would seem ideally placed to launch the initiative by creating an appeals mechanism that is common to all EU treaties under negotiation (TTIP, CETA, the FTAs with Vietnam, India and Singapore, the BIT with China, etc.). As the EU Member States BITs are being gradually replaced by EU IIAs, the new appellate system could be progressively expanded in bilateral negotiations through adding names to the roster of Appellate Tribunal members. This view seems to be shared by the European Commission, which has announced that in parallel to setting up bilateral appeals mechanisms,

the EU should work towards the establishment of an international investment court and appellate mechanism with tenured judges with the vocation to replace the bilateral mechanism which would be established. This would be a more operational solution in the sense of applying to multiple agreements with multiple partners but it will require a level of international consensus that will need to be built.<sup>151</sup>

The ultimate goal of the Commission is even stated to be “in the longer term, [to] 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”.<sup>152</sup> While the latter would seem unlikely to become politically feasible in the foreseeable future, the bilateral mechanisms could in the long run serve as ‘stepping stones’ towards a multilateral appellate structure for investment disputes outside of the WTO context.

## **IV. Conclusions**

Where an appellate structure in international investment adjudication, allowing for a substantive review of all first-instance awards, seemed politically unrealistic before 2015, it would now appear

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<sup>150</sup> J. Karl, ‘The Negotiations on the OECD Multilateral Agreement on Investment’, in M. Bungenberg, J. Griebel, S. Hobe and A. Reinisch (eds.), *International Investment Law* (Hart Publishing, 2015), 342.

<sup>151</sup> European Commission Concept Paper 2015, p. 4.

<sup>152</sup> COM(2015) 497 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade for All: Towards a more responsible trade and investment policy* (14 Oct. 2015) p. 15

feasible that an appeal tribunal will be established relatively soon as Canada and Vietnam have already consented to incorporating it in CETA and the EU–Vietnam FTA, respectively, while Mexico and Singapore have indicated their willingness to discuss this with regard to their relevant EU FTAs.<sup>153</sup> Whether this model will also be adopted in the TTIP, remains uncertain: US Trade Representative Michael Froman and a former US official are on record stating that an investment court with pre-appointed judges and an appellate mechanism is a no-go area from the US perspective: “well-intentioned but mistaken”.<sup>154</sup> The creation of an appellate mechanism would undermine the finality of one-stop dispute resolution, abolishing a core feature of international arbitration. A frequently voiced worry is that losing parties will appeal as a matter of course. The WTO experience demonstrates that this may indeed occur in the first years, but that as soon as a predictable jurisprudence emerges, the number of appeals decreases – although the appeal rate remains high. One way to prevent frivolous appeals aimed at merely prolonging the proceedings and increasing the costs, would be to put in place a ‘loser pays’ system.

This article has compared three existing international review mechanisms (the ICSID *ad hoc* annulment procedure, the WTO Appellate Body and the AAA/ICDR Optional Appellate Rules) in order to examine the potential of the ICS Appeal Tribunal, as advocated by the European Commission. These review mechanisms were scrutinised in light of their constitutive elements which shape the functioning and impact of an international judicial review system: the legal consequences of a successful application; the scope and standard of review; the composition of the review panel; and provisions limiting the duration and cost of review proceedings. Also, this article provided an outlook on the relationship of a new appeal process with existing review mechanisms and the potential of a multilateral appellate tribunal in investment disputes. To some extent, the ICS drafters have usefully drawn upon the experience of other review mechanisms, but in several respects, there is still room for improvement. Notwithstanding potential disadvantages in terms of additional cost and length of proceedings, it seems clear that an appellate mechanism could nonetheless enhance the coherence, consistency, and, ultimately, (the public perception of) the legitimacy of international awards.

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<sup>153</sup> See Politico, ‘Singapore Weighs International Court System in EU Trade Agreement’ (7 June 2016) <<http://www.politico.eu/pro/singapore-weighs-international-court-system-in-eu-trade-agreement-cecilia-malmstrom-investment-court-system-ttip/>>; Politico, ‘Mexico to Consider Investment Court System in Trade Deal Upgrade’ (30 April 2016) <<http://www.politico.eu/pro/mexico-to-consider-investment-court-system-in-trade-deal-upgrade-bilateral-cecilia-malmstrom/>>.

<sup>154</sup> Reuters Report, 29 Oct. 2015, <http://www.reuters.com/article/2015/10/29/us-trade-ttip-idUSKCN0SN2LH20151029>; Borderlex PRO, Daily EU trade briefing, 14 Apr. 2016, <http://www.borderlex.eu/pro-daily-news-todays-headlines/>.