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The Role of the European Union in the Systemic Reform of Investor-State Dispute Settlement in
International and Regional Trade Agreements
The Impact of the ISDS Reform on the Independence and Impartiality of Arbitrators

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RÉSUMÉ

La crise de légitimité du système de règlement des différends investisseurs-États (RDIE) fait rage depuis plus d'une décennie. Le statut de l'arbitre est inscrit au cœur de cette crise. L'éthique en arbitrage international, tout comme le manque d'uniformité entre les sentences arbitrales, sont identifiés comme les causes principales d'inquiétude et de critique du RDIE par les investisseurs, les états et la société civile.¹ Les critiques relatives à l'indépendance et l'impartialité sont formulées eu égard au respect de la règle de droit dans le RDIE.²

En 2014, pour répondre à ce mécontentement croissant, l'Union européenne (UE) a adopté une réforme fondamentale en remplaçant le RDIE dans ses accords par un tribunal permanent des investissements (TPI), dans le sillage de leurs négociations d'un accord de libre-échange avec les États-Unis. Bien que les négociations de cet accord aient été suspendues indéfiniment peu après, la réforme a néanmoins été mise en œuvre par l'UE dans le cadre de sa nouvelle politique d'investissement. À ce jour, cette réforme a été mise en œuvre dans les accords de l'UE avec Singapour, le Canada, le Viet Nam et le Mexique. Certains ont salué l'approche de l'UE comme une réforme fondamentale du RDIE, alors que d'autres la qualifient plutôt comme une judiciarisation partielle du RDIE.

Dans cette thèse, nous examinons si la réforme adoptée par l'UE permet de renforcer la règle de droit en ce qui concerne l'indépendance et l'impartialité des arbitres. Cette analyse est complétée par le biais d'une évaluation comparative entre les deux ordres juridiques autonomes que sont l'ordre juridique européen et l'ordre arbitral international. La valeur de la règle de droit est utilisée pour établir dans quelle mesure les réformes suggérées du RDIE, qu'il s'agisse du TPI, de la Cour multilatérale d'investissement (CMI) ou des autres propositions débattues, contribuent effectivement à renforcer la règle de droit.

Nous semblons, ces jours-ci, assister à la désintégration de l'ordre économique international.³ Le commerce international à l'heure des politiques protectionnistes des États-Unis, l'ascension continue de la Chine et les défis liés à la sortie du Royaume-Uni de l'UE ne sont que des rappels de ces temps changeants. L'Union européenne, après avoir décrété que "le RDIE est mort"⁴, tente maintenant d'assumer un rôle de leader et de réformateur du commerce et de l'investissement international avec l'introduction du TPI.

¹ Chiara Giorgetti et al, "Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options" (2020) 21 *Journal of World Investment & Trade* at 441 [Giorgetti et al].

² *Ibid.*

³ "Managing International Economic (Dis)Integration: Challenges and Opportunities", conférence organisée par l'American Society of International Law International Economic Law Interest Group, le Conseil canadien de droit international, le Centre for International Governance Innovation, et la Faculté de droit de l'Université McGill "Joint North American Conference on International Economic Law incorporating the 2018 ASIL IECLIG Biennial" (Conférence held at the Faculty of Law, McGill University, 21-22 September 2018).

⁴ "... the Juncker Commission has fundamentally reformed the existing system for settling investment-related disputes. A new system – called the Investment Court System, with judges appointed by the two parties to the

Les négociations en cours au sein du Groupe de travail III de la CNUDCI pour la réforme du RDIE, y compris l'établissement de la CMI, sont une autre illustration de l'impact et de l'influence croissants de l'UE sur le contenu et la conception des accords commerciaux internationaux.

L'objectif de cette thèse est donc de déterminer si les réformes de la politique d'investissement de l'UE ont un effet unificateur aux niveaux supranational, régional et international ou contribuent plutôt à sa fragmentation en mettant en lumière les défis et les échecs des réformes proposées sur l'indépendance et l'impartialité des arbitres.

FTA and public oversight – is the EU's agreed approach that it is pursuing from now on in its trade agreements... Anything less ambitious, including coming back to the old Investor-to-State Dispute Settlement, is not acceptable. *For the EU ISDS is dead.* (Emphasis added). European Commission, “EU-Japan Free Trade Agreement”, Factsheet, July 2018, p 6, online: European Commission <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf>.

ABSTRACT

The legitimacy crisis of the investor state dispute settlement regime has been gaining ground for well-over a decade. At the heart of this crisis stands the status of the arbitrator. Ethics in international arbitration have been identified, together with lack of consistency between awards, as the foremost cause of concern by investors, states and civil society.⁵ These critics regarding independence and impartiality of the arbitrators pose issues to the respect of the rule of law in investor-State dispute settlement (ISDS).⁶

In 2014, to address this growing discontent, the European Union enacted a fundamental reform by replacing ISDS in its agreements by the new Investment Court System (ICS), in the wake of their negotiations for the largest ever free trade agreement with the United States. While this agreement was paused indefinitely shortly after, the reform was nevertheless implemented by the EU as part of its new policy on investment. To date, this reform has been implemented in the EU Agreements with Singapore, Canada, Viet Nam and Mexico. Some have hailed the EU's approach as a fundamental reform of ISDS, and others have simply considered it a partial judicialization of ISDS.

In this dissertation, we examine whether the reform enacted by the EU provides for a more robust rule of law with respect to the arbitrators' independence and impartiality.⁷ This analysis is completed through a comparative assessment between the two autonomous legal orders that are the EU legal order and the International arbitral order. The value of the rule of law is used to establish the extent to which the suggested ISDS reforms, whether the ICS, the Multilateral Investment Court ("MIC") or the other debated proposals contribute to strengthen the rule of law.

We seem, these days, to be witnessing the disintegration of the international economic order⁸. International trade in the time of America First policies, the continuous rise of China, and the challenges related to the exit of the United Kingdom from the EU are mere reminders of these changing times. The European Union, after decreeing that "ISDS is dead"⁹, is now attempting

⁵ Chiara Giorgetti et al, "Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options" (2020) 21 *Journal of World Investment & Trade* at 441 [Giorgetti et al].

⁶ *Ibid.*

⁷ Güneş Ünüvar & Tim Kreft, "Impossible Ethics? A Critical Analysis of the Rules on Qualifications and Conduct of Adjudicators in the New EU Investment Treaties" in Güneş Ünüvar, Joanna Lam & Shai Dothan, eds, *Permanent Investment Courts: The European Experiment*, European Yearbook of International Economic Law (Cham: Springer International, 2020) [Ünüvar & Kreft, "Impossible Ethics?"]

⁸ "Managing International Economic (Dis)Integration: Challenges and Opportunities" is the title of the American Society of International Law International Economic Law Interest Group, the Canadian Council on International Law, and the Centre for International Governance Innovation, together with McGill University's Faculty of Law's "Joint North American Conference on International Economic Law incorporating the 2018 ASIL IECLIG Biennial" (Conference held at the Faculty of Law, McGill University, 21-22 September 2018).

⁹ "... the Juncker Commission has fundamentally reformed the existing system for settling investment-related disputes. A new system – called the Investment Court System, with judges appointed by the two parties to the FTA and public oversight – is the EU's agreed approach that it is pursuing from now on in its trade agreements... Anything less ambitious, including coming back to the old Investor-to-State Dispute Settlement, is not acceptable. *For the EU ISDS is dead.*" (Emphasis added). European Commission, "EU-Japan Free Trade

to take on the role of leader and reformer of international trade and investment with the introduction of the ICS.

The ongoing negotiations at UNCITRAL Working Group III for ISDS reform, including the establishment of the MIC, is another illustration of the EU's growing impact and influence on the content and design of international trade agreements.

The objective of this thesis is therefore to determine whether the EU investment policy reforms have a unifying effect at the supranational, regional and international levels or rather further contribute to its fragmentation by bringing to light the challenges and failings of the proposed reforms on the independence and impartiality of arbitrators.

Key words: *Investor-State dispute settlement – Investment arbitration reform – International investment agreements – EU Commission, EU Parliament, Court of Justice of the European Union, EU values, Exclusive and shared competences, Legitimacy, Rule of law, Ethics, Impartiality, Independence, Investment Court System, Multilateral Investment Court, United Nations Commission on International Trade Law, Complex Networks of treaties, Proliferation, Fragmentation*

Agreement”, Factsheet, July 2018, p 6, online: European Commission
<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf>.

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ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CETA	Comprehensive Trade and Economic Agreement between EU and Canada
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CJEU	Court of Justice of the European Union
	European Convention for the Protection of Human Rights and Fundamental
ECHR	Freedoms (often referred to as the European Convention on Human Rights)
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EFILA	European Federation for Investment Law and Arbitration
EU	European Union
EUMEX	European Union Mexico Agreement
EUVIA	European Union Viet Nam Investment Agreement
EUSIA	European Union Singapore Investment Agreement
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Center for the Settlement of Investment Disputes
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ISDS	Investor State Dispute Settlement
JEEPA	EU Japan Economic Partnership Agreement
LCIA	London Court of International Arbitration
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most Favoured Nation

MS	Member States
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PC	European and Community Patent Court
PCA	Permanent Court of Arbitration
PTA	Preferential Trade Agreement
RCEP	Regional and Comprehensive Economic Partnership
SCC	Stockholm Chamber of Commerce
SME	Small and medium-sized enterprises
SSDS	State-to-state dispute settlement
TFEU	Treaty on the Functioning of the European Union
TISA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership Agreement
UN	United Nations
UNCITRAL	UN Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization
WTO AB	WTO Appellate Body
WTO DSB	World Trade Organization Dispute Settlement Body

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INTRODUCTION – FRAMING THE ANALYSIS

“If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe.

Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as “investor-state dispute settlement”, or ISDS.”¹⁰

*“The Arbitration Game”, *The Economist**

SECTION 1. CONTEXT – THE INVESTOR STATE DISPUTE SETTLEMENT LEGITIMACY CRISIS

A. The Contextual Crisis in Investor State Dispute Settlement

1. Imagine a judge sitting, alone, atop its ivory tower, drafting decisions. Appointed after lengthy training at magistrate school¹¹ or following rigorous selection process and a number of years excelling in practice.¹² Now imagine an arbitrator appointed by a party to a private dispute. After filing her CV and a declaration that she has no conflict of interest, she is appointed to the arbitral tribunal.¹³ Nothing else is required. The difference between the two processes is striking.

2. Now consider this: an arbitrator caught on tape advising counsel who appointed him on how to sway the Tribunal¹⁴; another accepting repeated appointments from the same

¹⁰ “The Arbitration Game”, *The Economist* (11 October 2014), online: [The Economist <https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game>](https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game).

¹¹ As is the case in civil law systems.

¹² As is the case in common law systems.

¹³ This is a general description of the appointment to arbitral tribunals either through institution under their arbitration rules or on an ad hoc basis.

¹⁴ Chiara Giorgetti, “Arbitrator Challenges in International Investment Tribunals” in Daniel Behn, Ole Kristian Fauchald & Malcom Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge: Cambridge University Press, 2022) 133 [Giorgetti, “Arbitrator Challenges”]. This is the case of Dr Sekolec, an arbitrator nominated by Slovenia in the international maritime border dispute between Slovenia and Croatia, whose recorded conversation and Slovenia’s agent in the case, Ms Drenik was published on 22

parties;¹⁵ and an assistant accused of having written crucial parts of a 50\$ billion award.¹⁶ While it would be unimaginable that judges comport themselves in such scandalous manner, these are but a few of the most recent egregious examples of arbitrators challenged.¹⁷ These arbitrators are appointed to cases in which a foreign investor sues a state, for reasons of expropriation or unfair treatment, for amounts frequently ranging into the hundreds of millions of dollars. They are paid for their services directly by the parties, hundreds of thousands, if not millions. Compound this with alleged pro-investor awards, restricted access to these multimillion dollars decisions engaging public policy, the impossibility to appeal, as well as inconsistent and at times conflicting decisions on similar issues. Presented in such a way, it would not surprise the reader to learn that investor state arbitration has come under dire criticism.¹⁸

3. This thesis therefore investigates the concerns surrounding independence and impartiality of arbitrators, through the lens of Investor-State dispute settlement (“ISDS”) reform in the European Union and internationally.

4. ISDS is, indeed, in crisis. ISDS, or investor state arbitration, provides “ad hoc, one-off international arbitration for prospective disputes that can be initiated by an individual or

July 2015 by daily Croatian newspaper *Večernji list*. He disclosed preliminary Tribunal conclusions and ways to influence other arbitrators. Following this revelation, both arbitrator and agent resigned at the Slovenian Prime Minister’s request. ICJ President Ronny Abraham was nominated as replacement. Croatian Prime Minister then requested suspension of the proceedings, following which Professor Vukas, arbitrator nominated by Croatia, resigned on 30 July 2015. On 31 July, Croatia informed the Tribunal it would cease to apply the Arbitration Agreement with Slovenia. Ronny Abraham resigned on 3 August and in September two new arbitrators were appointed to replace Messrs. Vukas and Abraham.

¹⁵ Brigitte Stern, French arbitrator, was challenged multiple times for repeat nominations from parties, e.g. *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Simon Batifort & Chloe Baldwin, “Replacement and Disqualification of Conciliators and Arbitrators” in *The ICSID Convention, Regulations and Rules*, Ed. Julien Fouret, Remy Gerbay & Gloria M. Alvarez, *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Cheltenham (UK) & Northampton (MA): Edward Elgar, 2019) 751 at 768 [Batifort & Baldwin].

¹⁶ Dmytro Galagan, “The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal’s Mandate?”, *Kluwer Arbitration Blog* (27 February 2015) online: <http://arbitrationblog.kluwerarbitration.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/>; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (2005), PCA Case no 2005-04/AA227 (UNCITRAL) [*Yukos*].

¹⁷ Arguably, these are illustrations of egregious behaviour of the nature used by opponents of the ISDS regime to throw it into disrepute, to shock, or provide entertainment, as professed by Giorgetti for the latter. Scientific surveys of challenges, recusals and removals are available by Giorgetti, “Arbitrator Challenges”, *supra* note 14; Batifort & Baldwin, *supra* note 15.

¹⁸ For a concise summary of the current critiques of ISDS see José Alvarez, “ISDS Reform: The Long View” (2021) IILJ Working Paper 2021/6 at 2 [Alvarez, “The Long View”].

corporate foreign investor against the state hosting its investment”¹⁹ to be resolved by arbitrators nominated by the parties or institution outside of traditional national courts. Its legitimacy has now been vehemently contested for close to twenty years; it “remains one of the most controversial areas of globalisation and international law.”²⁰ And just like any good crisis, its existence itself is often put in doubt.²¹ As a result, this legitimacy crisis has acted as the guiding force behind the vast majority of the recent policy, research and practice in the field of international investment arbitration.

5. Among the leading actors in this reform is the European Union who, unbidden and without seeking a thorough review, decided in 2015 to unilaterally reform the ISDS system in its internal space, abolishing ISDS and replacing it by a permanent tribunal of first instance and appeal, named the Investment Court System (“ICS”). With this innovative and bold move, the EU attempts to secure its place among the global leaders of trade, pushing between the hegemons that are the United States and China.²²

6. The complex treaty regime of investor state arbitration has known unexpected growth in the past 30 years.²³ From a “small subset of international law to one of its most prominent,

¹⁹ Daniel Behn, Ole Kristian Fauchald & Malcom Langford, “Introduction”, in Daniel Behn, Ole Kristian Fauchald & Malcom Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2022) 1 at 1 [Behn, Fauchald & Langford, “Introduction”].

²⁰ Daniel Behn, Ole Kristian Fauchald & Malcom Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2022). Jeremy Sharpe, Charles Brower, “The Coming Crisis in the Global Adjudication System” (2003) 19:4 *Arbitration International* 415. Charles H. Brower, “Structure, Legitimacy and NAFTA’s Investment Chapter” (2003) 36 *Vanderbilt Journal of Transnational Litigation* 37; Ari Afilalo, “Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis” (2004) 17 *Georgetown International Environmental Law Review* 51; Ari Afilalo, “Meaning, Ambiguity, and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11” (2005) 25 *Northwestern Journal of International Law and Business* 279. Susan D Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions” (2005) 73 *Fordham L Rev* 1521 [Franck]; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008), M Sornarajah, “A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration” in Karl P Sauvant, ed, *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 39; Charles N Brower & Stephan W Schill, “Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law” (2008–9) 9 *Chicago Journal of International Law* 471; Michael Waibel et al, *The Backlash against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn (NL): Kluwer, 2010).

²¹ Malcom Langford et al, “Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction” (2020) 21:2-3 *The Journal of World Investment & Trade* 167 at 168 [Langford et al].

²² Mario Telò & Yuan Feng, eds, *China and the EU in the Era of Regional and Interregional Cooperation* (Brussels: Peter Lang, 2020) [Telò & Feng].

²³ Behn, Fauchald & Langford, “Introduction”.

with over 3,500 signed treaties and over 1,100 investor-state arbitrations registered”²⁴, this growth can be attributed to the exponential increase in the bilateral treaty network including provisions for investor state arbitration.²⁵ Behn, Fauchald and Langford fail to retrieve any comparable sector which shows similar growth.²⁶ They set forth the following telling statistics:²⁷

Starting with the first treaty-based ISDS case in 1987, it has grown from a few cases into a sprawling network of international adjudication, [...], we have seen an upwards growth trajectory over the past two decades with the past five years flattening off at about 80–100 new treaty- based ISDS cases being registered annually. Given that treaty-based ISDS cases take an average of 3.74 years from registration to final award and that about a third of all cases are settled or discontinued, approximately 40–50 final awards are currently being rendered each year, and 400 treaty-based ISDS cases are pending at any time.

7. In fact, “as of 1 January 2020, a total of 751 cases were concluded with 373 cases pending 1,126 ISDS cases registered”.²⁸ This unrivaled increase is apparent in the below diagram from the PluriCourts Investment Treaty and Arbitration Database (« PITAD»):²⁹

²⁴ Behn, Fauchald & Langford, “Introduction”, *supra* note 19 at 1.

²⁵ *Ibid* at 1; Investment Policy Hub, “International Investment Agreements Navigator”, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements>> (n. 1). See also Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, “Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey” (2012/02) *OECD Working Papers on International Investment* (96% of the 1,660 BITs surveyed contained ISDS language).

²⁶ Behn, Fauchald & Langford, “Introduction”, *supra* note 19 at 2.

²⁷ Behn, Fauchald & Langford, “Introduction”, *supra* note 19 at 2.

²⁸ *Ibid* at 2, n 10.

²⁹ *Ibid* at 3, Figure 1.1.

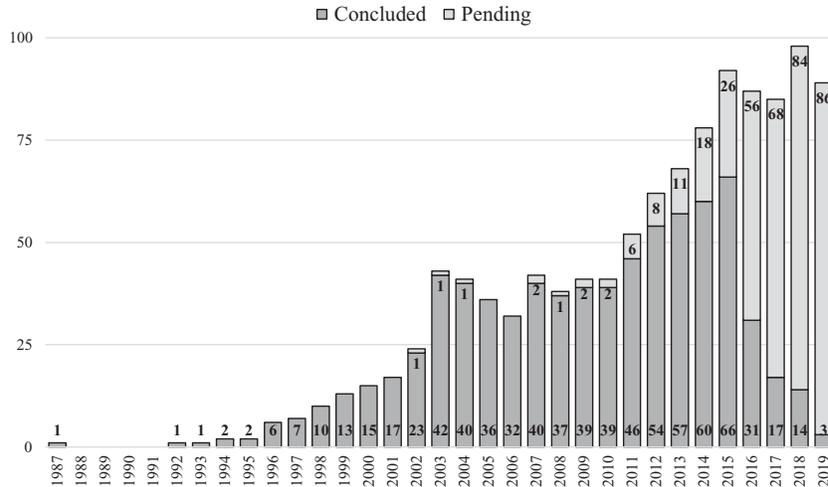


Figure 1.1 Growth in the ISDS caseload: pending versus concluded cases (1987–2020)¹

¹ PITAD database <pitad.org> data to 1 January 2020.

Source: Daniel Behn, Ole Kristian Fauchald & Malcom Langford, “Introduction”, in Daniel Behn, Ole Kristian Fauchald & Malcom Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2022) 1 at 3.

8. The natural comparison for the increase in ISDS cases is with that of the WTO, which, as of 1 January 2020, “almost double those of the WTO. The WTO records 593 disputes compared with 1,126 ISDS cases registered.”³⁰ This compares to previous statistics of WTO cases which had until 2012 generated a similar caseload to that of ISDS.³¹

9. The perceived unfairness of ISDS stems from allegations of “pro-investor bias, undue secrecy, conflicting jurisprudence and high levels of compensation, which is compounded by concerns that developing countries are burdened with excessive legal costs and frequently lose cases against foreign investors”.³² The tone of the prevalent discourse is aptly illustrated by the epigraph of the 2012 report “Profiting from Injustice”: “There is little use going to law

³⁰ *Ibid* at 3, n 11.

³¹ *Ibid* at 2.

³² Langford et al, *supra* note 21 at 168.

with the devil while the court is held in hell.”³³ In other words, claims of bias³⁴, excessive cost and length³⁵, lack of transparency and diversity³⁶, inconsistent and conflicting

³³ Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fuelling an Investment Arbitration Boom* (Brussel & Amsterdam: Corporate Europe Observatory & Transnational Institute, November 2012), online: CEO <<http://corporateeurope.org/trade/2012/11/profitting-injustice>>, as reported in Sadie Blanchard & Charles N Brower, “From ‘Dealing in Virtue’ to ‘Profiting from Injustice’: The Case against ‘Re-statification’ of Investment Dispute Settlement” (2014) 55 *Harvard Int’l L J* 46 [Blanchard & Brower].

³⁴ Susan D Franck, “Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law” (2007) 19:2 *Pac McGeorge Global Bus & Dev L J* 337; David Branson, “Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them” (2010) 25:2 *ICSID Rev* 367; Gus van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” (2012) 50:1 *Osgoode Hall L J* 211; Stavros Brekoulakis, “Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making” (2013) 4:3 *JIDS* 553; Gus van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013); Nathan Freeman, “Domestic Institutions, Capacity Limitations, and Compliance Costs: Host Country Determinants of Investment Treaty Arbitrations 1987–2007” (2013) 39:1 *International Interactions* 54; Susan D Franck, “Conflating Politics and Development: Examining Investment Treaty Outcomes” (2014) 55 *VJIL* 13; Cédric Dupont & Thomas Schultz, “Do Hard Economic Times Lead to International Legal Disputes? The Case of Investment Arbitration” (2014) 19:2 *Swiss Political Science Review* 564; Thomas Schultz & Cédric Dupont, “Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Study” (2015) 25:4 *EJIL* 14; Susan D Franck & Lindsey Wylie, “Predicting Outcomes in Investment Treaty Arbitration” (2015) 65 *Duke L J* 459; Gus van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration” (2016) 53:2 *Osgoode Hall L J* 540; Cédric Dupont, Thomas Schultz & Merih Angin, “Political Risk and Investment Arbitration: An Empirical Study” (2016) 7:1 *JIDS* 136; Alec Stone Sweet et al, “Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration” (2017) 8:4 *JIDS* 579; Daniel Behn & Malcolm Langford, “Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration” (2017) 18:1 *JWIT* 14; Julian Donaubauer, Eric Neumayer & Peter Nunnenkamp, “Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience” (2017) *Kiel Working Paper No. 2074*; Krzysztof Pelc, “What Explains the Low Success Rate of Investor-State Disputes?” (2017) 71:3 *International Organization* 559; Daniel Behn, Tarald Laudal Berge & Malcolm Langford, “Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration” (2018) 38:3 *Northwestern Journal of International Law and Business* 333; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford & Portland (Oregon): Hart, 2018); Silvia Steininger, “What’s Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration” (2018) 31:1 *Leiden J Int’l L* 33; Gus van Harten, “Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010” (2018) 29:3 *EJIL* 504.

³⁵ Susan D Franck, “Rationalizing Costs in Investment Treaty Arbitration” (2011) 88:4 *U Wash L Rev* 769; Albert Jan van den Berg, “Time and Costs: Issues and Initiatives from an Arbitrator’s Perspective” (2013) 28:1 *ICSID Rev* 218; Adam Raviv, “Achieving a Faster ICSID” in Jean Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Resolution System: Journeys for the 21st Century* (Leiden & Boston: Brill Nijhoff, 2015) 653; Susan D Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press, 2019); Sergio Puig, “Contextualizing Cost-Shifting: A Multi-Method Approach” (2019) 58:2 *VJIL* 261; Daniel Behn & Ana Maria Daza, “The Defense Burden in Investment Arbitration?” (2019) *PluriCourts Working Paper*.

³⁶ Eugenia Levine, “Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation” (2011) 29:1 *Berkeley J Int’l L* 200; Susan D Franck et al, “The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration” (2015) 53 *Col J Transnt’l L* 429 [Franck et al]; Emilie M Hafner-Burton & David G Victor, “Secrecy in International Investment Arbitration: An Empirical Analysis” (2016) 7:1 *JIDS* 61; Malcolm Langford, Daniel Behn & Runar Hilleren Lie, “The Revolving Door

jurisprudence³⁷, in a system that favors private over public interests, reveals a “game is rigged against poorer states, stifling economic development, not promoting it”.³⁸

10. The many critiques lodged in this regard are increasingly examined in a more nuanced perspective through empirical approaches with the help of social science theories and quantitative, qualitative and computational methods.³⁹ At a time where several international

in International Investment Arbitration” (2017) 20:2 *Journal of International Economic Law* 301; Lucy Greenwood, “Tipping the Balance: Diversity and Inclusion in International Arbitration” (2017) 33:1 *Arb Int'l* 99; Michael Waibel & Yanhui Wu, “Are Arbitrators Political: Evidence from International Investment Arbitration” (2017) *Working Paper*; Jansen Calamita & Elsa Sardinha, “The Bifurcation of Jurisdictional and Admissibility Objections in Investor-State Arbitration” (2017) 16:1 *LP ICT* 44; Luke Nottage & Ana Ubilava, “Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry” (2018) 21:4 *Int Arb L Rev* 111; James Crawford, “The Ideal Arbitrators: Does One Size Fit All?” (2018) 32:5 *Am U Int'l L Rev* 100; Taylor St. John et al, “Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration” (2018) *PluriCourts Working Paper*; James Devaney, “An Independent Panel for the Scrutiny of Investment Arbitrators: An Idea Whose Time has Come?” (2019) 18:3 *LP ICT* 366; Malcolm Langford, Daniel Behn & Runar Lie, “Computational Stylometry: Predicting the Authorship of Investment Arbitration Awards” in Ryan Whalen, ed, *Computational Legal Studies: The Promise and Challenge of Data-Driven Research* (Cheltenham (UK) & Northampton (MA): Edward Elgar, 2020) 53; Thomas Schultz & Niccolò Ridi, “Arbitration Literature” in Thomas Schultz & Federico Ortino, eds, *Oxford Handbook of International Arbitration* (Oxford University Press, 2020) 1.

³⁷ Ole Kristian Fauchald, “The Legal Reasoning of ICSID Tribunals: An Empirical Analysis” (2007) 19:2 *EJIL* 301; Jeffrey Commission, “Precedent in Investment Treaty Arbitration: A Citation Analysis of Developing Jurisprudence” (2007) 24(2) *J. Int'l Arb.* 129; Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse’ (2007) 23 *Arb Int'l* 357; Yas Banifatemi, “Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?” in Roberto Echandi & Pierre Sauvé, eds, *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press, 2013); Thomas Schultz, “Against Consistency in Investment Arbitration” in Zachary Douglas, Joost Pauwelyn & Jorge Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014); Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Leiden & Boston: Brill Nijhoff, 2017); Damien Charlotin, “The Place of Investment Awards and WTO Decisions in International Law: A Citations Analysis” (2017) 20:2 *JIEL* 279; Mark Feldman, “Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power” (2017) 32:3 *ICSID Rev* 528; José E Alvarez, *Boundaries of Investment Arbitration: The Use of Trade and European Human Rights Law and Investor-State Disputes* (Huntington & New York: Juris, 2018); Niccolò Ridi, “The Shape and Structure of the ‘Usable Past’: An Empirical Analysis of the Use of Precedent in International Adjudication” (2019) 10:2 *JIDS* 200.

³⁸ Behn, Fauchald & Langford, “Introduction”, *supra* note 19 at 6.19 at 6. See on the opponents to arbitration between investors and state who are in favor of its abolition, M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015). See also Lauge N Skovgaard Poulsen & Emma Aisbett, “When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning” (2013) 65 *World Politics* 273; Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015); Peter Nunnenkamp, “Biased Arbitrators and Tribunal Decisions against Developing Countries: Stylized Facts on Investor-State Dispute Settlement” (2017) 19 *J Int'l Dev* 851.

³⁹ Alschner, Wolfgang, Skougarevskiy, Dmitriy “Mapping the Universe of International Investment Agreements.” (2016) 19:3 *Journal of International Economic Law* 561; Behn, Fauchald & Langford, “Introduction”, *supra* note 19.

and national initiatives of reform are in progress, this allows a better understanding of the potentially successful pathways to reform.⁴⁰

11. The attacks on ISDS are balanced by advocates of the regime who “assert that concerns are exaggerated or overblown, and that the regime evolves to address criticism, attracts more support than is acknowledged, protects genuinely vulnerable investors, and promotes investment and the rule of law”.⁴¹ In fact, although the attention to the crisis of ISDS was first sketched out by Judge Brower, he remains a staunch advocate of the current regime, warning against the “re-statification of investment dispute settlement” in 2014:⁴²

States that have, for various reasons, decided to opt out and would-be reformers should refrain from tinkering with the system and undermining its ability to fulfill its intended purposes for those that wish to use it.

12. The real or perceived legitimacy issues stand at the core of ongoing ISDS reform discussions. In particular, issues related to arbitrators and the ethical framework within which they serve are crucial to the discussed reform.⁴³ The EU’s role in launching the ISDS reform discussions on the international plane, together with the EU internal reform of its investment policy, and their impact on the specific issue of arbitrators’ independence and impartiality, is the subject of this thesis.

⁴⁰ *Ibid* at 1.

⁴¹ Langford et al, *supra* note 21 at 168-69.

⁴² Blanchard & Brower, *supra* note 33 at 59.

⁴³ Chiara Giorgetti, “Arbitrator Challenges in International Investment Tribunals” in Daniel Behn, Ole Kristian Fauchald & Malcom Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge: Cambridge University Press, 2022) 133; Chiara Giorgetti et al, “Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options” (2020) 21:2-3 *The Journal of World Investment & Trade* 441; Malcolm Langford & Daniel Behn & Runar Lie, “The Revolving Door in International Investment Arbitration” (2017) 20:2 *JIEL* 301; Andrea Bianchi, “Epistemic Communities in International Arbitration” in Thomas Schultz & Federico Ortino, eds, *Oxford Handbook of International Arbitration* (Oxford University Press, 2020) 569; Emmanuel Gaillard, “Sociology of International Arbitration” (2015) 31:1 *Arbitration International* 1; Sergio Puig, “Social Capital in the Arbitration Market” (2014) 25:2 *EJIL* 387; Moshe Hirsch, “The Sociology of International Investment Law” in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Cambridge University Press, 2014). Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996). Judge Brower recalls that the first attack against this “elite group of arbitrators” dates back to 1996, when “the book *Dealing in Virtue* discussed the growth of international arbitration and a cadre of elite arbitrators who, through intense competition, established themselves as trustworthy to resolve high-stakes global disputes. Over the next decade and a half, opposition to arbitration developed, predominantly from leftist academics, anti-globalization groups, and States that found themselves as respondents in investment treaty arbitrations,” in Blanchard & Brower, *supra* note 33 at 59.

13. The concept of legitimacy has become the “prevailing standard against which to measure the acceptability of international arbitration”.⁴⁴ As critics and promoters of ISDS alike agree that “legitimacy” is the central tenet of the regime, this research is thus premised on the legitimacy issues.⁴⁵

14. Definitions of the concept of legitimacy abound. Behn et al. venture into the “jungle of legitimacy definitions” to lay out its most useful iterations for the analysis in the context of ISDS. In the discourse of the ISDS “legitimacy crisis”, said legitimacy is habitually distinguished between normative and sociological legitimacy.

15. Normative legitimacy, when discussed for global governance institutions, is defined by Buchanan and Keohane as:

the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content- independent reasons to follow them and/or to not interfere with others⁴⁶

16. Christopher Thomas opines that legal legitimacy may be defined as a ‘property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor discussion of legitimacy begins with legal obligation’.⁴⁷

17. While issues with ISDS derive both from normative and sociological legitimacy, examining whether the critique of ISDS is justified is, as argued by Behn et al, founded in normative legitimacy.

18. The scope given to the normative legitimacy is debated, from proponents of a wider scope to those of a narrower approach. Abi-Saab writes in this respect that he “would discard

⁴⁴ Stephan W Schill, “Conceptions of Legitimacy of International Arbitration” in David D Caron et al, eds, *Practicing Virtue: Inside International Arbitration* (Oxford, New York: Oxford University Press, 2015).

⁴⁵ Charles N Brower & Jeremy K Sharpe, “The Coming Crisis in the Global Adjudication System” (2003) 19:4 *Arbitration International* 415; Daniel Behn, Ole Kristian Fauchald & Malcom Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge: Cambridge University Press, 2022) 133 [Behn, Fauchald & Langford, *Legitimacy*].

⁴⁶ Alan Buchanan & Robert Keohane, “The Legitimacy of Global Governance Institutions” in Rudolf Wolfrum & Volker Röben, eds, *Legitimacy in International Law* (Berlin: Springer, 2008) 25.

⁴⁷ Christopher Thomas, ‘Uses and Abuses of Legitimacy in International Law’ (2014) 34(4) *Oxford J. Legal Studies* 729, 735.

from the discourse of legitimacy any attempt to use it as a means to dodge or get around the law; as a *passé-droit*, a licence trumping legality or a ‘justification’, of its violation.”⁴⁸

19. Behn et al. contend that:

assessing the broader normative legitimacy of an institution represents a long tradition in political thought and practice, often forming the basis for policy and legal proposals or calls for adjudicative deferentialism or activism in the case of courts, and captures certainly the broad range of critiques directed at the ISDS regime – which are moral, legal or both. Moreover, normative legitimacy provides an important external assessment of an institution’s ability to impose its legal (interpretive and coercive) authority. In any case, positive law remains consistently and highly relevant to two constituent elements of normative legitimacy: the fundamental role of consent in international law and process constraints on jurisdiction and legal reasoning. Any application of normative legitimacy needs to take seriously the existence of legal mandates and jurisdictional constraints. In the field of ISDS, part of the debate is precisely concerned with the scope of both the legal mandate and procedure.⁴⁹

20. The sociological aspects of legitimacy in the ISDS crisis are routed, in a secondary focus, on the beliefs surrounding the issue. These “beliefs might shift with greater normative awareness” write Behn et al.⁵⁰ This is precisely what this dissertation seeks to do.

21. Sociological legitimacy can be described as a behavioral or descriptive conception of legitimacy. It seeks to determine if individuals recognize a “system of authority”⁵¹ which they then follow.

22. Legitimacy is also tied specifically to the selection and appointment of international adjudicators in the discussion on ISDS reform. As Bjorklund writes:

Members of international courts enjoy a high degree of legitimacy, but only if they have been chosen in accordance with a predetermined selection process that guarantees they possess the qualities necessary to exercise the judicial function, including expertise, independence and impartiality, and if they have been ultimately elected or confirmed by states.⁵²

⁴⁸ Georges Abi-Saab, “The Security Council as Legislator and as Executive in Its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy” in Rudolf Wolfrum & Volker Röben, eds, *Legitimacy in International Law* (Berlin: Springer, 2008) 109 at 116.

⁴⁹ Behn, Fauchald & Langford, *Legitimacy*, Introduction, p 14.

⁵⁰ *Ibid*, p. 17.

⁵¹ Max Weber, *The Theory of Social and Economic Organization* (New York: Free Press, 1964) at 382.

⁵² Andrea Bjorklund et al, “Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform” (2019) Academic Forum on ISDS Concept Paper 2019/11 at 2.

23. She refers to Thomas M Franck’s definition of legitimacy as “the rule or institution has come into being and operates in accordance with generally accepted principles of right process”.⁵³

24. Investor-state dispute settlement, originally proposed within the framework of a multilateral convention to ensure its enforcement by the World Bank, was meant as a vehicle for the “depoliticization” of disputes between states.⁵⁴ The unexpected success and exploding number of cases in the 2000s have, in a way, rendered the system a victim of its own success. What some refer to as issues which may be due to an overly rapid growth, others decry as failures of an unfair system.⁵⁵ Sornarajah has repeatedly advocated for an end to the 3000 plus existing treaties so that the system can “start afresh”.⁵⁶

25. Judge Brower and Steven Sharpe were perhaps the first to foresee the impending crisis on the “Global Adjudication System”, which we now refer to as ISDS, in 2003.⁵⁷ In order to establish the crisis, they recalled the foundations of legitimacy of national court systems:

As a reference point for adjudging the posited crisis, it is appropriate to review the salient characteristics of a true, classic adjudication system, i.e., typically a national court system:

- a hierarchy of decisional instances [e.g., trial, appellate and supreme or cassation);
- decisions made by judges acting with publicly accepted authority;
- resulting finality of decisions; and
- a relatively consistent body of jurisprudence.

The overall result is, in a word, legitimacy — a system predominantly accepted as being legitimate. When we look at the global adjudication system, however, these elements and perceptions of legitimacy are too often spectacularly absent. (Our emphasis)

⁵³ Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) at 24.

⁵⁴ Ibrahim Shihata, “Toward Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA,” 1 ICSID Review 1 (1986), pp. 1-12 at 4. See also Ibrahim Shihata, “The Settlement of Disputes Regarding Foreign Investments: The Role of the World Bank Group” in Ibrahim Shihata, *The World Bank in a Changing World: Selected Essays*, Vol. 1 (Dordrecht: Martinus Nijhoff Publishers, 1991), 293. Schneiderman, David, *Revisiting the Depoliticization of Investment Disputes* (April 12, 2011). *Yearbook on International Investment Law and Policy*, 2010-11 (Oxford University Press), 693-714.

⁵⁵ Alvarez, “The Long View”, *supra* note 18.

⁵⁶ *Ibid*; M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) [Sornarajah, *Resistance and Change*].

⁵⁷ Charles N Brower, Charles H Brower & Jeremy K Sharpe, “The Coming Crisis in the Global Adjudication System” (2003) 19:4 *Arbitration International* 415.

26. The authors argue that this is due to the increasing lack of voluntary compliance with awards, the fact that sovereign states raise political and public policy considerations against which the national courts are compelled to intervene when dealing with annulment petitions, and, finally, the lack of appeal or other control mechanism.⁵⁸

27. They conclude their analysis of these four factors at the root of a lack of legitimacy with measured concern and what could now be revealed as pragmatic foresight of the reform efforts to come:⁵⁹

In the end, one doubtless must accept the fact that some degree of dysfunctionality is inherent in every system of adjudication. [...] A crisis clearly is upon us to a significant degree. Whether it will sink the system, however, is debatable. The success of the system depends, in the end, on the constant vigilance and active engagement of each of us. In short, the posited crisis is but one manifestation of life in our pluralistic and increasingly democratic world.

28. Susan Franck's seminal call to arms followed shortly the forewarnings of Brower and Sharpe. With "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", published in 2005, she brought the legitimacy foundational concern at the forefront of the debate of the announced ISDS.⁶⁰ Professor Franck defines this crisis as a concern for increasing inconsistencies in decisions in a growing system of ISDS. She takes stock of the recent explosion in the early 2000s of ISDS cases where investors sued states for "billions and billions"⁶¹ recalling that

⁵⁸ *Ibid* at 418.

⁵⁹ *Ibid* at 440.

⁶⁰ Franck, *supra* note 20.

⁶¹ *Ibid* at 1521, n 1. See Michael Goldhaber, "Big Arbitrations (recent arbitrations with a European connection)" (2004) 3 *Transnational Dispute Management*, online: TDM <<https://www.transnational-dispute-management.com/article.asp?key=236>>. As set out by Franck, Goldhaber "details a series of cases involving sovereign states that are or have been sued for breaches of investment treaties. These cases include the following: (1) the 'Czech TV Debacle' where the Czech Republic was sued for over U.S. \$500 million; (2) the 'Argentine Currency Crisis Claims' where the Republic of Argentina was sued for 'billions of dollars'; (3) the 'Lebanese Mobile Phone Fight' where U.S. \$1.05 billion was disputed in a case involving the Republic of Lebanon, (4) the 'Czech-Slovak Bank Battle' where the Slovak Republic was sued for U.S. \$1 billion in damages; (5) the 'Japanese-Czech Banking Battle' where a U.S. \$1 billion claim was made against the Czech Republic; (6) the 'Port Services Disputes' where claims are being brought claiming that the Islamic Republic of Pakistan owes approximately U.S. \$350 million and the Republic of Philippines owes U.S. \$120 million; (7) the 'Building Bridges in Pakistan' where a claim for U.S. \$450 million was made against the Islamic Republic of Pakistan; (8) the 'Turkish Power Plant Joint Venture' where the Republic of Turkey is being sued for U.S. \$300 million; (9) the 'Argentine Water Dispute' alleging the Republic of Argentina owes U.S. \$300 million; (10) the 'Egyptian Textile Business Dispute' where the Arab Republic of Egypt is being sued for U.S. \$250 million; and (11) the 'Oil Contract Bidding Dispute' where a U.S. \$200 million claim was brought against the

The consequence of this growth is that decisions about public issues with economic and political consequences are resolved in private before different sets of individuals who can and do come to conflicting decisions on the same points of law and no single body has the capacity to resolve these inconsistencies.

In the past twelve years, countries ("Sovereigns") have entered into approximately 1500 new Bilateral Investment Treaties ("BITs") and around five multilateral investment treaties in order to attract foreign investment by granting broad investment rights to foreign investors and creating flexibility in the resolution of investment disputes. The existence of this broad network of interrelated rights means that, when difficulties arise-as they inevitably do-there is a patchwork of mechanisms to resolve the investment disputes. (Our emphasis)

29. Her approach to the concept of legitimacy is pro-active and calls for taking steps to restore the legitimacy in peril. It is important to put into perspective her analysis written before 2005, where she considered that:

As investment arbitration is still in its infancy but in the middle of its first "growing pains," it is appropriate to help the jurisprudence develop, acknowledge the difficulties in the current framework, and find ways to minimize the looming legitimacy crisis. In this manner, investment arbitration will not be thrown out with the proverbial bathwater and international arbitration will be firmly on track to promote international justice.

30. She proposes that corrective measures be taken and heads the recent call for the establishment of an appellate tribunal so that "legitimacy, transparency, determinacy, and coherence can be reintroduced into the entire network of investment treaty disputes, and the concerns of citizens, investors, and sovereigns alike can be addressed".⁶²

31. Susan Franck's analysis rings as true today as it did in 2005. Arbitration, qualified in 2005 as in its infancy by Franck, might now be considered to be in its early adult years (or, at the very least, past its teenage crisis). As anticipated, the legitimacy crisis has fully bloomed. In order to assess the real or perceived lack of legitimacy, we use the value of the "rule of law", a fundamental standard to any functioning legal regime.⁶³ It stands, as a value,

Republic of Trinidad and Tobago." See also Jack J Coe, Jr, "Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods" (2003) 36:4 Vand J Transnat'l L 1381 at 1400-01 [Coe].] See, for instance, *European Energy Charter Treaty*, 17 December 1994, 34 ILM 360 [ECTT]; *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, 32 ILM. 612 (entered into force 1 January 1994) [NAFTA]. See also Ari Afilalo, "Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter" (2001) 34 NYU J Int'l L & Pol 1 at 5, indicating that in *Methanex v United States*, a case brought under NAFTA, a private investor sought close to U.S. \$1 billion in damages from the U.S. government.

⁶² Franck, *supra* note 20.

⁶³ Kriton Dionysiou, CETA's Investment Chapter, A rule of law perspective, (Springer 2021), Kriton Dionysiou, CETA's Investment Chapter, European Yearbook of International Economic Law 13.

at the heart of legitimacy.⁶⁴ As the independence and impartiality of adjudicators form part of the rule of law, they thus stand as one of the main areas of concern in this legitimacy crisis of ISDS. This research examines the ISDS reform proposed by the EU and contemplated on the international scene to restore legitimacy by strengthening the rule of law, with a specific focus on independence and impartiality of arbitrators and adjudicators.⁶⁵

32. Perception and perspective are powerful guides to the dissertation.⁶⁶ They are also fundamental concepts inherent to ethics of arbitrators.⁶⁷ On a broader level, however, we should be cognizant of the perspective of arbitration practitioners and users.⁶⁸ In this dissertation, we are guided by the EU's reform implemented to address users and civil society criticism. To a large extent, as pleaded by Yves Derains, the strongest criticism comes from within the arbitration system.⁶⁹ Arbitration practitioners and regular users continue to lament the failings of arbitration in terms of time and costs. This is applicable to commercial and investment arbitration, bearing in mind that for the latter the median time and costs for an arbitration are much longer than those in commercial standings.⁷⁰ Now that we have established that criticism abounds, internal and external to the investor-State dispute settlement mechanism, we need also recall that such may be the price to pay for its immense popularity.⁷¹ As demonstrated by the explosion of arbitration cases registered in the 2000s, the ISDS enthusiasm has not waned, despite a movement from a number of Latin American countries withdrawing from the Washington Convention, users were undeterred.⁷² Recent

⁶⁴ Giorgetti et al, *supra* note 55 at 441.

⁶⁵ Franck, *supra* note 20; Stephan Schill, "Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?" (2018) 19 *The Journal of World Investment and Trade* 1.

⁶⁶ Thomas Schultz, *The ethos of arbitration*, King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2019-23, p. 1.

⁶⁷ Catherine Rogers, *Ethics International Arbitration* (Oxford: Oxford University Press, 2014).

⁶⁸ Investor-State Dispute Settlement Reform, Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III (18 December 2019) (henceforth 'CCIAG Submission'). Thomas Schultz, *The ethos of arbitration*, King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2019-23, p. 1.

⁶⁹ Yves Derains, "New Ideas for Arbitral Proceedings" (Master Lecture delivered at the ICC Institute, 15 March 2021).

⁷⁰ Kun Fan, "Mediation of Investor-State Disputes: A Treaty Survey" (2020) 2020:2 *J Disp Resol* 327.

⁷¹ Behn, Fauchald & Langford, *Legitimacy*, *supra* note 45 at 1; Alvarez, "The Long View", *supra* note 55.

⁷² Alvarez, "The Long View", *supra* note 55.

uptake in cases in Asia and the Middle East confirm that ISDS, in whatever form or reform, shows all the marks of success for many years to come.⁷³

B. The Contextual Crisis in the Negotiation of Free Trade Agreements

33. In the current political climate, the frenetic pace at which states and regional blocs are negotiating and concluding new trade agreements can at times appear baffling to the unlearned observer. In an attempt to compete with the United States, since the indefinite suspension of the Transatlantic Trade and Investment Partnership (TTIP) negotiations⁷⁴, the European Union has redoubled its efforts to negotiate economic partnerships with major counterparts, as illustrated by the conclusion of the Japan EEPA, the EU-Mexico Agreement, or ongoing talks with MERCOSUR, Australia, and New Zealand.⁷⁵ With the exit of the United Kingdom and the new American administration with President Biden, trade relationships for a deep cooperation have gained an even greater importance.

34. The European Union offers a market of 500 million consumers, and is the largest existing trading block, followed by the United States and China.⁷⁶ China and the United States, however, continue to present interesting challenges. The latter plans the demise of the World Trade Organization (WTO), has launched a global trade war by increasing tariffs with China, the EU, and the rest of the world and has successfully threatened and replaced the North American Free Trade Agreement (NAFTA) with the Canada United States Mexico Agreement (CUSMA).

35. Referred to as the USMCA in the United States, T-MEC in Mexico, the CUSMA in Canada or NAFTA 2.0 version has nevertheless been hailed as a welcome update considering that NAFTA was the first generation of treaty – a number of new chapters were included to address considerations that did not exist or were fully developed at the time of its entry into

⁷³ Fortier, “Long Live the Golden Summer: Arbitration, Courts, & Colas” (2020) 9:3 *American University Business Law Review* 313; “Fortier on the cola wars”, *Global Arbitration Review* (18 October 2019) online: GAR <<https://globalarbitrationreview.com/fortier-the-cola-wars>> [“Fortier on the cola wars”].

⁷⁴ Trade EU, “Overview of FTA and other trade negotiations”, online: Trade EU <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> [Trade EU, “Overview”].

⁷⁵ *Agreement Between the European Union and Japan for an Economic Partnership*, 17 February 2019 (entered into force 1 February 2019); *EU-Mexico Trade Agreement*, 23 March 2000 (entered into force 1 July 2000).

⁷⁶ EU stats, 2014.

force, such as electronic commerce or sustainable development.⁷⁷ It is with respect to the dispute settlement provisions that the CUSMA figures as the embodiment of a fragmented creature of international investment law. Within the same treaty, further even than what Susan D. Franck imagined when she deplored the “patchwork of mechanisms”, CUSMA provides that disputes with respect to foreign investments will only be resolved through ISDS between Mexico and the United States.⁷⁸

36. China, meanwhile, continues to liberalize its markets and increasingly participate in the world economy. Recognized by the WTO as a market economy in 2001, consistently litigating its trade disputes before the WTO fora, China is also vying for first position among potential trade partners.⁷⁹ The ambitious One Belt One Road (OBOR or BRI), launched in 2013, recreates the former silk roads for a trading route, strengthened by infrastructure, in partnership with Asian and African countries, and is valued at 900 billions of investments from Pakistan to Sri Lanka (and across 65 countries).⁸⁰ With the OBOR, China encircles the world.⁸¹ In parallel, on 15 November 2020, ministers from 15 countries signed the Regional and Comprehensive Economic Partnership (RCEP). This free trade agreement was concluded between the ten member states of the Association of Southeast Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) and the five states with which ASEAN has existing free trade agreements (Australia, China, India, Japan, South Korea and New Zealand).⁸² It entered into force on 1 January 2022 for Australia, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, New Zealand, Singapore, Thailand and Viet Nam, and on 1 February 2022, for Korea. The RCEP paves the way for the creation of the world’s largest free trade area, covering 2.3 billion people or 30% of the world’s population, contributing US\$ 25.8 trillion about 30% of global

⁷⁷ Richard Ouellet, Stéphane Paquin, eds, “L’Accord Canada-États-Unis-Mexique” (Special Issue March 2022) Quebec Journal of International Law, online: SQDI <<https://www.sqdi.org/fr/hors-serie-mars-2022/>>.

⁷⁸ *Canada-United States-Mexico Agreement*, Canada, United States and Mexico, 30 November 2018 (entered into force 1 July 2020) [CUSMA]; Christopher Sands, “NAFTA apocalypse Now?”, *CD Howe Institute* (1 August 2017) online: CD Howe <<https://www.cdhowe.org/intelligence-memos/christopher-sands-naftapocalypse-now>>.

⁷⁹ Telò & Feng, *supra* note 22.

⁸⁰ Olivier Delas, *Relations commerciales internationales : L'Union européenne et l'Amérique du Nord à l'heure de la Nouvelle Route de la soie* (Bruxelles : Bruylant, 2020).

⁸¹ Tom Hancock, “China encircles the world with One Belt, One Road strategy”, *Financial Times* (3 May 2017) online: Financial Times <<https://www.ft.com/content/0714074a-0334-11e7-aa5b-6bb07f5c8e12>>.

⁸² Australian Government (Department of Foreign Affairs and Trade), “Regional Comprehensive Economic Partnership”, online: DFAT <<https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep>>.

GDP, and accounting for US\$ 12.7 trillion, over a quarter of global trade in goods and services, and 31% of global FDI inflows.⁸³

37. The race to trade hegemon between the United States and China appears to have taken a skewed turn, while the EU perseveres in its hyperactive trade strategy. While the EU is enviably poised, and is a trade partner not to be taken lightly, it is not a contestant in this unequal race. The importance of its aggregated market, however, initially seemed to be at risk due to internal frictions. The European institutions, for a long time, were unable to agree to a unified trade policy. Member States continue to be in disagreement with EU institutions on negotiation and implementation of these new generation deals, as they infringe upon Member States or even infra entities competences.⁸⁴ Could this then bring the EU to its demise, falling from enviable to untrustworthy trade partner?⁸⁵ In this context of crisis at the international level, the role of the European Union as a global actor is more than ever at stake.⁸⁶

SECTION 2. THE RESEARCH QUESTION

38. This dissertation examines the impact of the EU reform of ISDS on the independence and impartiality of arbitrators. The research question seeks to answer whether the EU's reform with the introduction of the Investment Court System provides a strengthened and viable framework for ISDS, focusing on the specific issue of the independence and impartiality of adjudicators, a central tenet of legitimacy.

⁸³ ASEAN, "The RCEP Agreement enters into force", online : ASEAN <https://asean.org/rcep-agreement-enters-into-force/>. Julien Chaisse & Richard Pomfret, "The RCEP and the Changing Landscape of World Trade : Assessing Asia-Pacific Investment Regionalism Next Stage" (2019) 12:1 Law and Development Review 159.

⁸⁴ Stephan Schill, "Arbitration Procedure: the Role of the European Union and the Member States in Investor-State Arbitration", in *Le droit européen et l'arbitrage d'investissement/European Law and Investment Arbitration* (Catherine Kessedjian ed., 2011) 129-147; Stephan Schill, "Editorial: Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment Agreements?" (2015), *The Journal of World Investment & Trade*, 16(3), 379-388.

⁸⁵ Guillaume Baumier & Richard Ouellet, "Europe's new investment policy faces an uncertain future" (29 January 2018) *Columbia FDI Perspectives* (Columbia Center on Sustainable Investment) no 218.

⁸⁶ Telò & Feng, *supra* note 22; Guillaume Baumier & Richard Ouellet, "Europe's new investment policy faces an uncertain future" (29 January 2018) *Columbia FDI Perspectives* (Columbia Center on Sustainable Investment) no 218.

39. Delving into this Research Question requires us to introduce a number of concepts before proceeding to the comparative analysis between the existing system, the EU proposal and the international proposals discussed at WGIII. We first introduce the concept of legitimacy to contextualize the ISDS crisis.
40. This allows us to introduce our reference to the value of the rule of law, as used both in the European legal order and in the Arbitral Legal Order. Through the application of a rule of law matrix to the existing ISDS system for the independence and impartiality, we compare it with the new Investment Court System introduced by the European Union, followed by a comparison with the Multilateral Investment Court and two other reform alternatives discussed at the United Nations Working Group III, the standalone selection mechanism and the standalone appellate mechanism. This comparative approach between three different orders allows us to answer our Research Question and determine whether the EU reform and the envisaged international reform at WGIII strengthen the rule of law as it exists in ISDS.

SECTION 3. METHODOLOGY, THEORY AND CONCEPT

41. The methodology proposed focuses on international investment law with a “conscious fragmentation” perspective.⁸⁷ Stepping away from unification or even harmonization⁸⁸, and recognizing the inherently fragmented nature of international law, which exists for investor-State dispute settlement, this approach recognizes that reform solutions oriented towards the creation of new international tribunals will contribute to the fragmentation, albeit in a refined manner.⁸⁹

42. In order to examine our Research Question, we proceed to a comparative analysis of two autonomous legal orders: the Arbitral Legal Order and the European Union Legal Order. Setting out the theory behind the International Arbitral Order as harnessed by Emmanuel Gaillard assists us in establishing the basis for our research and finding an answer to our

⁸⁷ Giorgetti (Keynote), *supra* note 34.

⁸⁸ Frequently Asked Questions – Mandate and History, UNCITRAL, “What does , “UNCITRAL mean by the “harmonization” and “unification” of the law of international trade?”, online: https://uncitral.un.org/en/about/faq/mandate_composition/history.

⁸⁹ Anne Peters, “The refinement of international law: From fragmentation to regime interaction and politicization” (2017) 15:3 International Journal of Constitutional Law 671 [Peters].

Research Question in the overlapping and interwoven above-referenced autonomous legal orders.

43. Having established that international arbitration stands autonomously as a legal order, we turn to the concept harnessed as the guiding point for the Research Question, namely the value of the “rule of law”. In line with our defined approach of a comparative critical analysis between the arbitral and EU legal order, we set out the “rule of law” as defined first in the EU and then in ISDS. It is through this value that we seek to bridge the gap between the two legal orders.

44. This leads us to establish the matrix used to assess the strength of the rule of law in the existing ISDS system, as well as the extent of its evolution with the EU’s ICS proposal, the MIC and the reform alternatives proposed by the UNCITRAL Working Group III. Emmanuel Castellarin proposes a tailored approach to define the rule of law concept by proposing a simple three prong approach, focusing on (1) legal certainty, (2) procedural fairness and (3) transparency. This matrix becomes our analytical test that will be applied throughout this dissertation.

SECTION 4. ROADMAP TO THE DISSERTATION

45. In order to answer our Research Question, as set forth above, we proceed in this dissertation to a comparative analysis of the existing system in place, i.e. ISDS, with respect to the independence and impartiality of arbitrators first with the new proposed system by the EU, the Investment Court System, on a EU level, and second with the proposals for the Multilateral Investment Court, as well as a selection mechanism for arbitrators and a stand-alone appeal level, on the international level.

46. The backdrop to this analysis is meant, as an original contribution to the research, to focus on the European values in line with the EU investment policy. Article 2 of the Treaty of the European Union (TEU) set outs that the EU:

is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States

in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁹⁰ (Emphasis added).

Woven through this research, the role of the rule of law, in EU and international law, will be examined, both as a starting point to investment policies and as a common thread. This incursion into EU law will allow us to close this comparative research, after navigating both the international and European legal systems.

47. In Part I of this dissertation, we introduce and navigate the complex frameworks of Investor state dispute settlement reforms. We first set out the historical framework of ISDS (Chapter 1), followed by a presentation of our methodological and conceptual framework (Chapter 2), before turning to an explanation of the European Legal Framework with regard to ISDS (Chapter 3).

48. Setting out the historical framework, we first review the history and development of the field of international investment law, together with the relevant sources in international law and the founding principles and investment protections. In particular, this contextualization will assist in explaining the current backlash against investor state dispute resolution and its alleged legitimacy crisis. We then navigate the crisis of multilateralism, explaining the explosion and proliferation of bilateral and regional trade negotiations. The proliferation of free trade agreements, as well as their intertwined levels of law and fragmentation, will be set out and, together with legitimacy, present as a silver lining to the dissertation. At the heart of this introduction, finally, a section is devoted to the role of the European Union as a supranational entity with its specific body of law.

49. The methodological and conceptual frameworks are then presented to frame the analysis anticipated with the research question. Aided by the perspective of a refined fragmentation in ISDS, we do not attempt to determine how to unify the reform alternatives proposed for either new courts or stand-alone mechanisms for selection of arbitrators and appeals. We proceed rather to a critical analysis of a comparative nature between the ISDS /International Arbitral Legal Order and its practice for the independence and impartiality of arbitrators with the new reform proposed by the EU with the Investment Court System. The value guiding our research is that of the rule of law, and the test for its evaluation in ISDS, as summarized by Emmanuel Castellarin. Accordingly, we examine the three-prong

⁹⁰ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 [TEU], art 2.

approach to determine the strength of the rule of law in ISDS, EU and other international reform avenues examined at UNCITRAL by WGIII by assessing the (1) legal certainty, (2) procedural fairness and (3) transparency.

50. In Part II of this dissertation, we navigate the ISDS and EU reform frameworks on the independence and impartiality of adjudicators. We first examine the Impact of the ISDS and the ICS Frameworks on the Independence and Impartiality of Adjudicators (Chapter 1), then turn to the assessment of the conformity of the Multilateral Investment Court and with the rule of law (Chapter 2), before concluding with the assessment of the "À La Carte" Reform Framework Proposals and their contribution to the rule of law for the independence and impartiality of arbitrators (Chapter 3). We conclude in favor of "à la carte" reform alternatives within the greater framework of a pro-ISDS reform.

SECTION 5. PRELIMINARY CONCLUSIONS

51. The ISDS legitimacy crisis exists, even if just in appearance still for many. Of its many contested facets, the independence and impartiality of arbitrators shines as a beacon of contestation.

52. Our comparative analysis of the existing ISDS system with the EU reform proposal of the Investment Court System on the European plane, and the MIC and the alternative "à la carte" reform proposals, on the international plane, reveals that, on a rule of law scope, the more practicable solution for efficiency, implementation and reasonableness resides in the *ad hoc* alternatives that are the selection and stand-alone appeal mechanisms. We therefore conclude the dissertation and the comparative assessment with a call in favor of a pro-ISDS reform.

PART I - NAVIGATING THE COMPLEX FRAMEWORKS OF ISDS REFORM

« Si antique que soit l'arbitrage, est peu d'institutions qui, en France aussi bien qu'à l'étranger, y soient aussi mal réglementées par le droit. Cette constatation, qui s'impose au comparatiste, donne à réfléchir et pose certaines questions. Pourquoi le droit n'arrive-t-il pas à saisir et régler de façon satisfaisante l'arbitrage; et pourquoi, d'autre part, observe-t-on, selon les époques, et selon les pays, de telles variations dans l'attitude des Etats, et dans celle des juristes, en ce qui concerne l'arbitrage ? »⁹¹

CHAPTER 1 THE HISTORICAL FRAMEWORK: THE BACKLASH AGAINST INVESTOR-STATE DISPUTE SETTLEMENT

SECTION 1. THE PRE-CRISIS DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW

A. *Historical Considerations and Sources of International Investment Law*

1. *The Development of International Investment Law as a Branch of International Economic Law*

53. Evidence of arbitration as a means to resolve commercial disputes dates back to Ancient Greece.⁹² Frequently characterized as a fairly recent branch of international economic law, evidence of the existence of the basic principles of international investment law dates back to the end of the 18th century. Emer de Vattel famously described the recognition of protection of aliens, in *The Law of Nations* in 1758.⁹³ In this treatise, de Vattel

⁹¹ René David, “Arbitrage et droit comparé” (1959) 11 :1 *Revue internationale de droit comparé* 5 at 7.

⁹² David W Rivkin, “The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture” (2013) 29:3 *Arbitration International* 327.

⁹³ History of the ICSID Convention – Documents concerning the origin and the formulation of the *Convention* (Washington : CIRDI, 1968) ; CNUCED, *Bilateral Investment Treaties: 1959-1999* (New York, Geneva: United Nations, 2000); CNUCED, *World Investment Report 2014: Investing in the SDGs: An Action Plan*, New York, Geneva: United Nations, 2014); Tarcisio Gazzini & Eric de Brabandère, eds, *International Investment Law: The Sources of Rights and Obligations* (Leiden, Boston: Martinus Nijhoff Publisher, 2012); Patrick Juillard, “L’évolution des sources du droit des investissements” (1994) 250 *RCADI* 9 [Juillard]; Antonio Parra, *The History of ICSID* (Oxford University Press, 2012); Elihu Root, “The Basis of

formulated the essence of international investment law, setting out the main investment protections and dispute resolution mechanisms.

54. As this field of law has recently evolved through the codification of custom and case law, the following section lays out the environment in which international investment law was first developed. In turn, this will contextualize the current issues and help frame the research questions investigated in this dissertation. Indeed, in order to understand the impact of the EU's investment policy at the European and international level on the complex regime of international investment agreements, an historical contextualization is essential to understanding the current issues leading to an EU and international reform of ISDS.⁹⁴

55. International investment law originates in national law and its dedicated protections to the economic activities of foreigners. These were first recognized in international customary law, before being codified into Friendship Commerce and Navigation Treaties, to finally be integrated into Bilateral Investment Treaties (BIT). The equivalent of BITs can also be found in other international investment agreements (IIAs), under the form of a chapter

Protection to Citizens Residing Abroad" (1910) 4 *AJIL* 517; SFDI, *Un accord multilatéral sur l'investissement : d'un forum à l'autre ?* (Paris: Pedone, 1998); Kenneth Vandeveld, "A Brief History of International Investment Agreements" (2005) 12 *UC Davis J Int'l L & Policy* 157 ; Emer de Vattel, *Droit des Gens ou Principes de la Loi Naturelle appliquée à la conduite et aux affaires des nations et des souverains*, 3 vol (Lyon: Robert et Gauthier, 1802) [Vattel]; Alfred Verdross, "Les règles internationales concernant le traitement des étrangers" (1931) 37 *RCADI*; Prosper Weil, "L'État, l'investisseur étranger et le droit international: la relation désormais apaisée d'un ménage à trois" in Prosper Weil, dir, *Écrits de droit international* (Paris: Presses Universitaires de France, 2000) 411.

⁹⁴ Zachary Douglas, *The International Law of Investment Claims* (2009); Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties* (2009); Stephen Schill, *The Multilateralization of International Investment Law* (2009); Kenneth Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (2010); José Alvarez, *The Public International Law Regime Governing International Investment* (2011); A Kulick, *Global Public Interest in International Investment Law* (2012); Andres Rigo Sureda, *Investment Treaty Arbitration* (2012); K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (2014); Anthea Roberts, "Triangular Treaties: The Extent and Limits of Investment Treaty Rights" (2015) 56 *Harvard ILJ* 353; D Collins, *An Introduction to International Investment Law* (2016); Christoph Schreuer, "The Development of International Law by ICSID Tribunals" (2016) 31 *ICSID Rev* 728; Jonathan Bonnitcha, LNS Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (2017); Jarod Hepburn, *Domestic Law in International Investment Arbitration* (2017); Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd edn (2017); Antonio Parra, *The History of ICSID*, 2nd edn (2017); M Sasson, *Substantive Law in Investment Treaty Arbitration*, 2nd edn (2017); U Kriebbaum, "Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes" (2018) 33 *ICSID Rev* 14; Stephen Schill et al, *International Investment Law and History* (2018); Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (2018); Federico Ortino, *The Origin and Evolution of Investment Treaty Standards* (2019); Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (2020).

dedicated to investment, in Free Trade Agreements (FTA) or Preferential Trade Agreements (PTA). The only type of treaty that does not exist is a multilateral convention regarding investments, the various proposals to that effect having so far failed.⁹⁵

56. The national law of the host state originally offered protection to foreign investors, in the 17th and 18th centuries. A number of the classic investment protections remain tied today to the sovereign rights of the states, whether regarding property laws and related protection against expropriation, or those against discrimination (such as fair and equitable treatment, most favored nation and national treatment). The general concept of protection of the foreign investor against discrimination can be found through the various national laws. The national treatment standard whereby the state offered the foreign investor similar protection to the investor was therefore the main existing protection.

57. De Vattel laid out the principle of the minimum standard of treatment, which became a standard of customary international law, and is applied notwithstanding national law.⁹⁶ This principle mandates that the state must extend to the alien the same treatment it reserves to its nationals regarding the protection of its property. The notion of investment itself would not be recorded until much later in the treaties.

58. It is the obligation of the state and its sovereign to extend protection to the foreigner on its territory.⁹⁷ Originating from Christian humanist reasons, these motives rapidly became intertwined with economic considerations, with the state wanting to assist the foreigner in his establishment, to help with the economic activity and protecting against discrimination. The states began progressively developing legal protections for these economic activities of foreigners in the 18th century. The first of these protections is therefore that for the physical security of aliens, and the second its extension to the property of the foreigner. It is this latest protection that will be qualified as “investment” after the Second World War.⁹⁸

⁹⁵ Eg, The last draft of the Multilateral Agreement on Investment (MAI), dated 22 April 1988, Online: <<http://www1.oecd.org/acces.bibl.ulaval.ca/daf/mai>>.

⁹⁶ Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn, NL: Kluwer, 2009) [Newcombe & Paradell].

⁹⁷ Vattel, *supra* note 9393, vol 2, ch III, para 103.

⁹⁸ The first case recognizing the notion of investment was adjudicated by the PCIJ in the Chorzow Factory case in 1928, discussing economic activity.

59. In the 18th century, international custom started supplementing national laws, largely due to de Vattel's work, to remedy the cases in which national laws appeared too restrictive in their protections to property. While what is now a distinct body of law initially evolved from national legislation, the reverse phenomenon has now caused international protections to investors that were developed in the modern treaties, such as fair and equitable treatment or standard minimum treatment, to be included in national laws through investment codes or specific legislations, to encourage FDI flows and foreign investors to establish themselves.

60. It is therefore through the national treatment principle that the basis of international custom and investment protections are established at the 18th century. The transition from national law to international law was therefore completed.

61. One of the first international decisions recognizing this principle was *Neer v. Mexico*.⁹⁹ An award rendered by a mixed US-Mexico Commission, regarding the physical protection due to an individual. The case concerned the obligation of the host State, Mexico, to investigate the death of an American national at his widow's request. The Commission found that the State would be considered as having breached the minimum standard of treatment if: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".¹⁰⁰ Although the award did not touch on questions regarding property, it has become known for setting out the minimum standard of treatment, and was cited to this effect by multiple investment awards in the 20th century.¹⁰¹

62. During colonial times, the respect of the minimum standard of treatment was imposed by the State to foreign investors establishing themselves on their territory. The notion, protection and enforcement of this standard remained at the time unwritten and vague. Dispute settlement mechanisms available at the time were diplomatic protection and mixed

⁹⁹ *LFH Neer and Pauline Neer (USA) v United Mexican States* (1926), 4 Reports of International Arbitral Awards 60 (United Nations) [*Neer*].

¹⁰⁰ *Ibid* at 61-62.

¹⁰¹ It was especially used in NAFTA Chapter 11 cases for the application of its article 1105. *ADF Group Inc v United States of America* (2003), 6 ICSID Reports 470 (ICSID) [*ADF*] or *Glamis Gold, Ltd v United States of America* (2009), 48 ILM 1039 (ICSID) [*Glamis*].

commissions. The request for diplomatic protection by a foreign investor when disputes arose was the first option available. The dispute therefore became *de facto* of a political nature – the investor would only receive protection should his state decide so, and in that case would benefit of no direct rights – the legal fiction created by diplomatic protection from the state taking on his national’s dispute meant that in principle the state was compensated. It was thereafter up to the state to determine whether, and to what extent, it would redistribute the compensation to the investor.

63. The *Mavrommatis Concession’s* case from the ICJ confirmed that:

C'est un principe élémentaire du droit international que celui qui autorise l'État à protéger ses nationaux lésés par des actes contraires au droit international commis par un autre État, dont ils n'ont pu obtenir satisfaction par les voies ordinaires. En prenant fait et cause pour l'un des siens, en mettant en mouvement, en sa faveur, l'action diplomatique ou l'action judiciaire internationale, cet État fait, à vrai dire, valoir son droit propre, le droit qu'il a de faire respecter en la personne de ses ressortissants, le droit international.¹⁰²

64. Diplomatic protection was also limited due to the inexistence of any other type of resolution mechanism for investors when they were shareholders. As was held initially in the *Barcelona Traction*¹⁰³ case and confirmed more recently in *Diallo*¹⁰⁴, investors now might be protected as shareholders through BITs, but they cannot benefit from diplomatic protection.

65. Starting in the 19th century, a codification process was initiated. This was meant to ensure that economic wars did not devolve into wars. It was also supported by newly independent states that did not relish the idea of being guided by customary law, the development of which they had not participated to.¹⁰⁵ The importance of customary law continues to be recognized, as was explicitly done in the *TOPCO* award, which recognized as customary international law the content of Resolution 1803 (XVII) of 14 December 1962 :

la résolution 1803 (XVII) paraît au tribunal de céans refléter l'Etat du droit coutumier existant en la matière [...] L'acquiescement en l'espèce d'une majorité d'Etats appartenant aux différents groupes représentatifs indique sans ambiguïté la reconnaissance universelle des règles incorporées, à savoir en ce qui concerne les

¹⁰² *The Mavrommatis Palestine Concessions (Greece v Britain)* (1924), PCIJ (Ser B) No 3 at 12.

¹⁰³ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1964] ICJ Rep 6 [*Barcelona Traction*].

¹⁰⁴ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, [2010] ICJ Rep 639.

¹⁰⁵ Juillard, *supra* note 93 at 77.

nationalisations et l'indemnisation, l'utilisation des règles en vigueur dans l'Etat nationalisant, mais cela en conformité avec le droit international¹⁰⁶

66. The Friendship, Commerce and Navigation Treaties (FCN) were the first instruments used for the codification of international investment law.¹⁰⁷ At the turn of the 19th century, FCN treaties were developed to protect foreigners' economic activities in host states. These treaties were meant to provide a framework for a number of fields, in addition to economic issues. However, they did not provide a dispute resolution mechanism and were instruments signed between states, creating no obligations for private persons. The first FCN treaty was concluded between France and the United States in 1778. France was particularly active in concluding FCN treaties (eg Liberia 1852, Brazil 1826), as were the United States, until the 20th century. In 1966, 43 FCN treaties could be counted.¹⁰⁸

67. While initially protecting only property, the FCN treaties initiated the codification of investor protections for economic activities, which would come to be recognized as investments after the Second World War. It is therefore possible to trace back to the protection against expropriation without compensation, with art. 3 of the United-States-Spain FCN of 1902 :

The citizens or subjects of each of the High Contracting Parties shall be exempt in the territories of the other from all compulsory military service, by land or sea, and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever.

Furthermore, their vessels or effects shall not be liable to any seizure or detention for any public use without a sufficient compensation, which, if practicable, shall be agreed upon in advance.

the most favored nation principle, in art. 6 of the Brazil-France FCN of 1826 :

les sujets de chacune des hautes parties contractantes, en restant soumis aux lois du pays, jouiront en leur personne, dans toute l'étendue du territoire de l'autre des mêmes droits, privilèges, faveurs, exemptions qui sont ou seraient accordés aux sujets de la nation la plus favorisée. Ils pourront disposer librement de leurs propriétés par vente, échange, donation, testament ou toute autre manière, sans qu'il y soit mis aucun obstacle ou empêchement. Leurs maisons, propriétés et effets ne pourront être saisis par aucune autorité contre la volonté des possesseurs;

¹⁰⁶ *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic* (1977), at para 87 [TOPCO].

¹⁰⁷ Newcombe & Paradell, *supra* note 96.

¹⁰⁸ Kenneth Vandeveld, "The Bilateral Investment Program of the United States" (1988) 21 Cornell Int'l LJ 201.

or the national treatment for certain economic activities, in art. III of the United States-Colombia FCN of 1824 :

The two high contracting parties, being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree that the citizens of each may frequent all the coasts of countries of the other, and reside and trade there, in all kinds of produce, manufactures and merchandize; and that they shall enjoy, all the rights, privileges and exemptions, in navigation and commerce, which native citizens do or shall enjoy, submitting themselves to the laws, decrees and usages there established, to which native citizens are subjected. But it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by the parties respectively according to their own separate laws.

68. FCN treaties, as mentioned above, did not yet mention to the notion of investment, and instead referred to the protection of economic activities and the protection for certain types of properties. Originally drafted to protect individuals and their property, and at times focusing on protections granted to diplomats, their objective was not to focus on interstate economic activities. Ultimately, although they offered some guarantees to foreign investors, these remained quite minimal. Not yet international protections, the provisions of FCN treaties were often the equivalent of what the national law of the host states made available to foreign investors. Available dispute resolution mechanisms, in addition, continued to be either diplomatic protection or national courts, similar to the fora previously available.

69. FCN treaties were progressively abandoned from the middle of the 20th century. As they were mainly concluded between states with a similar level of economic development, they did not correspond to the needs of states in a post-colonial period. In addition, the object of these treaties was mainly to avoid economic wars, and provided no direct protection for investment or dispute resolution mechanism accessible to an investor.

70. Bilateral investment agreements were thus developed to fulfill these needs. Following the progressive disappearance of FCN treaties, the bilateral investment treaties were the first to focus specifically on investor protection and provide a dispute resolution mechanism specific to the field. These treaties started being negotiated after the Second World War, marking the beginning of a new era of the international global order. Germany and Pakistan

signed the first BIT in 1959¹⁰⁹, but it was only in the treaty between Chad and Italy, in 1969, that a provision for ISDS was first included.¹¹⁰

71. During the colonial period, overseas investments were rarely in need of a protection for their foreign investments, which would fall under the national law of the colonial state. In addition, many exportations were from the colonies themselves to the colonial state, and therefore did not pose a risk to the state, which had no necessity (or wish) to protect the colonized territory.

72. During decolonization, the former colonial powers attempted to protect their nationals who were residing in the former colonized state. The growing opposition between former colonies and the colonial states mainly revolved around their right to their natural resources, upon which both had claims. The new independent states wished to protect their natural resources, and the former colonial powers wished to protect their nationals established on its former territory, who could now be qualified as foreign investors. It is this object that was the basis of bilateral investment agreements in their current forms. BITs were presented as a necessity for former colonial states to protect their foreign investment in the newly independent states, to avoid the use of force, and to benefit from a stronger protection than what was offered by international custom.

73. The inspiration for bilateral treaties came from the Abs-Shawcross Convention of 1959, drafted by Herman Abs, banker with the Deutsche Bank and Lord Shawcross, former British prosecutor. This multilateral convention, presented as the “Magna Carta of the protection of foreign property”, was presented to the Association for the promotion and protection of foreign private investments, but ultimately failed to be accepted. Its content, however, would serve to model the BITs that would be concluded thereafter.

74. Following the Second World War, as noted earlier, Germany’s need to attract foreign investments to reinvigorate its economy led to the conclusion of the first BIT between West

¹⁰⁹ *Germany-Pakistan BIT*, 25 November 1959, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany--pakistan-bit-1959>> [*Germany-Pakistan BIT*].

¹¹⁰ *Chad-Italy BIT*, 11 June 1969, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/826/chad---italy-bit-1969->>.

Germany and Pakistan in 1959.¹¹¹ Their example was rapidly followed by European countries, with the conclusion of BITs between Switzerland and Tunisia (1961)¹¹², the Netherlands and Tunisia (1963)¹¹³, Guinea and Italy (1964)¹¹⁴, and France and Tunisia (1963 and 1972), to name a few.¹¹⁵

75. Several attempts were made at negotiating a multilateral framework for international investments. Until today, however, all of them failed. Only the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Washington Convention)¹¹⁶, which manages procedural issues, was successfully adopted.

76. The Abs-Shawcross Convention was at the origin of the proposal at the OECD in 1962 of a Draft Convention on the protection of foreign property¹¹⁷ by the German delegation. The vote of this convention as a resolution in 1967 however failed, due to the insufficient number of member states votes.

77. The ICSID Convention, establishing the International Center for the Settlement of Investment Dispute, was successfully signed on 18 March 1965, and came into force on 14 October 1966.¹¹⁸ As of 21 April 2022, 157 States had deposited their instruments of ratification.¹¹⁹ Although no substantive law can be found in the convention, it was essential

¹¹¹ *Germany-Pakistan BIT*, *supra* note 109.

¹¹² *Switzerland-Tunisia BIT*, 2 December 1961, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2997/switzerland---tunisia-bit-1961>>.

¹¹³ *Netherlands-Tunisia BIT*, 23 May 1963, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2659/netherlands---tunisia-bit-1963->>.

¹¹⁴ *Guinea-Italy BIT*, 20 February 1964, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1836/guinea---italy-bit-1964->>.

¹¹⁵ *France-Tunisia BIT*, 9 August 1963, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3605/france---tunisia-bit-1963->>; *France-Tunisia BIT*, 30 June 1972, online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1618/france---tunisia-bit-1972->>.

¹¹⁶ *Convention on the settlement of investment disputes between States and nationals of other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*].

¹¹⁷ “Draft Convention on the Protection of Foreign Property” (1967), online: UNCTAD <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2812/download>>.

¹¹⁸ *ICSID Convention*, *supra* note 116.

¹¹⁹ ICSID, “List of Contracting States and other Signatories of the Convention (as of April 21, 2022)”, <<https://icsid.worldbank.org/sites/default/files/ICSID%2010/List%20of%20Member%20States%20ICSID3.pdf>>.

to establishing an environment in which international investment agreements would successfully be concluded, leading to the development and finer definition of international investment law.

78. In 1995, encouraged by the multiplication of bilateral investment agreements, the OECD revived the idea of a multilateral instrument, and proposed the adoption of the Multilateral Investment Agreement.¹²⁰ Unfortunately, negotiations were suspended in 1998, with France announcing that it refused to adhere to the convention in light of the lack of recognition of the cultural exemption.

79. The United States' lack of support or enthusiasm was also instrumental in the failure to obtain support from an important number of member states. Finally, NGOs protested the lack of transparency in negotiations. As a result, in 1998, negotiations were suspended and never initiated again.

80. The discussions of Working Group III at UNCITRAL, started in 2017, and the creation of a multilateral investment court, are therefore, to this day, the latest multilateral project to be discussed.¹²¹

2. The Sources of International Investment Law

81. International investment law has developed as a body of law through simultaneous codification of custom through the negotiation and proliferation of IIAs, as well as jurisprudence from international courts and arbitral tribunals, as was established in the

¹²⁰ OECD, "Multilateral Agreement on Investment", online: OECD <<http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>>.

¹²¹ UNCITRAL, "Working Group III", *supra* note 32.

previous section.¹²² Despite the codification of customary international law, there continues to be significant overlap between bilateral investment treaties (“BIT”) and customary law.¹²³

82. The absence of the principle of precedent, or *stare decisis*, is also considered by many as one of the major issues of ISDS, and more broadly in the complex regime of IIAs.¹²⁴ In theory, this means that arbitral tribunals are not bound by prior decisions rendered and are free to decide as they wish on a previously point of law. Arbitral tribunals have nonetheless recognized the importance of following prior decisions to construct a coherent body of jurisprudence.¹²⁵ Unfortunately, this drawback also acts as a safeguard and feature of international arbitration, protecting the arbitrators’ rights to distinguish on a case-by-case basis.

83. The absence of *stare decisis* is not the only aspect criticized in ISDS. The concerns over the lack of legitimacy of this dispute resolution mechanism also arise, *inter alia*, over the lack of transparency, conflicts of interest of arbitrators and perceived advantages to states.¹²⁶

84. The proliferation of the BITs can be tracked helpfully with the statistics compiled by UNCTAD. Graphics and progression tracking completed demonstrate that the development of BITs increased at a steady, and slow, pace from 1959. The number of BITs only exponentially grew in the 1990s, establishing the conclusion of BITs from several a year to several a week.¹²⁷

¹²² Elena Sciso, « Il ruolo del diritto non scritto nel commercio internazionale e nella disciplina degli investimenti esteri », in: *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, (2016) Month 1, p. 67-75.

¹²³ *Barcelona Traction*, *supra* note 103 at para 33 : “Dès lors qu’un État admet sur son territoire des investissements étrangers ou des ressortissants étrangers, personnes physiques ou morales, il est tenu de leur accorder la protection de la loi et assume certaines obligations quant à leur traitement.”

¹²⁴ Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer, *Principles of International Investment Law*, 3rd Edition (Oxford, 2022), 46-47 [Kriebaum, Schreuer & Dolzer, *Principles of International Investment Law*]; Jan Paulsson, ‘The Role of Precedent in Investment Treaty Arbitration’ in Katia Yannaca-Small (ed) *Arbitration under International Investment Agreements* (2018) 4.01

¹²⁵ Kriebaum, Schreuer & Dolzer, *Principles of International Investment Law*, *supra* note 124 at 46-47.

¹²⁶ Franck et al, *supra* note 36. Alvarez, “The Long View”, *supra* note 55.

¹²⁷ Above, paras 6-7.

B. The Complex Framework of International Investment Agreements

1. International Investment Agreements and Models

85. The vast majority of bilateral investment treaties follow a similar framework. Traditionally, they will, after the preamble, include a first part for definitions and scope of the treaty. A second part will focus on the admission of investments, a third on the substantive protections to foreign investors, and a fourth will provide the dispute resolution mechanisms. Content may vary widely within these sections, but the traditional structure can be recognized across BITs, and across the BIT models that the states have enacted.¹²⁸

86. Indeed, as the negotiations for IIAs became increasingly popular, several countries developed their own models.¹²⁹ This allows them to propose their detailed conventional model at the start of negotiations. This trend started with the United States in 1977, when they developed the US BIT program.¹³⁰

87. The Canadian model BIT was also formatted to follow that of the United States, to the extent that modifications to the Canadian model, the latest being in 2012, were done following those of the United States.¹³¹ The last Canadian model BIT issued in 2021 was presented as the first in-depth update since 2003 with a view to an important modernization of the model. Progressive chapters and provisions were included to reflect the Canadian government's stance on issues which, even in the last informal update of 2012, were nowhere in sight.¹³²

88. Some international investment agreement models have become known for the characteristics they contain. The US model was, for example, the first to include the

¹²⁸ For example, the US model is reprised by Canada. The models developed by the OECD were integrated with some success in the negotiations of several states. On Europe's lack of model, see Guillaume Beaumier & Richard Ouellet, "Europe's new investment policy faces an uncertain future" (29 January 2018) *Columbia FDI Perspectives* (Columbia Center on Sustainable Investment) no 218.

¹²⁹ Most of these models are available on the ITALAW website: <<https://www.italaw.com/>>.

¹³⁰ Newcombe & Paradell, *supra* note 96 at 47.

¹³¹ The latest update to the Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model was released on 11 May 2021. It resembles r to that of the recent Netherlands model BIT, with provisions recognizing the right of states to regulate, thereby increasing protections to the public police powers, and the right of states to intervene in sectors affected, such as health, the environment, public morals, etc.

¹³² "Canada BIT model", *Bilaterals* (11 May 2021) online: *Bilaterals* <<https://www.bilaterals.org/?canada-bit-model-may-2021&lang=en>>.

exception for indirect expropriation to allow States to regulate under strict considerations of public policy. This was included in an Annex, reproduced in the Canadian 2012 model. This annex famously provides for the protection of public policy rights and has also now been reproduced in the CETA. The identification and reproduction of items between BITs are the very factors that have led many to argue that despite the lack of *stare decisis* in this branch of law, there is an inclination towards unification and consistency.¹³³

89. The OECD Model Convention of 1967, which failed to be adopted, has nevertheless served as model for a number of BITs.¹³⁴ It was mostly used by rising economies such as India, South Africa, and Brazil, initially. These countries have also now excluded ISDS from their treaties and prefer alternative options for dispute resolution. This model interestingly provides for increased investor protections, detailed discrimination provisions, and language reestablishing an equilibrium between the signatories to the IIA.

90. On 22 March 2019, the Dutch Government released the text of the new model Netherlands BIT which prioritizes gender and regional diversity as well as the United Nations sustainability goals.¹³⁵ Although it was received with some suspicion that its objectives were too lofty and idealist – it was also applauded for its firmly progressive turn. The Netherlands’s latest BIT model prior to the recent revision had dated back to 2004.

91. Interestingly, the European Union has always refused to acknowledge and present a formal model. Despite this posture, many authors have argued that the European Union presents a *de facto* IIA and FTA model for negotiations.¹³⁶

92. While some States have explicitly issued BIT models, there remain many who refuse to recognize their use, such as the European Union. This phenomenon is made more explicit

¹³³ Stephan Schill, “Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals” in Stefan Griller, Walter Obwexer & Erich Vranes, eds, *Mega-Regional Agreements: TTIP, CETA, TiSA. New Orientations for EU External Economic Relations* (Oxford: Oxford University Press, 2017); Anne Peters, “The refinement of international law: From fragmentation to regime interaction and politicization” (2017) 15:3 *International Journal of Constitutional Law* 671 [Peters].

¹³⁴ Rudolf Dolzer and Margaret Stevens, “Bilateral Investment Treaties” (Martinus Nijhoff 1995) 2.

¹³⁵ Marika R P Paulsson, “The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI”, *Kluwer Arbitration Blog* (18 May 2020) online: Kluwer <<http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/>>.

¹³⁶ Guillaume Beaumier & Richard Ouellet, “Europe’s new investment policy faces an uncertain future” (29 January 2018) *Columbia FDI Perspectives* (Columbia Center on Sustainable Investment) no 218.

through the investigation of specialized websites or databases. In this regard, the research completed by Dr. Wolfgang Alschner and his colleagues through the “mappingbit” website is remarkable. Not only does it provide “heatmaps” illustrating the position of states in the general IIA framework, it allows for a more granular investigation into types of provisions used in IIAs. It is thus possible to identify treaties that provide a public policy exception for indirect investment or for the recognition of pre-establishment rights for investments. Through text as data analysis, this project provides a unique set of information and perception of the entire IIA framework. A recent addition to the website has been the FTA search engine, thus expanding the original mandate.

93. The Design of Trade Agreements Database (DESTA) is equally helpful in analyzing the body of IIAs and allows for the download of the datasets themselves.¹³⁷ Designed by scholars of political science, international political economy and international relations, this website could be seen as the pendant to the legal website of mappingbits.com. These sites may have a complementary and combined use, provided that one is trained in quantitative methods.

94. Finally, the long ongoing project of UNCTAD should be mentioned.¹³⁸ Investment Hub, in collaboration with a wide network of universities throughout the world, has accomplished an ambitious objective: the codification of all existing BITs. The reform objectives of UNCTAD have also focused on the substantive provisions and propose an approach that is vastly different than the one discussed at WGIII at UNCITRAL.¹³⁹

95. While UNCTAD’s long term reform project focuses on the core substantive issues at the heart of the legitimacy crisis, WGIII only focuses on the procedural reform aspects, which Alvarez refers to as the “low hanging fruit”. Alvarez summarizes UNCTAD’s reform efforts as follows:

UNCTAD has been hard at work in supporting states that want to replace their older “overly investor-friendly” BITs with more “balanced” ones. To this end, it has generated a regularly updated recipe book of desirable IIA reform options. These include updating old BITs by adding references to global standards (as on

¹³⁷ DESTA, “Design of Trade Agreements Database”: online DESTA <<https://www.designoftradeagreements.org>>.

¹³⁸ UNCTAD Investment Policy Hub: <<https://investmentpolicy.unctad.org>>.

¹³⁹ Alvarez, “The Long View”, *supra* note 55.

human and labor rights); managing relationships between coexisting treaties; consolidating a state's IIA network; replacing, abandoning, or amending "outdated" treaties; re-interpreting old treaty provisions by issuing joint state interpretations; and "engaging multilaterally."¹⁴⁰

96. Even these in-depth reform efforts, argues Alvarez, are ill-fated and will fail to resolve ISDS's core issues:

UNCTAD seems bent on changing both IIAs and ISDS without a clear sense of how its prescriptions might affect the amount of critically needed capital flows. But at least UNCTAD, alone among global investment regime reformers, acknowledges that there needs to be a close connection between IIA/ISDS reform and attaining sustainable, but real, economic development.

The most serious problem facing ISDS reform is that it does not address how the planet will vastly increase private and public funds to the places and industries that the peoples of the world need to survive.¹⁴¹

2. Traditional Protections for Investors

97. International investment law is unique in that it offers an asymmetrical treatment of the parties involved.¹⁴² While States are accountable to most obligations, the investors benefit from protections to their investment. Traditional protections are offered to investors in IIAs, for the breach of which they may sue the State party. It is also notable that in the vast majority of agreements, the right to sue is unilateral, and the State is not enabled to bring counterclaims against investors. This has lately been the subject of much discussion, with some BITs agreeing to include this right, although it remains the minority. States who then wish to sue foreign investors on their territory must pursue their claims before their national tribunals or through other remedies.

¹⁴⁰ *Ibid*, p. 11; eg, 'Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties', IIA Issues Note (June 2017) at 7, Figure 7. UNCTAD's Phase 1 was devoted to assisting states in devising their own model IIAs suited to their own development and regulatory needs in addition to helping states to negotiate more "balanced" treaties going forward.

¹⁴¹ Alvarez, "The Long View", *supra* note 55, p. 40.

¹⁴² Alessandra, Arcuri, "The Great Asymmetry and the Rule of Law in International Investment Arbitration", in Lisa Sachs, Lise Johnson and Jesse Coleman, eds., *Yearbook on International Investment Law and Policy 2018* (OUP, 2019), online: <<https://ssrn.com/abstract=3152808>>; Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration", *Osgood Hall Law Journal* 50.1 (2012) 211-268; Joachim Pohl, K. Mashigo and A. Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", *OECD Working Papers on International Investment*, 2012/02 (OECD Publishing), online: https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf.

98. Protections offered to investors in IIAs have historically been similar. The right of protection against expropriation (or nationalization) by the State is the first right originally recognized. In addition, the investors benefit from national treatment (NT), the minimum standard of treatment (MST), and fair and equal treatment (FET), among those most famously recognized.

99. Without attempting to delve deeply into substantive international investment law, we will provide an overview by defining the notion of investment, before briefly setting out the renown classical protections to investors. Lastly, exceptions to these provisions, whether the state of necessity, force majeure, public policy or armed conflicts will be set out. This will then allow us to present the second part of IIAs, on which this dissertation focuses as an example, the investor-state dispute settlement mechanism.

100. Defining investment itself has proven difficult. The Washington Convention intentionally did not include a definition in its article 25 in order to avoid potentially restricting the notion.¹⁴³ After a long evolution in the jurisprudence, the definition of investment that is currently considered as valid is that given in *Salini v. Morocco* (2001).¹⁴⁴ BITs have also defined investment in two manners: through open and closed lists. Some definitions include the criteria for economic investment, such as (1) a transfer of money, (2) a long-term project, (3) expectations of a profit, (4) the participation of a private or public person making the investment and (5) a risk. Closed lists, on the other hand, refer to a specific list, providing no or little room for interpretation. There has been a recent increase of detailed, specific definitions, to restrict or avoid possible interpretations by arbitral tribunals.

101. The tribunal in *Salini*, in 2001, had to determine whether the construction of an autoroute in Morocco by an Italian company (Salini) could be considered as an investment. Responding positively, the tribunal referred to three elements to define investment: (1) money, (2), time and (3) risk. The tribunal also decided to add a fourth criteria, that of (4) the

¹⁴³ Administrator's report, *ICSID Convention*, *supra* note 116, art 25.

¹⁴⁴ *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, Decision on Jurisdiction (2003), 42 ILM 609 (ICSID), online: Italaw <<https://www.italaw.com/cases/documents/959>> [*Salini v Morocco*].

contribution of the investment to the host State's development of the economy.¹⁴⁵ Although this test has since been widely discussed, and sometimes opposed (such as in the *Pantechniki* award¹⁴⁶), two schools on the definition of investment remain, one objective and the other subjective. The latter follows that of the ICSID administrators' report, which considered that the definition of investment should be what the State has decided in its national law or BIT. The first objective approach, on the other hand, follows the *Salini* definition, with some skepticism remaining on the necessity for the fourth criteria linked to the impact on the development on the host State's economy.

102. The classic protections to investors that can be found in BITs will include the protection against expropriation without compensation, national treatment, and the minimum standard of treatment.¹⁴⁷ As will all obligations, exceptions are provided to these protections, in limited cases.

3. Dispute Resolution Mechanisms and their Evolution

103. This dissertation focuses on a particular type of dispute resolution mechanism, the investor-state dispute settlement, and its reform both as enacted by the European Union and as discussed by UNCITRAL Working Group III. While ISDS is the most used mechanism, there exist, however, a number of other dispute resolution mechanisms that can be found in IIAs.

104. Within ISDS itself exist various types of arbitration. First, we can distinguish between arbitrations administered by institutions and those that are not, referred to as *ad hoc*. A number of arbitration institutions have gained popularity for administering arbitrations, under

¹⁴⁵ *Salini v Morocco*, *supra* note 144 at para 52: "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition."

¹⁴⁶ *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania*, ICSID Case no ARB/07/21 (ICSID), online: Italaw <<https://www.italaw.com/cases/810>>.

¹⁴⁷ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012).

their rules. Others, not administered, are designated as *ad hoc*, and are often conducted under the UNCITRAL Arbitration Rules.¹⁴⁸

105. Aside from permanent arbitration courts, such as the Iran - US Claims Tribunal, institutions may be found as designated to administer arbitrations in BITs, from the International Chamber of Commerce (the “ICC”), the Permanent Court of Arbitration (the “PCA”), the Stockholm Chamber of Commerce (the “SCC”) to the London Court of International Arbitration (the “LCIA”) as the most frequently designed institutions.

106. Finally, the International Court of Justice (the “ICJ”) has also been designated as a dispute resolution mechanism, as has the Arab court of investment, the human rights courts (such as the CEDH-CIADH), and inter-state arbitration. We will revert to the availability of these mechanisms at a later stage of the dissertation, when evaluating alternative solutions in the systemic reform of ISDS.

SECTION 2. NEW GENERATION TRADE AGREEMENTS IN RESPONSE TO THE DISINTEGRATING MULTILATERALISM

1. Multilateralism, Regionalism and Bilateralism – An Evolution of ISDS through the Development of Mega-Regional Agreements

107. A prolific literature has been developed around theories bridging multilateralism, regionalism and bilateralism.¹⁴⁹ The interdisciplinary nature of the existing research is particularly striking – the phenomenon was apprehended by political scientist, international

¹⁴⁸ David D Caron, Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd Edition) (2013, Oxford).

¹⁴⁹ Philippe de Lombaerde (Ed.), *Multilateralism, Regionalism and Bilateralism in Trade and Investment, 2006 World Report on Regional Integration*, (Springer, 2006). Nathan Iumba, “Chapter III: Comments on Dynamism in the Interface of Multilateral Trading System and Regional Trade Agreements: A Post-Cancún Perspective” in *Multilateralism and Regionalism: The new interface*, (UNCTAD, 2005), online: <https://unctad.org/system/files/official-document/ditctncd20047ch3_en.pdf>.

relations specialists, historians and lawyers alike, at times within their disciplines, and increasingly, across several disciplines.¹⁵⁰

108. Bhagwati's famous illustration of the spaghetti bowls of bilateral trade agreements¹⁵¹ has been overly used to explain the risks of overlapping and potential conflicts of laws caused by the proliferation of BITs. The "building blocks" theory was equally a long-term favorite of both the European Union to discuss its approach to bilateral and regional agreements.¹⁵² In view of the slow pace of WTO negotiations, the European Union is continuing to enter into trade and economic agreements, bilateral and regional, which can be considered as building blocks to the multilateral trade system. In sum, the EU is preparing the terrain for the ultimate objective that continues to be multilateralism.¹⁵³

109. Most recently, Morin, Pauwelyn and Hollway have argued that the current complex regime of trade agreements constitute a "complex adaptive system".¹⁵⁴ Presenting a complex regime that adapts, evolves and learns, it illustrates a body of agreements that coevolves, and remains stable and dynamic, rather than chaotic, as per the previously cited theories. The advantage of interdisciplinary research is that it allows the understanding of a specific scientific field, here, the law, through a systemized approach that comes from another, here, international relations and political science.¹⁵⁵ The use of the complex adaptive system illustration to the network of international investment agreements presents a positive

¹⁵⁰ Jonathan Bonnitcha, Lauge N Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017); Telò, *supra* note 25.22.

¹⁵¹ Jagdish Bhagwati, "US Trade Policy: The Infatuation with FTAs" (April 1995) Discussion Paper Series No 726 [Bhagwati, "US Trade Policy"].

¹⁵² European Commission, *Trade for All – Towards a more responsible trade and investment policy* (Luxembourg, Publications Office of the European Union, 2015), online: EC <https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> [*Trade for All*], 31-32.

¹⁵³ European Commission, "EU and WTO", online: <<https://ec.europa.eu/trade/policy/eu-and-wto/>>.

¹⁵⁴ Jean-Frédéric Morin, Joost Pauwelyn & James Hollway, "The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements" (2017) 20:2 *Journal of International Economic Law* 365.

¹⁵⁵ Jeffrey L. Dunoff & Mark A. Pollack (Eds.), *Interdisciplinary Perspectives on International Law and International Relations, The State of the Art*, (Cambridge University Press, 2013). Theresa Carpenter, Marion Jansen, Joost Pauwelyn, (Eds), *The Use of Economics in International Trade and Investment Disputes*, (Cambridge University Press, 2017).

framework for an evolution that deeply contrasts with the more radical, negative and somewhat dated approach of the fragmentation of international law.¹⁵⁶

2. The World Trade Organization and the Crisis of the Multilateral Trade System

110. In comparison to the other institutions governing ISDS, the World Trade Organization (WTO) remains a contemporary and relatively recent international organization. Tasked with governing the rules of trade in accordance with the WTO agreements signed by the bulk of the world's trading nations in order to "help producers of goods and services, exporters, and importers conduct their business".¹⁵⁷

111. The impasse in international trade negotiations caused by the failure to conclude the Doha rounds, and the painstakingly slow progress have given rise to new negotiation techniques. The rise of regionalism and increase of preferential trade agreements is thus directly proportional to the absence of conclusion of any further multilateral conventions at the WTO.

112. The WTO crisis is also well entrenched. Following that of the failure of its Appellate Body, and the interim Agreement to bypass this blockage, a full-fledged crisis currently exists at the WTO.

113. The election of Ngozi Okonjo-Iweala as Director General of the WTO on 15 February 2021 may be a sign that the tide has finally turned for the WTO. Provided that, as announced, "They need something different, it cannot be business as usual for the WTO - [they need] someone willing to do the reforms and lead."¹⁵⁸, the stage appears to be set for the rebirth of the WTO.

¹⁵⁶ Jean-Frédéric Morin, Joost Pauwelyn & James Hollway, "The Trade Regime as a Complex Adaptive System : Exploration and Exploitation of Environmental Norms in Trade Agreements" (2017) 20:2 Journal of International Economic Law 365.

¹⁵⁷ World Trade Organization, "What is the WTO?", online: <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm>.

¹⁵⁸ Kunle Falayi, "Ngozi Okonjo-Iweala makes history at WTO", *BBC News* (1 March 2021), online: BBC News <<https://www.bbc.com/news/world-africa-54903788>>.

114. The precedent of a functioning and efficient model of standing court set by that of the WTO Dispute Settlement Body (WTO) is one of the foundational stones to our analysis. In most aspects, the EU text is greatly inspired by that of the DSB. If adapted to the times to reckon with a number of ISDS features, we nevertheless recognize the fundamental marks of a fixed roster, panel members and, of course, an appellate level.¹⁵⁹

115. While the WTO DSB has been hailed by many as an efficient and functional dispute resolution mechanism, and the parties involved in disputes have complied with the determinations, a full-fledged crisis has developed following the United States opposition to continue nominations to the Appellate Board. Opposed to this mechanism for reasons of partiality, inconsistency, delays and general inefficiency, the opposition strategy initiated under President Obama was fruitful in grinding to a halt entirely the work of the Appellate Body. The paradox that the EU's model for its reform of ISDS is meant to address these very criticism is patent.

116. Whilst the EU has openly acknowledged its inspiration for the ICS and MIC as being the WTO DSB and AB, important nuances must be made. The judicial structure, roster and permanent nature are clearly reproduced in the ICS.¹⁶⁰ However, the specific mechanisms for appointment to the roster and implementation remain to be defined.¹⁶¹ The EU seeks to harness the advantages of the WTO system while avoiding its debilitating flaws. The analysis of the MIC in the second part of the dissertation will address the specific measures proposed to do so successfully.

3. *Preferential Trade Agreements and Bilateral Investment Treaties: A Proliferation to Bypass the Crisis*

117. In accordance with article XXIV of the GATT, countries, following the Doha round, continued to negotiate trade agreements at the regional and bilateral level. While BITs have continued to be concluded at a regular pace, the new generation of treaties is that of the mega-

¹⁵⁹ See Annex I, "Comparison of CETA Tribunal, WTO DSB panels and ICSID arbitral panels."

¹⁶⁰ Below Annex I.

¹⁶¹ Alvarez, "The Long View", *supra* note 55.

regional agreements.¹⁶² One step closer to a multilateral system, and a seemingly appealing compromise between the bilateral and multilateral planes, the “mega-regional” agreements have lately stolen the spotlight. The CPTPP, CETA, TTIP, but also the USMCA (NAFTA 2.0), and the negotiations between the EU and MERCOSUR, can be counted amongst the new generation mega regional agreements. The argument behind the acceleration of these types of negotiations is simple – it allows parties to access a wider portion of the market, as they now encompass an ever more expansive list of topics, ranging from human rights, the environment, electronic commerce, and corporate social responsibility. The vast majority of these agreements include an investment chapter.¹⁶³

118. The first of these Free Trade Agreements to be concluded was the North American Free Trade Agreement, which came into force now over 20 years ago, on January 1st, 1994. At the time an exception, and an innovation, NAFTA contained a specific chapter dedicated to investment. This chapter reflected the structure found in BITs, with the first section devoted to the protections of foreign investments, and the second to dispute settlement, in this case ISDS.

119. While technically not yet part of the new generation of agreements, NAFTA was the first free trade agreement to include an investment chapter. Its scope was wider than prior agreements, and original in proposing the integration of investment protections and free trade provisions. This new approach to FTAs was broadened and evolved to what has recently been categorized as the « new generation » of free trade agreements.

120. The comprehensiveness of these agreements is in play, and the ever-increasing scope allows us to distinguish the new generation of treaties from the old. The level of details in the text of the treaties has exponentially increased, with the standardized approach now being to provide as little interpretive room as possible with the level of specificity in the treaty.¹⁶⁴

¹⁶² Chad P Brown, “Mega-Regional Trade Agreements and the Future of the WTO” (2017) 8:1 Global Policy 107.

¹⁶³ Richard Ouellet, Stéphane Paquin, eds, “L’Accord Canada-États-Unis-Mexique” (Special Issue March 2022) Quebec Journal of International Law, online: SQDI <<https://www.sqdi.org/fr/hors-serie-mars-2022/>>.

¹⁶⁴ To wit, the comparison between the 1994 NAFTA : 22 chapters, 393 pages to the latest from Canada, the CETA : 30 chapters, 1598 pages, overs 30 annexes. The level of details is also meant to include the jurisprudence of arbitral tribunals developed in the 20 years, as NAFTA Chapter 11 claims were prolific.

121. The interplay between FTAs or PTAs and BITs is complicated due to the overlap of obligations between the same parties, potentially different fora and dispute resolution mechanism. Treaty shopping may lead the same case to be heard for the same parties in different fora, with the risk of differing awards, with issues relating to jurisdiction, and conflict of laws. While some of the new agreements provide for such overlap and try to avoid treaty shopping, the vast majority still does not have any dispositions to this effect. This risk is also responsible for part of the controversy and disagreement on ISDS. Establishing a permanent investment court, as well as a multilateral investment court, would partly address this issue.

122. Responding to the States' warning against the regulatory chill effect of BITs, the new generation of FTAs provides increasing protection to States. Investment chapters included in first generation FTAs were modeled after existing Bilateral Investment Treaties (BITs) in force at the time. They have since evolved. While traditionally signed between developing and developed economies, the BIT regime has often been criticized as unfairly advantaging investors from developed countries investing in developing countries. This was an instrument rendered popular at the time of many decolonization, and which aimed at attracting foreign investments in countries which could benefit from them. This hugely popular instrument, with over 3000 BITs now signed in the world, has since sought to rebalance its interests.¹⁶⁵

123. Staunch critics of the regime have systematically explained the great divide between the Global South and Global North economies. Sornarajah, for the Global South, is often cited as a staunch opponent to ISDS, which he depicts "an abomination bearing the visage of rapacious greed. They are exemplars of global capitalism run amuck: "neoliberal" tools that violate sovereign equality to grease an empire of capital".¹⁶⁶ Senator Elizabeth Warren, for the Global North, concurs in the criticism of IIA as "top-undemocratic constraints on

Examples. For Greater Certainty" and "For the Avoidance of Doubt"; The Most Important Words in the TPP? Mark Kantor, 21 November 2015, Young OGEMID.

¹⁶⁵ UNCITRAL report.

¹⁶⁶ M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

governments' ability to channel market capitalism to protect labor rights, the environment, and income equality."¹⁶⁷

124. Interestingly, as Alvarez writes,

*For both, the most effectively enforced global international law regime in existence is a shameful enterprise that only protects the property of wealthy oligarchs – “the one percent.” Those with this monster in their sights want to kill the 3000 or so IIAs in existence in order to, as Sornarajah says, “start afresh.”*¹⁶⁸

125. In a peculiar way, the investment chapter in a free trade agreement or a BIT continues to promote and protect investors' rights. The States rights and obligations are conversely conspicuously absent. It is thus a strangely asymmetrical legal regime.¹⁶⁹ Since, however, BITs have continued to be signed now between developed countries, and States are decrying the blockage of their modification of legislation due to obligations in the chapter. The classic protections offered to investors are against expropriation without compensation, for the provision of national treatment (NT), equal treatment of foreign investors with that of nationals under the most favored nation clause (MFN), for fair and equitable treatment (FET) and the free circulation of capital.

126. Taken from the US and Canadian BIT models, an annex regulating the right of States to intervene for public policy reasons has been systematically included in the new generation of trade agreements. As such, and in rare circumstances, the States may now expropriate without compensation foreign investments when done under reason related to public welfare such as health, security, and environment. The inclusion of this provision echoes recent arbitral decisions and claims by governments to this effect¹⁷⁰.

¹⁶⁷ 'Alliance for Justice Letter to Members of Congress' (11 March 2015) <https://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3>; 'Public Statement on the International Investment regime' <https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>; and '220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)' (7 September 2016) <https://www.citizen.org/wp-content/uploads/isds-law-economics-professors-letter-sept-2016.pdf>.

¹⁶⁸ Alvarez, "The Long View", supra note 55, p. 3. M. Sornarajah, 'Starting anew in international investment law' (16 July 2012) Columbia FDI Perspectives, no 74.

¹⁶⁹ Alessandra Arcuri, "The Great Asymmetry and the Rule of Law in International Investment Arbitration" in Lisa Sachs, Lise Johnson & Jesse Coleman, eds, *Yearbook on International Investment Law and Policy 2018* (Oxford: Oxford University Press, 2019), online: SSRN <<https://ssrn.com/abstract=3152808>>.

¹⁷⁰ *Santa Caterina; SD Meyers, Inc v Government of Canada* (2002) (NAFTA); *Técnicas Medioambientales Tecmed, SA v The United Mexican States* (2003), ICSID Case No ARB(AF)/00/2 (ICSID) [*TecMed*]; *Methanex Corporation v United States of America* (2005) (NAFTA).

SECTION 3. THE INTRODUCTION AND EVOLUTION OF THE EUROPEAN UNION INVESTMENT POLICY

127. In 2009, upon the entry into force of the Lisbon Treaty came the official introduction of the European Union investment policy through the inclusion in article 207(1) of the exclusive competence for the EU for foreign direct investment:

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

128. The attribution of this exclusive competence means that only the “Union may legislate and adopt legally binding acts, the member states being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”¹⁷¹

129. Before that date, as Member States were directly negotiating their BITs, no formal European investment policy existed. It could only be referred to, as Catherine Titi suggests, as the best practice of its Member States.¹⁷² At the time, France, the Netherlands and Germany had model BITs, and were reluctant to give over their competence to the EU.¹⁷³ The Commission had assured its Member States that its own investment policy would do no more than “be inspired by best practices that Member States ha[d] developed”.¹⁷⁴ It is

¹⁷¹ *Treaty on the Functioning of the European Union*, 26 October 2012, JO C 326, vol 55, art 2(1) [TFEU].

¹⁷² Catharine Titi, “The European Commission’s Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court System” (2015) 12:6 *Transnational Dispute Management* [Titi].

¹⁷³ Nikos Lavranos, “In Defence of Member States’ BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs: A Member State’s Perspective” (2013) 10:2 *Transnational Dispute Management* [Lavranos, 2013].

¹⁷⁴ EC, *European international investment policy European Parliament resolution of 6 April 2011 on the future European international investment policy*, [2012] OJ, C 296 at paras 9, 18, 19 [EC, *Resolution 296*]; European Commission, Communication, COM(2010)343 final, “Towards a Comprehensive European International Investment Policy”, (7 July 2010) at 5 [EC, *COM(2010)343 final*]. Interestingly, studies have demonstrated that both *EU-Singapore* and *CETA*, i.e., the first agreements negotiated solely by the EU, only marginally followed practices developed in Member States’ models. Titi offers the examples of the negotiating mandates,

important to recall that even before the Lisbon Treaty, Member States did not have a full competence for the negotiation of investment treaties, as the EU already had exclusive competence on market access, which covers the pre-establishment phase of the investment. In this manner, the EU was already involved, to a certain extent, in the “elaboration of international investment law norms.”¹⁷⁵ The Member States then only had competence over the post-establishment norms, i.e., once the investor had established itself on the territory of the host State.

130. Accordingly, the EU negotiated FTAs covering market access and the pre-establishment phase, basing itself on the “EU Minimum Platform on Investment”, which served as a template for the negotiation of EU free trade agreements.¹⁷⁶ In 2012, the Commission considered that it should model its approach for investment on the one it was taking for market access, in safeguarding the right of the state to regulate.¹⁷⁷ Additional reasons to consider including the right to regulate are linked to the transfer of competence. Pursuant to articles 21 TEU and 205 TFEU, the EU has a constitutional obligation for its common commercial policy to comply with principles guiding its external action; these principles including “democracy, human rights, sustainable development, the preservation

statement of principles and early versions of the treaties. the negotiating directives of 12 September 2011 authorizing the opening of negotiations on free trade agreements with Canada, India and Singapore. See European Union Council, Press Release, “3109th General Affairs Council Meeting” (12 September 2011) at 13. Another illustration is offered by the EU–US negotiations, see Council of Europe, *Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, Doc 11103/13 DCL 1 (2014) at para 23, online: EU <<https://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>>. The document has been leaked in 2013: Jamal Henni, “Exclusif – Ce que dit le mandat de négociation Europe/États-Unis”, BFM Business (18 June 2013), online : BFM <www.bfmtv.com/economie/exclusif-dit-mandat-nego-ciation-europe-etats-unis-540582.html>. E.g., European Commission, Press Release, “EU and US Adopt Blueprint for Open and Stable Investment Climates” (10 April 2012). For another example of an internal document of the European Commission, see Catharine Titi, “EU Investment Agreements and the Search for a New Balance: A Paradigm Shift from Laissez-faire Liberalism Toward Embedded Liberalism?” (2013) 86 *Columbia Foreign Direct Investment Perspectives. Draft EU–Singapore FTA* (October 2014), Chapter 9 – Investment, online: Bilaterals <<https://www.bilaterals.org/IMG/pdf/-16.pdf>>.

¹⁷⁵ Titi, *supra* note 172; Patrick Julliard, “Investissement et droit communautaire : À propos des accords bilatéraux d’investissement conclus entre États membres et pays tiers” in Jean-Claude Masclet et al, eds, *L’Union Européenne: Union de droit, union des droits, Mélanges en l’honneur de Philippe Manin* (Paris: Pedone, 2010) 445 [Julliard, 2010].

¹⁷⁶ For example, *EU-CARIFORUM Economic Partnership Agreement Creating opportunities for EU and Caribbean businesses*, October 2008 [EU-CARIFORUM]; *EU-Korea Free Trade Agreement*, July 2011 [EU-Korea]. Titi, *supra* note 172.172. EU Council, Minimum Platform on Investment, Doc. 15375/06, 27 November 2006. Titi notes that the platform has never been made publicly available, and requests for it have always been rejected.

¹⁷⁷ Titi, *supra* note 172.

and improvement of the environment, sustainable management of natural global resources and the guiding principles of the Charter of the United Nations.”¹⁷⁸ The European Parliament, in agreement with the Council, expressed its agreement in a resolution with the necessity to protect the right of states to regulate, thus aiming to rebalance the rights between the state and the foreign investor.¹⁷⁹

131. The desire to strengthen the EU’s external economic action, and specifically to “enhance its role in the elaboration of international investment norms” justified the transfer of competence from Member States to the EU in terms of investment.¹⁸⁰ The addition of “foreign direct investment” at article 207(1) TFEU triggered a heated debate. Practitioners, academics and policy makers were at odd ends on the scope of the new power of the EU regarding investment. In particular, the questions of whether portfolio investments were to be considered as included in “foreign direct investment” and if the treaties including investment chapters would be considered as mixed agreements were the subject of sustained debate.¹⁸¹

132. The transfer of competence to the EU per article 207(1) was also accompanied by an increased power granted to institutions other than the EU Commission. The ordinary legislative procedure (article 207(2)) was introduced in the Common commercial policy. The EU Parliament was therefore granted the most new power, with article 218(6) TFEU, providing for its necessary consent to any agreement covering foreign direct investment for

¹⁷⁸ *Ibid* at 645.

¹⁷⁹ *Ibid*; Council of Europe, Foreign Affairs, 3041st Council Meeting, *Conclusions on a Comprehensive European International Investment Policy*, 25 October 2010 at para 17; EC, *Resolution 2010/2203* of 6 April 2011, OJ 2012 C296 E.296, *supra* note 174.

¹⁸⁰ Marc Bungenberg & Stephan Hobe, “The Relationship of International Investment Law and European Union Law” in Marc Bungenberg et al, eds, *International Investment Law: A Handbook* (München: CH Beck, 2015) 1602 [Bungenberg & Hobe, 2015].

¹⁸¹ Marc Bungenberg, Jörn Griebel & Steffen Hindelang, eds, *European Yearbook of International Economic Law 2011, Special Issue: International Investment Law and EU Law* (Berlin: Springer, 2011) [Bungenberg, Griebel & Hindelang, 2011]; Marc Bungenberg, “Going Global? The EU Common Commercial Policy after Lisbon” in Christoph Herrmann & Jörg PhilippJ Terchechte, eds, *European Yearbook of International Economic Law* (Berlin: Springer, 2010) 123 [Bungenberg, 2010]; Juillard, 2010, *supra* note 175. Both these questions were raised before the CJEU upon the conclusion by the EU of its first treaty containing investment provisions and resolved in Opinion 2/15: Opinion of the Court (Full Court) of 16 May 2017 (OJ C, C/239, 24.07.2017, p. 3, CELEX: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CG0002>) [Opinion 2/15] , of 16 May 2017, in the affirmative. Part I of the dissertation provides an in-depth analysis of the background to this decision, the legal arguments involved, and of course, the impact on the EU investment policy.

their adoption. In a way, this can be understood as the power for the EU Parliament to veto any treaty under 207(1) should it wish to do so. In addition, the Parliament was also granted the right to regular information on negotiations' progress (art. 207(3), 218(10)).

133. Other than causing new internal challenges regarding existing intra-EU BITs,¹⁸² as well as on the role of subnationals,¹⁸³ the content of the new EU investment policy can be considered as modern and innovative in many regards. The EU investment policy shift between the old Member States Practices and the new standards in the new agreements (eg, CETA, TTIP, EU-Singapore) represents the shifting paradigm in the evolution in the investor state dispute settlement systems.¹⁸⁴ Stemming from a dispute resolution model inspired by international commercial arbitration, founded in international private law, the EU's investment policy and proposal for a permanent investment court now positions its treaties and dispute resolution mechanism squarely within public international law modeled on existing international permanent courts (e.g. CIJ, WTO).¹⁸⁵

134. Professor Titi recalls that with its nascent investment policy "Europe marks its distances with the old approach of the member states and appears eager to set its own 'model'. While broadly in harmony with the new generation of North American investment treaties, the nascent EU policy aims to improve international investment law in innovative ways, targeting both substantive and procedural protections, and leading to a yet newer generation of international investment treaties".¹⁸⁶ Titi was then exploring whether the EU would manage, by setting a new EU standard, to "change the face of international investment law as we know it".

135. Effecting a powerful change at the procedural level, with the replacement of ISDS by a permanent court system, playing an instrumental role in the initiation of work by WGIII at UNCITRAL on the reform of ISDS and the potential multilateral investment court, as well

¹⁸² See the *Achmea* saga initiated by *Slovak Republic v. Achmea B.V.* (Case C-284/16).

¹⁸³ The Wallonia saga, and subsequent request to the CJEU.

¹⁸⁴ The paradigm shift referred to here is from the arbitration system proposed traditionally in BIT, and which the EU has done away with and replaced with a permanent investment court, modelled on the WTO. The argument that a shift occurs in the paradigm is justified by the impact on the nature of the dispute resolution method, at the root of international investment law itself.

¹⁸⁵ Titi, *supra* note 172.

¹⁸⁶ *Ibid.*

as on the substantive level, with increased investor protections, balanced with the recognition of the State to regulate, together with the inclusion of progressive measures, one could conclude that the new EU standard already changes the face of international investment law. But while these modifications make for a radical departure, and innovative positioning of the EU in the development of investment policy, a number of other factors should be considered before coming to this conclusion. China's impact on the geopolitical redistribution (e.g. 145 BITs, new ISDS announced, WTO accession)¹⁸⁷ and the new American approach favoring bilateralism with a disclosed intent on destroying multilateralism appear to dampen the EU's innovative approach to establishing itself as a leader in investment policy.¹⁸⁸

SECTION 4. AN (UN)EXPECTED BACKLASH: THE WESTERN DISCOVERY OF ISDS

1. The Rise of Discontent against ISDS

136. The *Vattenfall* arbitration is often referred to as the perfect illustration of the legitimacy crisis of ISDS. The factual matrix, and the political reaction to the case, have been consistently used by critics of ISDS to denounce the multiple failings inherent to this dispute resolution mechanism and call for reform. Following Fukushima's disastrous leak at its nuclear plant in 2011, the German government decided to phase out nuclear power by 2022.¹⁸⁹ This decision came at the end of a decade-long debate on the issue in the German government. To do so, Germany amended the Atomic Energy Act, which required an immediate shutdown of the oldest nuclear reactors. Vattenfall, a wholly-owned Swedish company, owned these two plants located in Hamburg. Vattenfall simultaneously filed

¹⁸⁷ Diane Desierto, "China as a Global ISDS Power", (Oxford University Press, 24 August 2018), online: <https://oxia.oup.com/page/715> [Desierto]. Diane Desierto, "The Complexities of Democracy, Development, and Human Rights in China's Belt and Road Initiative" (2020) Connecticut Journal of International Law 3, online: U Connecticut <<https://opencommons.uconn.edu/cjil/3>>.

¹⁸⁸ Geneviève Dufour et Delphine Ducasse, "La négociation des accords de libre-échange sous l'administration Trump: les principes de réciprocité et de multilatéralisme" (2017) 30:2 QJIL 51; 2017 CanLIIDocs 436, online : <<https://canlii.ca/t/2s74>>; Telò, *supra* note 22.

¹⁸⁹ Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark* (International Institute for Sustainable Development, 2014) [Bernasconi-Osterwalder & Dietrich].

arbitration proceedings against Germany for compensation, and a lawsuit before the Federal Constitutional Court of Germany. The reported amount in dispute has varied, starting at US\$ 700 million, and most lately reported at US\$ 5140.00 million.¹⁹⁰ The arbitration under the Energy Charter Treaty was kept confidential, and only minimal information was available to the public.¹⁹¹ The German media extensively chronicled the judicial debacle and outrage spread, tied to the amount in play and lack of transparency. On 5 March 2021, a settlement was announced with Germany’s ministries of finance and the environment confirming it would pay €1.4 billion to Vattenfall. The three German energy companies affected by the decision would also receive compensation, with the state paying €880 million to RWE, €80 million to EnBW and €42.5 million to E.ON. Altogether, the payments by Germany come to around €2.4 billion. These companies have, in return, agreed to withdraw all pending proceedings against the state – including Vattenfall’s Energy Charter Treaty claim and have waived the right to bring any future claims.¹⁹²

137. Claimant Vattenfall had denounced an illegitimate closure of its plants in contravention to international law, specifically in breach of its protection against expropriation, based only on the perception of a risk to public health by the government. In response, Germany’s case hinged on the right for government to regulate for safety and security concerns, protected under most international investment agreements. Public outcry and protest were enormous, unforeseen by the German government.¹⁹³ The release of documents was continually refused under access to information acts, MPs were denied supplemental information, and crucial documentation was stored in a highly secured government building. Bernasconi and Walder relate the incident in which, responding to a

¹⁹⁰ Investment Policy Hub, “Vattenfall v. Germany (II), *Vattenfall AB and others v. Federal Republic of Germany (II) (ICSID Case No. ARB/12/12)*”, online: UNCTAD <<http://investmentpolicyhub.unctad.org/ISDS/Details/467>>.

¹⁹¹ The ICSID website which records details and information on the proceedings neither indicates the amount in dispute, nor makes available any documentation. Live streamings are however available of the opening and closing statements from October 10 and 21 2016: ICSID, “Case Details - Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12)”, online: ICSID: <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/12>> [ICSID, “Case Details – Vattenfall”].

¹⁹² Cosmo Sanderson, “Germany settles with Vattenfall”, *Global Arbitration Review* (5 March 2021) online: GAR <<https://globalarbitrationreview.com/germany-agrees-settle-vattenfall-case>>.

¹⁹³ Vera Wegmann & David Hall, “The unsustainable political economy of investor–state dispute settlement mechanisms” (2021) 87:3 *International Review of Administrative Sciences* 658, online: SAGE <<https://journals.sagepub.com/doi/pdf/10.1177/00208523211007898>>.

request from an MP Ralph Lenkert. Secretary Anne Ruth Herkes responded simply that ICSID arbitrations are confidential.¹⁹⁴

138. While there exists no obligation of confidentiality in the ICSID Rules, parties may request that the arbitral tribunal render confidentiality orders to protect documents and hearings. This is undoubtedly the case with Vattenfall – if it is possible to note from the ICSID website report, four confidentiality orders were pronounced by the Arbitral tribunal.¹⁹⁵ The documents being unavailable however, it is not possible to determine the scope of the orders.

139. The outrageous amount of damages claimed for a publicly funded endeavor, coupled with the repeated refusal of the government to inform the public, contributed to the increasing anger and debate on the relevance of investor state dispute settlement. This was further aided by the fact that two other cases involving the German government following the closure of plants were submitted to the German Federal Court, which provided public proceedings. In sum, it was not comprehensible to the public that between two democratic states, offering guarantees of a stable judiciary and recognized rule of law, a private parallel tribunal would be established, to rule on publicly relevant issues (health and security) and funds.

140. *Vattenfall* is often depicted as the first prominent arbitration to be conducted between two developed economies. Continued opposition, relentless protests, and the beginnings of an organized opposing movement contributed to the anti-ISDS movement catching in under similarly preoccupied countries (France, The Netherlands and Italy were particularly vocal).¹⁹⁶ At that time, the European Union was actively involved in the biggest commercial negotiations, trying to broker a comprehensive deal with the United States (the now ill-fated Transatlantic Trade and Investment Partnership Agreement or TTIP). These combined events

¹⁹⁴ Bernasconi-Osterwalder & Dietrich, *supra* note 189.

¹⁹⁵ ICSID, “Case Details – Vattenfall”, *supra* note 191. The little information available on the ICSID website indicates that the Tribunal has issued 37 procedural orders, and most lately on May 30, 2018 the parties filed responses to questions from the Tribunal. A hearing on jurisdiction, merits and quantum was held in Washington, DC from 10 to 21 October 2016, followed by post-hearing briefs (May 2017) and submissions on costs (October 2017). The Tribunal in March 2018 posed questions to the parties, which were answered on May 31, 2018.

¹⁹⁶ Brent Patterson, “CETA Ratification faces a new hurdle following the election in the Netherlands », The Council of Canadians, (2017) online: <<https://canadians.org/analysis/ceta-ratification-faces-new-hurdle-following-election-netherlands>>.

contributed to the EU Commission launching an online public consultation on investor protection and ISDS in TTIP in 2014.¹⁹⁷

141. It is remarkable that Germany, the country who negotiated the first known BIT with Pakistan in 1958, should also voice such opposition to ISDS, after failing to offer any comments at the time the negotiation mandates were deposited at the Commission for TTIP.¹⁹⁸

142. If *Vattenfall* has become a reference case to set out the backlash against ISDS in Europe, we cannot forget other relevant and contemporaneous cases which arguably caused the same wariness of ISDS, such as the tobacco arbitrations involving Phillip Morris who initiated proceedings against Uruguay's and Australia's plain packaging regulations.¹⁹⁹ These two arbitrations are often cited as an illustration of the failures and dangers of ISDS. The right of a state to regulate for public health, i.e. the introduction by Uruguay and Australia of plain packaging legislation which has been demonstrated to act as a deterrent to smokers, was contested by a foreign investor, a major multinational, that held no such regard. On its face, the situation is revolting. The fact that these arbitrations could be conducted in great part in secrecy, by appointed arbitrators (and not judges of the countries) and for exorbitant amounts, contributed to the public outcry and further fueled the legitimacy crisis. Last, a sizeable argument of detractors of ISDS was that the risk that the two awards would be, at worst, contradictory or inconsistent in their reasoning and findings, which proved true.²⁰⁰

¹⁹⁷ European Commission, "Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)", online: European Commission < http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179> ["Online public consultation"].

¹⁹⁸ Titi, *supra* note 171 at 659, referring to Shawn Donnan & Stefan Wagstyl, "Transatlantic Trade Talks Hit German Snag", *Financial Times* (14 March 2014).

¹⁹⁹ Josef Ostřanský, "Tobacco Investment Disputes – Public Policy, Fragmentation of International Law and Echoes of the Calvo Doctrine" (2012) 3 *Czech International Law Yearbook* 161; Andrew D Mitchell, "Tobacco Packaging Measures Affecting Intellectual Property Protection under International Investment Law: the Claims against Uruguay and Australia" in Alberto Alemanno & Enrico Bonadio, eds, *New intellectual property of health: beyond plain packaging* (Northampton, MA: Edward Elgar, 2016) 213.

²⁰⁰ Tania Voon, Andrew D. Mitchell, "Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia (2011) 14:3 *Journal of International Economic Law*, online: <<https://ssrn.com/abstract=1906560>>.

143. As is well known, a singular aspect of the international investment law is that it does not follow the principle of precedent, or *stare decisis*, which acts as a control and guarantee that the body of law developed by jurisprudence is consistent as judges are held by preceding decisions. In practice, and we will revert to this aspect below in the section dedicated to ISDS, arbitrators have repeatedly recognized that despite the absence of the rule of precedent they give regard and analyse the relevant arbitral decisions so that they continue to produce a consistent body of law.²⁰¹

2. The European Union Consultation on ISDS and the Reform

a. The European Union Consultation on ISDS

144. On 27 March 2014, in the wake of the TTIP negotiations, the EU launched a wide consultation on ISDS.²⁰² The high interest and participation led to unambiguous results, reflecting “a wide-spread opposition to investor-State dispute settlement (ISDS in TTIP or in general)”.²⁰³ Decried as a “threat to democracy and public finance or to public policies”, it was also repeatedly portrayed as “unnecessary between the EU and the US, in view of the perceived strength of the respective judicial systems.”²⁰⁴ The majority indicated that they were unsatisfied with ISDS and demanded either a reform or abolition of the system. When faced with the results of the consultations in 2014, the EU could only recognize the level of discontent with the investor state dispute settlement mechanism.²⁰⁵ The key issue the Commission was consulting on was « whether the EU’s proposed approach for TTIP

²⁰¹ And to an extent even in a system where the principle of precedent is respected, it is always de mise to distinguish from cases to establish the law. Similarly, and although they are held by no such formal principle, arbitral tribunals will take great precaution to cite and analyse relevant case law, from which they will distinguish when they need to do so to support their findings, or, to the contrary, rely on arbitral jurisprudence to buttress their legal argumentation and conclusions.

²⁰² European Commission, Press Release, “European Commission launches public online consultation on investor protection in TTIP” (27 March 2014) online: EC <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_292>.

²⁰³ European Commission, *Commission Staff Working Document, Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, 13 January 2015 at 11, online: European Commission <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> [*Commission Staff Working Document Report*, 13 January 2015].

²⁰⁴ *Ibid.*

²⁰⁵ *Commission Staff Working Document Report*, 13 January 2015, *supra* note 203203.

achieves the right balance between protecting investors and safeguarding the EU's right and ability to regulate in the public interest ». ²⁰⁶ It is however worth noting that a vast majority of large companies and business associations were, conversely, in favor of maintaining ISDS in the TTIP. In addition, the beneficial effect on FDI flows was recognized, as well as its positive impact to economic growth and jobs. ²⁰⁷ Additionally, the EU's role in improving investment protections was recognized by many among trade unions, NGOs and business organizations. ²⁰⁸

145. The consultation was open to all interested parties and the submission deadline even extended to take into account the high expression of interest. Ultimately, 149 399 online responses were submitted over a period of 4 months, from 27 March 2014 to 13 July 2014. This exceptionally high number was explained by the fact that close to 145 000 responses were identical, pre-defined answers submitted *en masse* through a variety of online platforms. ²⁰⁹ To this day, the battle still rages between opponents and detractors of ISDS as to which side submitted the most automatic responses to the consultation. Although the Commission identified these similar predefined answers, it did take them all into account when compiling statistics as well as the final report. The last 3000 responses were submitted by individual organizations, NGOs, trade unions, academics, law firms, etc. All Member States participated to the consultation, with 97% of responses received from, in order of importance, the United Kingdom, Austria, Germany, France, Belgium, the Netherlands and Spain. ²¹⁰

146. The questionnaire's scope encompassed issues within the two principal investment fields, i.e. (1) investor protections and (2) investor-state dispute settlement. To guide respondents, illustrative text from the EU's most recent negotiations in CETA was included.

²⁰⁶ "Online public consultation", *supra* note 197. See also European Commission, *Preliminary report (statistical overview), Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, July 2014 [*Preliminary report*, July 2014].

²⁰⁷ *Commission Staff Working Document Report*, 13 January 2015, *supra* note 203 at 14.

²⁰⁸ *Ibid* at 15.

²⁰⁹ *Ibid* at 3, 11. As a result of the *en masse* responses on the deadline, the Commission website crashed momentarily. The deadline was therefore extended by a week to allow all participants to submit a response despite the technical issues.

²¹⁰ *Commission Staff Working Document Report*, 13 January 2015, *supra* note 203 at 9, n 4. A detailed statistical overview was published shortly after the conclusion of the consultation, see *Preliminary report*, July 2014, *supra* note 206.

It is worth noting that CETA was already considered as the most detailed, comprehensive and far-reaching agreement at that time (prior to any modification to the ISDS chapter). The consultation was structured around the twelve following issues:

1. Scope of substantive investment protection provisions,
2. Non-discriminatory treatment for investors,
3. Fair and equitable treatment,
4. Expropriation, %.
5. Ensuring the right to regulate and investment protection,
6. Transparency in ISDS,
7. Multiple claims and relationship to domestic court,
8. Arbitrator ethics,
9. Conduct and qualifications,
10. Reducing the risk of frivolous and unfounded cases,
11. Allowing claims to proceed (filter),
12. Guidance by the parties on the interpretation of the agreement,
13. Appellate mechanism and consistency of rulings.²¹¹

147. A last question was left open for other views on ISDS in TTIP. Investor protections in TTIP had been substantially more defined than in preceding IIAs. The only other concurrently negotiated agreement at the point that contained perhaps more information would have been the Transpacific Partnership (TPP).²¹²

148. In July 2014, the Commission issued a preliminary report on statistics, partly setting out the main contributing countries, as well as the total number of participants. On 13 January 2015, the Commission issued its report analyzing the entire set of responses. Three categories of statements in response to the questionnaire were identified: the first as opposed to the TTIP, the second to ISDS in the TTIP and the third proposing concrete suggestions for a way forward with specific views.²¹³ Four areas for improvements were emphasized: 1) protecting the States' right to regulate, 2) the establishment and functioning of arbitration tribunals, 3) the relationship between domestic judiciary and ISDS and 4) the establishment of an appeal level for reviewing ISDS decisions.²¹⁴ In describing these three categories of findings, the Commission distinguished between the responses in line with the consultation, i.e. the first category of responses opposed to TTIP were not considered as responsive to the consultative.

²¹¹ *Commission Staff Working Document Report*, 13 January 2015, *supra* note 203 at 8.

²¹² Following the withdrawal of the TPP by the United States, as the first act promised by President Trump in his campaign, on 30 January 2017, the parties nonetheless decided to go forward with the agreement. After an additional meeting, the original text was reframed and a number of progressive sections were added. The TPP was simultaneously renamed the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP). On 8 March 2018, the parties officially signed the CPTPP: Government of Canada, "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)", online: Canada <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpp/index.aspx?lang=eng>>.

²¹³ *Commission Staff Working Document Report*, 13 January 2015, *supra* note 203 at 3.

²¹⁴ *Ibid* at 4.

In a similar way, the second category was considered as relevant, although broader than the original consultation. The Commission therefore noted that this category of response required an in-depth follow-up for a review of the ISDS system, in the TTIP and more generally. In the four categories above identified as required further investigation, the Commission indicated it would pursue further inquests in the first session of 2015.

149. In a resolution of 8 July 2015 on the Transatlantic Trade and Investment Partnership, the European Parliament requested the replacement of ISDS with a new system.²¹⁵ It subsequently supported the establishment of a multilateral solution for investment disputes in a resolution of 5 July 2016 on a future strategy for trade and investment.²¹⁶ This model called for a new permanent investment court, which included an appeal level, as well as permanent members. This was neither included in the TTIP proposal by the EU to the US, nor in the CETA. Although the signature of this agreement had already been announced, the Canadians accepted this substantial modification to the ISDS as part of the legal scrubbing stage. Shortly thereafter, the new investment court was also incorporated as part of the EU-Vietnam free trade agreement in February 2014.

150. While the legal community was eagerly awaiting the CJEU's decision in *Opinion 2/15*, which would determine whether ISDS was an exclusive or a shared competence of the EU, the EU's new approach was already getting included into new negotiations. At this time, the mechanism has also been included into the EU-Singapore Agreement, EU-Viet Nam as well as the EU-Mexico Agreement.²¹⁷ Negotiations for an investment agreement are still ongoing with Japan, despite their agreement to a new historic trade deal, the Economic Partnership Agreement, which entered into force on 1 February 2019.²¹⁸ As will be set out

²¹⁵ EC, *Negotiations for the Transatlantic Trade and Investment Partnership (TTIP): European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, [2017] OJ, C 265/35.

²¹⁶ *Ibid.*

²¹⁷ European Commission, Trade, "Negotiations and agreements", online: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en>.

²¹⁸ European Commission, Press Release, "EU-Japan trade agreement enters into force" (31 January 2019) online: EU <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_785>. "On the parallel issue of investment protection, negotiations with Japan continue on standards and investment protection dispute resolution, with a meeting of Chief Negotiators scheduled for March. The firm commitment on both sides is to reach convergence in the investment protection negotiations as soon as possible, in light of their shared commitment to a stable and secure investment environment in Europe and Japan."

below, the EU is now following its new policy proposing distinct trade and investment agreements, as a result of the CJEU's Opinion 2/15.²¹⁹

b. The Innovative Proposal of the Investment Court System

“Anything less ambitious, including coming back to the old Investor-to-State Dispute Settlement, is not acceptable.

For the EU ISDS is dead.”

European Commission, July 2018

151. The EU, as a response to uncertainties expressed in the consultation, thus first introduced the Investment Court System (ICS) by including it at the very last minute in the CETA. According to the EU, the ICS offers a permanent, neutral, cost-efficient and consistent new model with the ICS which was meant to respond to critics and their fears that the private arbitration model favored foreign investors and offered no consistent grounds or appeal mechanism.²²⁰

152. The ICS is not an invention of the EU. In fact, such a model had been widely discussed for the past decades in academic and policy circles.²²¹ Introduced by the EU at a time when the CETA negotiations had been closed, the EU justified this new proposal as an instance of tying loose ends in the course of the legal scrubbing.

153. The new EU ICS includes a number of features meant to reassure parties opposed to ISDS. It proposes a model based on standing permanent international courts and features a judicialization of arbitration. First, it includes an appeal level. Unavailable under the former ISDS mechanism, as it is considered to be a distinguishing feature of arbitration, appeal was

²¹⁹ See introduction, as well as Part I, of *Opinion 2/15*, *supra* note 181.

²²⁰ Comprehensive Trade and Economic Agreement between Canada and the European Union, 30 October 2016, [CETA], ch 8. European Parliament, From arbitration to the investment court system (ICS): The evolution of CETA rules, 15 June 2017, online: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA\(2017\)607251](https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2017)607251).

²²¹ Franck, *supra* note 20.

limited to annulment proceedings before the national courts pursuant to the narrow grounds in national legislations. The appeal now offered under the permanent court investment system is meant to reassure users (investors and states) that in the event of error they will get a chance to have a correction of decision.

154. This body is constituted with permanent members nominated to a roster in equal numbers by the parties to the treaty.²²² The members are required to be specialists in the field of international trade and investment law. In order to avoid bias and conflicts of interest, members may not continue work as counsel once they are nominated to the roster. Similarly, the appeal's court members are permanent, specialists and forbidden from counsel appointments. This is also meant to ensure a greater consistency in decisions issued. As the principle of precedent (*stare decisis*), does not exist in arbitration, the composition and particular set-up are justified as means to respond to this default.

155. The EU has now introduced this system as part of its investment policy and proposes the adoption of the model in trade agreements to its partners. To date, this mechanism has been included in the EUSIPA, the EUVIPA and the EU Mex, in addition to the CETA. Moreover, as will be set forth below, these three agreements have entered into force, including the ICS, as opposed to the CETA which is only provisionally applied. However, the ICS has been excluded from the EU Japan, EU China and EU UK agreements. So far, critics have denounced the unilateral imposition of the ICS on weaker trade partners, whereas the EU could not obtain agreement from major trade partners like China, Japan and the UK to agree to the new system. Unfortunately, this two-headed approach considerably weakens the EU's formal stance that "ISDS is dead" and that it will include the ICS in each of its trade agreements.

²²² CETA, *supra* note 220, ch 8, article 8.

c. *An Innovation at the United Nations: The Multilateral Investment Court*

156. At the same time than it introduced the ICS model in CETA, the EU Commission started working in parallel on the development of a new Multilateral Investment Court, and considering in general the relevance of a systemic reform to ISDS.

157. Following the failure of the WTO to harness both the proliferation of international investment agreements, as well as its crisis, it is significant that UNCITRAL would be tasked with reviewing the current ISDS system and evaluating the necessity for a reform.²²³ While some have argued that the opportunity was partly coincidental, as Working Group III had just finished a mandate, there is no denying the importance that the review has since undertaken.²²⁴ While Working Group III held its first session in October 2017, interest and attendance rapidly grew with unprecedented representativity, academic groups and NGOs involved in these issues, and a number of new networks reporting on progress and analyzing the reform of ISDS. Already in January 2020, in Vienna, the Working Group session was attended by more than 400 delegates representing 106 States, and 66 international inter-governmental organizations and non-governmental organizations.²²⁵ This is a success in and of itself, and it can only be hoped that the experience will be repeated with future Working Groups at UNCITRAL.

²²³ Frequently Asked Questions – Mandate and History, UNCITRAL, online: https://uncitral.un.org/en/about/faq/mandate_composition/history, “What does , “Harmonization” “UNCITRAL mean by the “harmonization” and “unification” of the law of international trade?: “UNCITRAL is a subsidiary body of the General Assembly of the United Nations. The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat. In contrast, the World Trade Organization (WTO)) is an intergovernmental organization independent from the United Nations.

The issues dealt with by the WTO and UNCITRAL and UNCITRAL are different. The WTO deals with trade policy issues, such as trade liberalization, abolition of trade barriers, unfair trade practices or other similar issues usually related to public law, whereas UNCITRAL deals with the laws applicable to private parties in international transactions. As a consequence, UNCITRAL is not involved with "state-to-state" issues such as anti-dumping, countervailing duties, or import quotas.”

²²⁴ Langford et al, *supra* note 21.

²²⁵ See “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session” (Vienna, 20–24 January 2020) UNCITRAL, 54th Sess., UN Doc. A/CN.9/1004/Add.1 (28 January 2020) (henceforth WGIII Report 1004/Add.1) p. 3; See also “UNCITRAL Working Group on investor- State dispute settlement (ISDS) continues work on reforms”, Press Release, UNIS Vienna, United Nations Information Service, (24 January 2020), available at <<https://unis.unvienna.org/unis/en/pressrels/2020/unis1289.html>> (last accessed 2 December 2020).

158. In September 2017, Working Group III at UNCITRAL was formally tasked with examining the necessity of a reform of ISDS, including the potential development of a new convention for a multilateral investment court. There has been a serious proposal for an opt-in convention that would be available to all states part to treaties with an ISDS mechanism.²²⁶ Professor Anthea Roberts, participating for Australia to the discussions at Working Group III, and member of the newly formed ISDS Academic Group, has also been continuously chronicling the efforts, pitfalls and current issues with the envisaged reform of ISDS.²²⁷

159. Kauffman-Kohler and Potestà examined, in their first report to UNCITRAL of 3 June 2016, the feasibility of a convention based on the recently adopted Mauritius Convention on transparency.²²⁸ By opting into the convention, parties would be agreeing to litigate all disputes relating to investment before this new court. The model in terms of appointment of arbitrators, and an appeals level, is similar to that of the ICS.²²⁹ A follow-up report was then issued on 15 November 2017 by the authors, elaborating on the composition of the proposal multilateral investment court and appeal level.²³⁰

160. Discussions on the necessity and feasibility of ISDS reform continue to be lively and controversial. Many have openly voiced their concern on the necessity of this project, feasibility and unrealistic expectations.²³¹ Judge Charles Brower, former judge at the Iran-US Claims Tribunal and eminent arbitration specialist, was only one of several the preeminent

²²⁶ Gabrielle Kaufmann-Kohler & Michele Potestà, “Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap” (2016) Research paper, CIDS, Geneva Center for Dispute Settlement [Kaufmann-Kohler & Potestà, 2016]. Elaborated on the model of the recent Mauritius convention on transparency, the possibility for states to opt into the convention would allow all states party to benefit from the resolution of their investment disputes by the MIC.

²²⁷ Anthea Roberts, “Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration” (2018) 112 *American Journal of International Law*, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189984>.

²²⁸ Kaufmann-Kohler & Potestà, 2016, *supra* note 226.

²²⁹ Kaufmann-Kohler, Gabrielle & Potestà, Michele “The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards” (2017) CIDS Supplemental Report, CIDS, Geneva Center for Dispute Settlement [Kaufmann-Kohler & Potestà, 2017].

²³⁰ *Ibid.*

²³¹ Charles N Brower & Charles B Rosenberg, “The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded” (2013) 29:1 *Arbitration International* 7.

arbitration practitioners to denounce the “many follies” of a new multilateral investment court.²³²

SECTION 5. THE AUTONOMY OF EU LAW AND ITS RELATIONSHIP TO ISDS

161. EU law stands apart and functions in parallel to international law.²³³ It is relevant to recall in introduction the autonomy of these two legal frameworks as we will examine the issue of arbitrator impartiality within the proposed EU and international investment law reforms of ISDS. While EU law is a defined body of law, with its system of courts and established by the EU founding treaties, the same cannot be said of international law. Indeed, international law writ large is but a series of separate clusters focused on different areas of international law, which work in parallel, in interconnection or sometime do not speak at all to each other. There exists no founding treaty for international law as an individual framework. In fact, international law is recognized for its highly fragmented nature, which, despite best efforts of private and public actors, continues to be more widely distributed with a tendency towards an increase of diversification and fragmentation.²³⁴

162. The proliferation of international investment agreements has only contributed to this fragmentation. And thus, we must not examine for the purposes of this thesis the relationship between EU law and international law, a theoretical question widely researched, but the relationship between EU law and international investment law, and more specifically, investor-state dispute settlement.

²³² *Ibid.*

²³³ Koen Lenaerts, “The autonomy of European Union law” (2019) 1 Post AISDUE 2 at para 2 [Lenaerts, 2019].

²³⁴ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi), UN Doc A/CN.4/L.682, 13 April 2006 [ILC, *Study Group*, April 2006], International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (Addendum, Appendix, Draft conclusions of the work of the Study Group, Finalized by Martti Koskenniemi), UN Doc A/CN.4/L.682/Add.1, 2 May 2006 [ILC, *Study Group*, May 2006]; International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.702, 18 July 2006 [ILC, *Study Group*, July 2006].

163. We will first assess of EU law, its recognized autonomy and its relationship with ISDS before turning to the particular nature of international arbitration as an autonomous system, and the body of literature which recognizes the international arbitral legal order.²³⁵

164. This section analyzes specifically the conformity of EU law with fundamental rights, pursuant to the *Opinion 1/17* of the Court of Justice of the European Union (CJEU or the Court). The Court examines the following questions: (1) What are the autonomy conditions that the Court imposes for the ICS and the MIC? (2) What are the fundamental rights conditions? (3) To what extent are the autonomy conditions intended to ensure that the EU can protect its own vision of fundamental rights and do they do this effectively? and (4) alternatively, might the autonomy conditions make it more difficult to ensure compliance with fundamental rights? *E.g.*, if the CETA tribunal cannot interpret or apply EU law, can it be expected to ensure that EU fundamental rights are complied with in the interpretation of CETA? Would the fundamental rights conditions apply also to a MIC, or only in a bilateral FTA? We focus on the first of the above questions.

165. On 30 April 2019, *Opinion 1/17* confirmed that the ICS was compatible with EU law, including fundamental rights. In our analysis of the EU's proposed reform of ISDS and the conformity of the new ICS to the rule of law as defined by the EU, the Court's analysis in *Opinion 1/17* bears great significance and helps to determine the framework of analysis. Indeed, it is following the matrix developed in *Opinion 1/17* that we will examine the branches of rule of law through due process, access to justice and the independence of the tribunal.

1. *Opinion 1/17 and the autonomy of EU law*

²³⁵ Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden, Boston: Brill, Nijhoff, 2010) [Gaillard, *Legal Theory of International Arbitration*]; George A Bermann, "The self-styled 'autonomy' of international arbitration" (2020) 36:2 *Arbitration International* 221 [Bermann, 2020].

166. “EU law is not ordinary international law.”²³⁶ CJEU’s President Koen Lenaerts defines it as “an autonomous legal order that has the capacity to operate as a self-sufficient system of norms.”²³⁷

167. The autonomy of EU law and its compatibility with fundamental rights are understood, at the moment, to be part of the EU constitution. The autonomy of EU law is undoubtedly an EU construct – an internal standard elaborated by the case law of the Court of Justice of the European Union. The requirement to respect EU fundamental rights also impact on EU external relations – in other words, although autonomy is an internal EU standard, it also impacts on EU external relations.

168. The much-awaited *Opinion 1/17* of the Court issued on 30 April 2019 examines the relationship between the autonomy of EU law and fundamental rights.²³⁸ It finds that the new Investment Court System (ICS) proposed in the Canada-European Union Comprehensive and Global Economic Agreement (CETA) is compatible with EU law. After *Opinion 2/13*²³⁹, *Opinion 1/17* has now become the latest case to examine issues and challenges pertaining to the autonomy of EU law as a concept, the creation of a new court, and the compatibility of the ICS with fundamental rights, amongst other issues. While *Opinion 1/17* goes beyond the analysis of the autonomy of EU law and fundamental rights, the object of this section is to limit itself to the analysis of these two issues only.

169. A number of questions have thus arisen, namely to what extent the structures of fundamental rights impinge on EU external action. In other words, is the autonomy of EU law a constraining factor that needs to be taken into account in assessing whether or not an agreement complies with fundamental rights, or is autonomy a characteristic of EU law

²³⁶ Lenaerts, 2019, *supra* note 233 at para 2.

²³⁷ *Ibid* at para 1, *in fine*.

²³⁸ *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, Opinion 1/17, [2019] ECR (ECLI:EU:C:2019:72) [*Opinion 1/17*].

²³⁹ *Accession of the European Union to the European Convention*, Opinion 2/13, [2014] ECR (ECLI:EU:C:2014:2454) [*Opinion 2/13*].

deemed necessary in order to ensure that the EU does not depart from its human rights standards?²⁴⁰

170. President Lenaerts, in his 2018 speech on the autonomy of EU law, concluded that “the autonomy of EU law has, as part of its very DNA, the idea of engaging in a balancing exercise that allows the EU to find its own constitutional space whilst interacting with the Member States and the wider world.”²⁴¹ *Opinion 1/17* can be said to focus on this issue, as it examines the relationship between the autonomy of EU law and external relations, through the respect of fundamental rights.

171. The object of this section is to analyze the manner in which the autonomy of EU law impacts how the EU approaches fundamental rights compliance with regard to the Investment Court System.

172. In response to President Lenaerts’ assessment that the CJEU is engaged in a “balancing exercise” between EU and international law, others have proven more critical.

173. On 18 December 2014, the Court delivered its long awaited *Opinion 2/13* on the compatibility with EU law of the draft agreement for EU accession to the ECHR, striking down the Draft Agreement on accession to the European Convention on Human Rights. An important surprise to many, an “outrage”²⁴² and generally derided as “unsubstantiated,”

²⁴⁰ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05, [2008] ECR I-6351 [*Kadi*]. See also Juliane Kokott & Christoph Sobotta, “The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?” (2012) 23:4 *European Journal of International Law* 1115.

²⁴¹ Lenaerts, 2019, *supra* note 233 at 11.

²⁴² Michl, “Thou shalt have no other courts before me”, *VerfBlog*, (23 December 2014) online: [VerfBlog <http://www.verfassungsblog.de/en/thou-shalt-no-courts/>](http://www.verfassungsblog.de/en/thou-shalt-no-courts/). For a sampling of the numerous critical comments, see, e.g., Pieter Jan Kuijper, “Reaction to Leonard Besselink’s ACELG Blog”, *Amsterdam Centre for European Law and Governance Blog* (6 January 2014) online: [ACELG <http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks-s-acelg-blog/>](http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks-s-acelg-blog/); Sionaidh Douglas-Scott, “Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice”, *VerfBlog* (24 December 2014) online: [VerfBlog <https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/>](https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/) [Douglas-Scott, “Christmas bombshell”]; Leonard F.M. Besselink, “Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13”, *VerfBlog* (23 December 2014) online: [VerfBlog <https://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/>](https://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/); Mattias Wendel, “Mehr Offenheit wagen! Eine kritische Annäherung an das Gutachten des EuGH zum EMRK-Beitritt” *VerfBlog* (21 December 2014) online: [VerfBlog <https://verfassungsblog.de/mehr-offenheit-wagen-eine-kritische-annaeherung-das-gutachten-des-eugh-zum-emrk-beitritt/>](https://verfassungsblog.de/mehr-offenheit-wagen-eine-kritische-annaeherung-das-gutachten-des-eugh-zum-emrk-beitritt/); Tobias Lock, “Oops! We did it again – the CJEU’s Opinion on EU Accession to the ECHR”, *VerfBlog* (18 December 2014) online: [VerfBlog <http://www.verfassungsblog.de/en/oops-we-did-it-again-the-cjeus-opinion-on-eu-accession-to-the-echr/>](http://www.verfassungsblog.de/en/oops-we-did-it-again-the-cjeus-opinion-on-eu-accession-to-the-echr/)

purely “self-interested,” and “playground politics”, this Opinion found that a number of obstacles rendered the accession impossible.²⁴³

174. In 2012, with respect to *Opinion 2/13*, Wouters, Odermatt and Ramopoulos argued “that the Court’s more guarded approach, often motivated by a desire to preserve the autonomy of EU law, is largely unwarranted”. Rather, the Court should enter into a more open dialogue with international law, helping the EU to “contribute [...] to the strict observance and the development of international law”, as prescribed by Article 3(5) TEU.”²⁴⁴

175. Halberstam, in a review of the previous decisions of the Court, “threads the needle of accession” and finds strong indicia that *Opinion 2/13* could well be expected and need not be decried as such a surprise by many. A careful review of prior decisions of the Court reveals that this decision should have been expected.

<<https://verfassungsblog.de/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu-2/>>. Aidan O’Neill, “Opinion 2/13 on EU Accession to the ECHR: the CJEU as Humpty Dumpty”, *eutopialaw* (18 December 2014) online: <<https://eutopialaw.wordpress.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/>>; Steve Peers, “The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection”, *EU Law Analysis* (18 December 2014) online: EU Law Analysis <<http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html>>. For the very few more positive voices, see, Catherine Barnard, “Opinion 2/13 on EU accession to the ECHR: looking for the silver lining”, *EU Law Analysis* (16 February 2015) online: EU Law Analysis <<http://eulawanalysis.blogspot.com/2015/02/opinion-213-on-eu-accession-to-echr.html>>; Henri Labayle, “La guerre des juges n’aura pas lieu. Tant mieux? Libres propos sur l’avis 2/13 de la Cour de justice relatif à l’adhésion de l’Union à la CEDH”, *RUEDELSJ* (22 December 2014) online : RUEDELSJ <<http://www.gdr-elsj.eu/2014/12/22/droits-fondamentaux/la-guerre-des-juges-naura-pas-lieu-tant-mieux-libres-propos-sur-lavis-213-de-la-cour-de-justice-relatif-a-ladhesion-de-lunion-a-la-cedh/>>; Jean Paul Jaqué, “Non à l’adhésion à la Convention européenne des droits de l’homme?,” *Droit de l’Union européenne* (23 December 2014) online : Droit UE <<http://www.droit-union-europeenne.be/412337458>>. Martin Sheinin, in turn, steers clear of the substance, arguing in favor of three “mitigating circumstances” for the Court’s Opinion “without any intention to defend the Opinion itself.” See Martin Sheinin, “CJEU Opinion 2/13 – Three Mitigating Circumstances”, *VerfBlog* (26 December 2014) online: VerfBlog <<https://verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances-2/>>.

²⁴³ Douglas-Scott, “Christmas bombshell”, *supra* note 242; Daniel Halberstam, “‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward” (February 2015) Paper no 432, *Public Law and Legal Theory Research Paper Series*, Michigan Law (University of Michigan), online: IOW <<https://iow.eui.eu/wp-content/uploads/sites/18/2015/04/Spaventa-09-Halberstam.pdf>> [Halberstam].

²⁴⁴ Jan Wouters et al, “Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law” (August 2012) Working paper no 96, Leuven Center for Global Governance Studies. The interrelationship between EU law and international law is the subject of an important body of academic literature. Also of interest to the point of view of the authors cited above, are Jed Odermatt, “A Giant Step Backwards? Opinion 2/13 on the EU’s Accession to the European Convention on Human Rights” (February 2015) Working Paper no 150, Leuven Center for Global Governance Studies; Jed, Odermatt, “The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law” in Achilles Skordas, ed, *Research Handbook on the International Court of Justice* (Cheltenham: Edward Elgar).

176. In *Opinion 2/94*²⁴⁵, when the Court was asked to opine on whether EU accession to the European Convention on Human Rights (“ECHR”) was legal. The Council queried whether EU accession was compatible with the EU Treaties. *Opinion 2/94* deflected that question and instead declared “that the EU did not have the competence to join the ECHR. The Court opined that joining the ECHR would exceed the general rounding out competence of what was then Article 235 of the Treaty on European Community.”²⁴⁶ In other words, “after *Opinion 2/94* said that accession to the ECHR would entail changes of constitutional proportions in the European Union’s legal order, the political actors turned around with a mandate to join the ECHR, demanding at the same time that there be no significant changes in the European Union’s legal order.”²⁴⁷

177. Halberstam also recalls the other warning signs in the prior jurisprudence of the Court, namely the *Kadi*²⁴⁸ and *Opinion 1/09* on the Unified Patent Court.²⁴⁹ *Kadi* “confirmed the Court’s view that EU law is autonomous not only vis-à-vis Member State law”²⁵⁰, but also vis-à-vis international law²⁵¹ and that, as a consequence, no international legal obligation could alter core principles of EU constitutional law. *Opinion 1/09*, in turn, “held that the application of EU law must remain in the hands of EU judiciary, which includes national courts but excludes courts in which Member States and non-Member States participate together.”²⁵² Both were strong assertions of the autonomy of EU law and the necessity of maintaining the integrity of the EU’s constitutional architecture.”²⁵³

178. In many ways, *Opinion 1/17* can be seen as a response to the long standing criticism of the Court’s decisions centering on the autonomy of EU law. The CJEU appears attentive to the international legal order and its previous case law (*Opinion 2/13*). In *Opinion 1/17*, in

²⁴⁵ *Accession by the Community to the European Convention*, *Opinion 2/94* [1996] ECR I-01759 [*Opinion 2/94*].

²⁴⁶ Halberstam, *supra* note 243 at 6.

²⁴⁷ *Ibid* at 7.

²⁴⁸ *Kadi*, *supra* note 240.

²⁴⁹ *Creation of a unified patent litigation system*, *Opinion 1/09* [2011] ECR I-1137 [*Opinion 1/09*].

²⁵⁰ Halberstam, *supra* note 240 at 7.

²⁵¹ Gráinne de Búrca, “The EU, the European Court of Justice and the International Legal Order after *Kadi*” (2010) 51:1 *Harv Int LJ* 1.

²⁵² *Opinion 1/09*, *supra* note 249 at paras. 78, 80, 89. See also, for instance, Roberto Baratta, “National Courts as ‘Guardians’ and ‘Ordinary Courts’ of EU Law: *Opinion 1/09* of the ECJ” (2011) 38:4 *Legal Issues of Economic Integration* 297.

²⁵³ Halberstam, *supra* note 250 at 8.

contrast to how the autonomy of EU law operates internally, the CJEU hints that the Investment Court System (ICS) makes it easier to comply with autonomy of EU law because it is independent.

179. To successfully implant a new system, the ICS, the EU has to continue to convince Member States to ratify CETA, as well as States participating in the reform discussions at UNCITRAL Working Group III (WGIII) to set up a Multilateral Investment Court (MIC). The EU has only recently presented in detail its proposal for a Multilateral Investment Court to the WGIII, which mirrors the ICS.²⁵⁴ Moving away from the question of the controversy surrounding the creation of this new type of tribunal, the Chair of WGIII skillfully moved the debate to one of feasibility.²⁵⁵ Participating States were thus content to reflect on the different ways in which an appellate level or multilateral investment court could be created. By examining the technical steps leading to its eventual creation, the controversy tied to the political choice of such a mechanism was much subdued and, presumably, left to future decisions of the group.

180. The EU, at the moment, may seem to impose its fundamental rights norms to the international legal order through its proposal for the MIC²⁵⁶, but not the autonomy of EU law. In this context, the autonomy of EU law becomes a two-edge sword. And in *Opinion I/17*, the Court is using it as a justification to the ISDS system to mean that it is not interfering, getting in the way or being problematic. Problems arise where the EU is trying to import back in the ISDS system the fundamental rights system of the EU – which therefore has to be compliant to the EU fundamental rights. We examine these issues in turn below.

2. The autonomy of EU law and fundamental rights

²⁵⁴ UNCITRAL, “Working Group III”, *supra* note 32. Since 2017, the EU has been promoting the creation of a Multilateral Investment Court to respond to ISDS criticism worldwide. These efforts have been enshrined in the treaties signed by the EU, and debated before the UNCITRAL Working Group III tasked with tackling the reform of ISDS.

²⁵⁵ Anthea Roberts & Taylor St John, “UNCITRAL and ISDS Reforms: What Makes Something Fly?”, *EJIL: Talk! Blog of the European Journal of International Law* (11 February 2020) online: EJIL: Talk! <<https://www.ejiltalk.org/uncitral-and-isds-reforms-what-makes-something-fly/>>.

²⁵⁶ This will hold true only if the EU participates to the MIC.

a. The autonomy of EU law

181. One of the pivotal concepts of EU law, “the principle of principles”, is its autonomy.²⁵⁷ At times difficult to apprehend for legal experts outside of the EU, one can only recognize the constant work of President Lenaerts and the Court to situate this concept. A returning issue being of course that of the relationship between EU law and international law, the objective of this section goes somewhat beyond to address the challenges arising out of the required respect of fundamental rights in *Opinion 1/17*, and the extent to which it impinges or not on the autonomy of EU law.

182. Our purpose is to examine the interrelations between the autonomy of EU law and fundamental rights, as well as its impact on EU external relations. The most recent Opinion of the Court on this issue, *Opinion 1/17*, therefore stands at the center of our analysis.

183. *Opinion 2/13* is undoubtedly the most detailed expression of the legal construct that is the autonomy of EU law. As submitted by President Lenaerts, it embodies the previous evolutions of the CJEU and places the autonomy of EU law in context.²⁵⁸

184. One of the most frequent misconceptions, President Lenaerts argues, is that the “EU and its law are euro-centric and that the Court of Justice seeks to insulate EU law from external influences by building legal walls that prevent the migration of ideas.”²⁵⁹ Rather, it stands as an “autonomous legal order that has the capacity to operate as a self-sufficient system of norms.”²⁶⁰

b. Fundamental rights in EU law

185. Early on from its creation, the Court addressed the interrelationship between the autonomy of EU law and fundamental rights. Widely considered the leading case on this

²⁵⁷ Maria Fanou, “The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future” (2020) 22 Cambridge Yearbook of European Legal Studies 106.

²⁵⁸ Lenaerts, 2019, *supra* note 233 at 3.

²⁵⁹ *Ibid* at 2.

²⁶⁰ *Ibid*.

issue, the Court in *Internationale Handelsgesellschaft*²⁶¹ established for the first time the case law with regard to the primacy of EU law over national law protective of fundamental rights. More importantly, the CJEU in this case proclaimed that fundamental rights principles are principles of EU law itself, a statement which is now reflected in article 6(3) of the TEU.

186. Fundamental rights are recognized and protected by a number of legal instruments in the EU, including the Treaty on the European Union (TEU) and the Charter of Fundamental Rights of the European Union (Charter).

187. Article 6(1) of the TEU refers directly to the Charter and provides that:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

188. These rights are recognized in Article 6(3) of the TEU:

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

189. The European Convention on Human Rights (ECHR) is dedicated to protecting fundamental rights. It bears recalling, as President Lenaerts did in his speech for the Opening of the European Court of Human Rights Judicial Year in 2018, that

although both the ECHR and the EU legal order are committed to protecting fundamental rights, their respective systems of protection do not operate in precisely the same way. Whilst the ECHR operates as an external check on the obligations imposed by that international agreement on the Contracting Parties, the EU system of fundamental rights protection is an internal component of the rule of law within the EU.²⁶²

190. We have also witnessed, since the 1970s, the development of case law from Member States and the recognition in their constitutions of the protection of fundamental rights.

²⁶¹ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, Judgment of the Court of 17 December 1970. - Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany.

²⁶² Lenaerts, 2019, *supra* note 233 at 4; Koen Lenaerts, “The European Court of Human Rights and the Court of Justice of the European Union: Creating Synergies in the Field of Fundamental Rights Protection” (2018) no 1 *Il Diritto dell’Unione Europea* 9. The “EU system of fundamental rights protection” can be read as referring here to the Charter, article 6(1) TEU, and its general principles, article 6(3) TEU.

191. The most detailed explanation of the relationship between fundamental rights and EU law is found in *Opinion 2/13*²⁶³. The Court was tasked here, pursuant to article 218(11) TFEU, to determine the compatibility of the draft agreement of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the EU Treaties. It ultimately found that there was no compatibility.

192. *Opinion 2/13*, paragraphs 169-171 address this specifically; paragraph 170 in particular sets out the relationship of autonomy of EU law in relation to international law for the interpretation of fundamental rights:

169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (see judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14; *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 73; and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 283 and 284).

170. The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 281 to 285).

²⁶³ As previously mentioned, this case stands as the most detailed explanation of EU law, beyond simply its relationship with fundamental rights, as it discusses the relation of the concept of autonomy to “the constitutional structure of the EU, the nature of EU law, the principle of mutual trust between the Member States, the system of fundamental rights protection provided for by the Charter, the substantive law of the EU that directly contributes to the implementation of the process of European integration, the principle of sincere cooperation and the EU system of judicial protection of which the preliminary reference procedure laid down in Article 267 TFEU is conceived as its keystone.” Lenaerts, 2013, *supra* note 236 at 7.

171.

As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraphs 17 to 21). (Emphasis added)

193. In sum, the autonomy of EU law is firmly established through the jurisprudence of the Court. *Opinion I/17* is only the latest manifestation that EU law stands apart and undoubtedly constitutes of a legal order which stands by itself. Having now established that EU law is marked by its autonomy and that it exists as a separate legal order, we can assess the international arbitral order. The foundations for our legal framework of comparative analysis will thereafter be set. This will allow us to examine the strengthening of the rule of law in the EU legal order and in the international arbitral order through the impact of the proposed reforms to ISDS on arbitrators' independence and impartiality.

CHAPTER 2 THE METHODOLOGICAL AND CONCEPTUAL FRAMEWORKS

Section 1. An International Investment Law Methodology: A Conscious Fragmentation

“This phenomenon reflects greater confidence in justice and makes it possible for international law to develop in ever more varied spheres. However, it also raises the risk of parties competing for courts —sometimes referred to as forum shopping —and overlapping jurisdiction. ... The proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations. No new international court should be created without first questioning whether the duties which the international legislator intends to confer on it could not be better performed by an existing court. International judges should be aware of the dangers involved in the fragmentation of the law and take efforts to avoid such dangers. ... The international community needs peace. The international community needs courts. It needs courts which declare the law.”

A. *An Introductory Word on International Legal Theory – Originality and Contribution of the Research*

194. The methodological and theoretical framework provides the backbone of this dissertation. It postulates guidance into our conceptualization of the methodology used through a comparative perspective and a recognition of the benefits gained from a “conscious fragmentation” yielding the “paradigm for thinking about international [investment] law”.

195. As Prof Hernandez writes,

once one peeks beyond the form and substance of legal rules, theory is everywhere: it helps us to understand the legal system that we have, and its interaction with other legal systems; it gives us conceptual frameworks through which to understand the interplay between law and ethics, morality, politics and ideologies. Theory, moreover, helps us to go beyond the immediate, obvious effects of law in our societies, but also to see the hidden biases, or indirect structures of domination, oppression and inequality that are upheld through law.

Theory in international law has too often been reduced to the sterile discussion between naturalism and classical legal positivism, and a particular Eurocentric paradigm for thinking about international law. Though both have been utterly dominant history, and establish the bedrock for most theorising about international law, they are insufficient. In the last decades especially, knowledge and ideas drawn from other disciplines and from around the world to challenge received ideas and presumptions about the nature of international law. These give rise to choices: methodological choices, certainly, but also ethical, political and moral choices. In short, these choices arise from outside the law, even if international law is conceived as an autonomous, self- standing order.²⁶⁵

196. By mobilizing a comparative approach to identify the impact from one autonomous legal order, the European legal order, on the other, the International arbitral order, on the strengthening of the rule of law for the independence and impartiality of arbitrators and adjudicators, we must first recognize the intrinsically fragmented nature of international law. Far from being hindered by this diagnostic, and without striving towards a harmonization or

²⁶⁴ “Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations” (30 October 32001) online: ICJ <<https://www.icj-cij.org/public/files/press-releases/3/2993.pdf>> [“Speech by H.E. Judge Gilbert Guillaume”].

²⁶⁵ Gleider Hernandez, *International Legal Theory*, Syllabus (Université Paris Nanterre, May 2020).

unification of the body of law that is international investment law, we argue for the reinforcing of guarantees in the existing system of ISDS.

197. The contribution and originality of the research are organized around three axes.

198. First, the comparative analysis of two distinct legal orders organizes the structure and founds the methodology. This objective is rendered more complicated by the fact that these two legal orders, i.e. (1) European Law and (2) International Arbitration, continue, to an extent, to be contested. While they exist independently, and co-exist with other legal orders, i.e., the domestic legal orders and the “international legal order”, they do not always do so peacefully. This tension explains some of the research issues examined in the dissertation. Outside of domestic legal orders, which are legitimized through their own legal corpus and recognized both inside and outside of the confines of the state which they regulate, both EU law and international arbitration exist within their own defined borders. Certainly, EU law has greater legitimacy; it is clearly founded on Treaties which set forth the fundamental tenets of this body of law. Its origin is founded in constitutional law and it is regulated by institutions which define and establish its laws and policies, policed by a system of courts established strictly for questions of EU law. As explained below in the section referring to autonomy of European law, the concept itself continues to be defined through the caselaw of these courts.

199. International arbitration does not, however, benefit from such a well-defined recognition. By its very nature, there exist no founding treaties or an entire adjudicative system devoted to international arbitration. This particularity is not unique to international arbitration. It is the hallmark of international law, as famously explained by Koskenniemi for the “fragmentation” of international law.²⁶⁶

200. Additionally, international arbitration has been recognized as an autonomous and independent legal order. Famously theorized by Emmanuel Gaillard as “*l’ordre arbitral*”, we follow his philosophy for the comparative purposes of this research.²⁶⁷ Gaillard writes:

International arbitration readily lends itself to a legal theory analysis. The fundamentally philosophical notions of autonomy and freedom are at the heart of its field of study. Similarly essential are the questions of legitimacy raised by the

²⁶⁶ ILC, *Study Group*, April 2006; ILC, *Study Group*, May 2006; ILC, *Study Group*, July 2006, *supra* note 234.

²⁶⁷ Gaillard, *Legal Theory of International Arbitration*, *supra* note 292.

parties freedom to favor a private form of dispute resolution over national courts, to choose their judges, to tailor the procedure and to choose the applicable rules of law, and by the arbitrators freedom to determine their own jurisdiction, to shape the conduct of the proceedings and to choose the rules applicable to the dispute.

201. These two legal orders exist in the constellation which composes international law. We attempt to determine the impact and benefit of the collision and interweaving of these systems. Namely, whether the EU and its proposal for reform of ISDS can manage to positively affect and cure the deficiencies which plague the system. A host of solutions written into the ICS bear the mark of European law, with the imposition of a standing court with permanent members, as exist in the EU. Interestingly, the proposal of this solution was not received favorably by the EU institutions which considered that it strayed beyond existing EU parameters. A first part explains the evolution of the EU policy as proposed by the EU Commission, all the way to its acceptance and recognition by the CJEU. Now that the compatibility of the ICS to EU law has been formally recognized, the acceptance of the proposed reform rests with the international arbitration order.

202. Second, the existing body of rules is not sufficient to cover the topic. In other words, we must refer to a corpus of soft law instruments which are meant to regulate the ethics of arbitrators, such as the IBA Guidelines, the CETA Code of Conduct, amongst others. Moreover, the second part which examines the progress of WGIII in constructing new law is still ongoing. With a recognized deadline, for the moment set to 2025/2026, it is clear that the dissertation will not be able to analyze the impact of the Code of Conduct once it is enforced.

203. Third, to a more limited extent, the background to the research is informed by considerations of international relations and political science. While this research is conducted strictly within the confines of EU and international economic law, the very existence of the reforms examined to ISDS are due to a context of unrest and discontent in the general population. The evolution of EU policy and the genesis of its internal reform owes its impetus to general unrest and discontent in the population and civil society. In that respect, it can be stated that the policy considerations have informed the proposed reform.

204. Similarly, the EU's actions were a driving force behind the constitution of WGIII and the initiation of the reform process of ISDS at large. In exercising this role, the EU went

beyond its traditional borders and, basing itself on the proposed ICS model, influenced the international arbitration order.

205. The conceptualization of rule of law transcends the borders of legal orders.²⁶⁸ At the very foundation of every single order, its interpretation and use vary widely. And while, just as with the entire legal corpus that constitutes the international arbitration order, the rule of law is not set out as part of a founding treaty, it nevertheless constitutes a basic value on which the entire system rests.

206. The value and originality of the research therefore lies in the demonstration of the impact of European law, and its approach of the rule of law, on the international arbitration order, and its own understanding of the rule of law, to remedy the lacunae of independence and impartiality of the adjudicators in both systems. In other words, whether the proposed reform of the ICS by the EU resolves contested issues related to the ethics of arbitrators in the ISDS system.

207. The literature often examines these legal orders separately. We find, accordingly, a well-developed corpus of scientific research on the autonomy of EU law, together with the interactions, advantages and issues which stand at the crossroads of EU law and arbitration.

B. Comparing the Autonomous Legal Orders of International Arbitration and European Law

208. This thesis is firmly rooted in international investment law. The analysis also delves into European law in a comparative perspective. The methodology is thus inspired by the nature of both systems as autonomous legal orders. On the one hand, international arbitration has been repeatedly recognized as a self-regulating framework which functions and exists independently.²⁶⁹ On the other, the autonomous nature of EU law finds its basis in the

²⁶⁸ International Law Association, *Sydney Conference (2018): Rule of Law and International Investment Law*, (ILA, 2019) at 1, online: ILA <https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Investment_RuleofLaw.pdf> [ILA, *Draft Report* (2019)]. August Reinisch, “The UN Concept of the Rule of Law” (2019) 22:3 ZEuS Zeitschrift für Europarechtliche Studien 337.

²⁶⁹ George A Bermann, “The self-styled ‘autonomy’ of international arbitration” (2020) 36:2 *Arbitration International* 221.

jurisprudence of the EU courts, specifically the CJEU, as well as in the EU Founding Treaties. Comparing these two autonomous legal orders calls upon the very nature of international law and its inherently fragmented nature.²⁷⁰

209. The objective in conducting this comparison of two distinct legal orders is to determine whether the influence of one on the other can be found. In the present case, we seek to determine whether the rule of law as strengthened in the new EU reform through the ICS proposal will have as an impact to contribute and strengthen the weakened rule of law in ISDS and help shape a strengthened rule of law in the reform efforts conducted at WGIII, whether through the implementation of a MIC or another proposed means of reform such as a separate appeal level or a selection mechanism.

210. A third layer of fragmentation can even be defined: by focusing on arbitrator ethics, we are called upon to examine the complex framework of ethical codes and regulations.²⁷¹ This legal framework stands at the confines of soft and hard law, depending on the nature of the agreements regulating ethics and conduct of arbitrators.

211. International investment law stands at the convergence of international public and international private law. While ISDS is a matter of international public law as it concerns states, several rules of arbitration that we examine for comparative purposes, such as the ICC and LCIA Rules, stem from international commercial arbitration. The treaties examined are true instruments of public international law, which include norms reminiscent of

²⁷⁰ ILC, *Study Group*, April 2006; ILC, *Study Group*, May 2006; ILC, *Study Group*, July 2006, *supra* note 234; Peters, *supra* note 133133; Mads Andenas & Eirik Bjorge, eds, *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015) [Andenas & Bjorge, *A Farewell to Fragmentation*]; Mireille Delmas-Marty, *Les forces imaginantes du droit. II. Le pluralisme ordonné* (Paris : Seuil, 2006); Anne-Charlotte Martineau, *Le débat sur la fragmentation du droit international : Une analyse critique* (Bruxelles : Bruylant, 2016) [Martineau]. Mario Prost, *The Concept of Unity in Public International Law* (Portland: Hart Publishing, 2012) 202; Pierre-Marie Dupuy, “L’unité de l’ordre juridique international” (2002). 25(4) *Mich J Int’l L* (special issue: symposium, diversity) 297 *Recueil des cours* 9; “Diversity or Cacophony?: New Sources of Norms in international law” (2003–International Law Symposium” (2004) 25:4 (Special Issue) *Michigan Journal of International Law*; Benedetto Conforti, “Unité et fragmentation du droit international: ‘Glissez, mortels, n’appuyez pas!’” (2007) 111 :1 *RGDIP* 5; Tamar Megiddo, “Beyond Fragmentation: On International Law’s Integrationist Forces” (2018) *GlobalTrust Working Paper 03/2018*; Eyal Benvenisti & George W Downs, “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law” (2007) 60:2 *Stanford Law Review* 595.

²⁷¹ CETA Code of Conduct; *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement* (1 May 2020) ICSID and UNCITRAL, online: ICSID <https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf> [*Draft Code of Conduct: Version One*].

constitutional and administrative law.²⁷² The field of international investment law stems from that of international economic law and international trade law.

C. Analyzing a Network of International Treaties: at the Crossroads between Fragmentation and Unification

212. The fragmentation of international law, specific to international investment agreements, is also referred to as a theoretical framework to this dissertation. The research question relates to the impact of the EU's reform of ISDS on arbitrators' independence and impartiality in the EU and in international agreements. The focus is on arbitrators and adjudicators' independence and impartiality, so as to understand whether the EU proposal for the ICS and the MIC strengthens the rule of law by comparison to the existing ISDS system. The underlying problematic of the fragmentation of international investment agreements will therefore serve as a backdrop to the legal analysis throughout.

213. In her famed call to “bid farewell to fragmentation”, Anne Peters promotes a refined approach to fragmentation.²⁷³ Peters explains that “[t]he diagnosis of fragmentation refers to the dynamic growth of new and specialized subfields of international law after 1989, to the rise of new actors beside states (international organizations, non-governmental organizations (NGOs), and businesses), and to new types of international norms outside the acknowledged sources”.²⁷⁴ Triggered by the end of the communist bloc in 1989, the bi-polar world order, and in the wake of the post-cold war “new world order”²⁷⁵, a slew of multilateral treaties were concluded and permanent international bodies founded, from the Rio Conventions in 1992, the WTO in 1994, the ICTY in 1993, the ICC in 1998, the International Tribunal for the Law of the Sea (ITLOS) in 1996, and the ECtHR in 1998. Meanwhile, investment

²⁷² UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS) – Submission from the European Union*, UN Doc A/CN.9/WG.III/WP.145, 12 December 2017 [UNCITRAL, *Possible reform – Submission*].

²⁷² Titi, *supra* note 172 at 661, paras 4, 6.

²⁷³ Peters, *supra* note 133.

²⁷⁴ *Ibid* at 673; Martineau, *supra* note 270.

²⁷⁵ “Commencement Address on New World Order”, C-Span (13 April 1991), online: C-Span <<https://www.c-span.org/video/?17541-1/commencement-address-world-order>>.

arbitration saw a meteoric rise and the membership of the ICSID Convention and number of BITs exploded.

214. The “diagnosis of fragmentation”, much like a disease or an epidemic, has come to be viewed as a pejorative term. The term “denotes both a process and its result, namely a (relatively) fragmented state of the law”.²⁷⁶ The risk denounced in the 1990s was that newly created specialized tribunals would “damage the coherence of the international legal system.” by creating greater variations in their determinations of general international law,²⁷⁷ Vehemently denounced by Judge Guillaume²⁷⁸, who was subsequently accused of trying to preserve the hegemony of his own court, the ICJ, the “proliferation” of tribunals became the menace that the international legal community most feared.

215. From the “heydays of the academic fragmentation debate”²⁷⁹ in the first decade of the millennium to the “spirit of systemic harmonization”, as set forth in *Al-Dulimi*, Peters proposes to “bury the f-word” and bid “farewell to fragmentation. She argues for a vision that “concentrates on the positive contribution of the new techniques which courts, tribunals, and other actors have developed in order to coordinate the various subfields of international law. ‘Techniques’ are understood here as a form of techné, as a political and legal art (as opposed to mechanics or managerialism).”²⁸⁰

216. Today, with the recognized and some might say welcome proliferation of treaties, and the resulting denounced fragmentation of the regime, the theoretical framework really is devoted to discussing a refined and evolved approach to fragmentation.²⁸¹ From Koskenniemi in 2006, and its identification in the seminal International Law Commission of the crisis of international law and fragmentation of regimes, to the conclusions presented by Peters in 2017 calling for a refined approach, we side with the latter for an approach which

²⁷⁶ Peters, *supra* note 133 at 672-73.

²⁷⁷ *Ibid* at 673; Jonathan I Charney, “Is International Law Threatened by Multiple International Tribunals?” (1998) 271 *Recueil des cours* 101 at 347.

²⁷⁸ “Speech by H.E. Judge Gilbert *Guillaume*”, *supra* note 264.

²⁷⁹ Peters, *supra* note 133 at 674: “Pierre-Marie Dupuy devoted his 2000 General Course in the Hague Summer Academy to the issue. An important symposium on “diversity or cacophony” was held at Michigan Law School (with contributions, *inter alia*, by Hafner, Teubner, and Simma) which resulted in a 500-page journal issue in 2004.”

²⁸⁰ *Ibid* at 672.

²⁸¹ “Speech by H.E. Judge Gilbert *Guillaume*”, *supra* note 264; Peters, *supra* note 133.

evolves towards congruence.²⁸² Joost Pauwelyn takes the argument further, arguing that after 10 years devoted to avoiding fragmentation through proliferation of treaties, the pendulum has swung the other way, leaving the door open to an en masse exit of international tribunals.²⁸³

217. Anne Peters argues that fragmentation of international law has in fact become much more refined, in the sense that many treaties (IIAs) converge with similar principles and objectives.²⁸⁴ Across the universe of investment agreement treaties, whether examining solely the most renowned models, it is therefore possible to identify specific particularities. For example, it is well known that China will not accept pre-establishment, and that the United States (and later Canada) models were at the origin of the annex providing for an exception for indirect expropriation for public policy reasons (now found in CETA). The EU's *de facto* model is nothing but a modernized version of the 2012 US model, as argued by Paparinksis, when he writes that "the black letter of the existing EU practice is an update of the US practice of the last decade, better on some points than others – not that there is anything wrong with that."²⁸⁵ Peters thus argues that the complex IIA network is closer to a pattern of likeness than fragmentation.

218. This position calls to mind that of the mandate of UNCITRAL for "harmonization and unification" of international law:²⁸⁶

'Harmonization' and 'unification' of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.

'Harmonization' may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. 'Unification' may be seen as the adoption by States of a common legal standard governing particular aspects of international business

²⁸² ILC, *Study Group*, April 2006; ILC, *Study Group*, May 2006; ILC, *Study Group*, July 2006, *supra* note 234; Peters, *supra* note 133.

²⁸³ Joost H B Pauwelyn & Rebecca J Hamilton, "Exit from International Tribunals" (2018) 9:4 *Journal of International Dispute Settlement* 679.

²⁸⁴ Peters, *supra* note 133.

²⁸⁵ Martins Paparinksis, "International Investment Law and the European Union: A Reply to Catharine Titi" (2015) 26:3 *The European Journal of International Law* 670.

²⁸⁶ UNCITRAL, "Harmonization", *supra* note 223.

transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws, legal guides, legislative guides, rules, and practice notes. In practice, the two concepts are closely related.”.

219. By examining a possible reform of ISDS through the establishment of Working Group III, UNCITRAL is currently at the forefront of the changing tides of international economic law. The relative homogeneity across treaties will therefore be the underlining approach to our analysis.²⁸⁷

220. Our critical perspective will approach the evolution of the nascent EU investment policy as a policy inspired and modeled upon others, which, at this time, is using the opportunity of a systemic reform of ISDS to influence investment treaty standards and “improve international investment law in unprecedented ways”.²⁸⁸ This approach is illustrated through the reform of the EU of its own ISDS system and replacement by the ICS²⁸⁹, inspiring UNCITRAL to examine a larger reform of ISDS and development of a Multilateral Investment Court.

221. The reform efforts at Working Group III are increasingly leading to the development of all existing alternatives to bonify and/or replace ISDS, which can work separately or together, in a combination of options. At the moment, Chiara Giorgetti estimates that the end result is likely to be a “menu” of options from which the parties may choose their favorite combination, resulting in a “conscious fragmentation”.²⁹⁰ The illusion of unification must be contended with. The harmonization attempt, however, remains a governing standard to which the international economic law community can strive towards. Only some members of the community will truly strive towards unification. While this is the divulged objective of the

²⁸⁷ UNCITRAL, *Possible reform – Submission*, *supra* note 272.

²⁸⁸ Titi, *supra* note 172 at 661.

²⁸⁹ “Following the recent public debate, the Juncker Commission has fundamentally reformed the existing system for settling investment-related disputes. A new system – called the Investment Court System, with judges appointed by the two parties to the FTA and public oversight – is the EU's agreed approach that it is pursuing from now on in its trade agreements. This is also the case with Japan. Anything less ambitious, including coming back to the old Investor-to-State Dispute Settlement, is not acceptable. For the EU ISDS is dead.” (Our emphasis)

²⁹⁰ Chiara Giorgetti, “Looking at the Future: Reflecting on the Reform Process in Investor-State Dispute Settlement” (Keynote Address delivered at the 2021 International Arbitration and Dispute Resolution Symposium: New Directions in International Arbitration & Mediation in 2021, Washington University School of Law, 19 February 2021) [Giorgetti (Keynote)].

EU, it is by no means that of all members participating in the discussions. The very fact that a variety of options are considered as reform options for ISDS, to be added together or separately with an “à la carte” approach, makes clear that harmonization and unification may not be the primary objective of all. It may be instead, that the creation of a functioning and living organism of the complex framework of treaties can be considered to add and bonify the existing regime.²⁹¹

222. In sum, while the EU appears to follow a unification approach for a new and consistent reform, the WGIII errs on the side of recognizing the inherent nature of international law calling for a practical, and conscious, fragmentation.

D. International Arbitration as an Autonomous Legal Order

“All told, autonomy lies at international arbitration’s very foundation, not least its existence and functionality.”

George Bermann

223. International arbitration, which includes ISDS, has long been recognized as a self-regulated autonomous system.²⁹² This framework informs our choice for the theoretical approach and the methodology adopted for this dissertation. The problematic driving the comparison between the EU legal order and the International arbitral legal order in its appraisal of ISDS reform is crystallized by Bermann’s finding that:

International arbitration’s autonomy currently faces a very particular challenge emanating from the European Union (EU) ...Significantly, the Court of Justice justified the result as necessary to ensure, quite literally, the “autonomy” of EU law – a move deplored in turn by the international arbitration community as an assault on its own autonomy. The remarkable and unprecedented result is a confrontation

²⁹¹ Sophie Meunier & Jean-Frédéric Morin, “No Agreement Is an Island: Negotiating TTIP in a Dense Regime Complex” in Jean-Frédéric Morin et al, eds, *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Abingdon: Routledge, 2015) [Meunier & Morin].

²⁹² Emmanuel Gaillard and George Bermann make a case for arbitration as an autonomous legal system, coexisting with other legal universes. In this sense, it resembles the configuration of EU law as an autonomous system within international law. The two systems coexist and interact as autonomous legal systems. Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden, Boston: Brill, Nijhoff, 2010) [Gaillard, *Legal Theory of International Arbitration*]; George A Bermann, “The self-styled ‘autonomy’ of international arbitration” (2020) 36:2 *Arbitration International* 221 [Bermann, 2020].

between two international regimes, each ascertaining an autonomy of its own devise seen as threatened by the autonomy asserted by the other.²⁹³ (our emphasis)

224. This section addresses the autonomy of the international arbitration regime as a legal order, after having addressed the autonomy of EU law above. These two legal orders cohabit as autonomous and, yet, are interrelated. In this case, by the dispute resolution mechanism. And by the attempts of one order, the EU legal order, to reform ISDS and restore legitimacy by attaining a higher rule of law standard, there are direct and indirect impacts on ISDS and the International arbitral order with and within which the EU legal order operates.

225. Emmanuel Gaillard, in his legal treatise on the theory of international arbitration, advances that international arbitration is an autonomous legal order, and refers to the Arbitral Legal Order.²⁹⁴ We refer to this qualification in this thesis as a foundational concept for our analysis.

226. As Gaillard established in his treatise, the system was established historically upon the feature of its autonomy with respect to national and international legal orders.²⁹⁵ Tailored specifically and self-contained, arbitration has developed its own body of rules and control mechanisms.²⁹⁶ Unfortunately, as it stands outside of national and domestic courts, critics have long lamented the lack of state controls to preserve the rule of law. A somewhat ironic stance when one recalls that the very purpose of arbitration is to provide a fully legitimate and self-standing dispute resolution mechanism.

227. George Bermann writes that “[a]mong international legal regimes, international arbitration has traditionally claimed for itself a remarkable degree of autonomy from other international regimes, an autonomy that enables it to enjoy a remarkable measure of self-

²⁹³ Bermann, 2020, *supra* note 292 at 10-11. See *Slowakische Republik v Achmea BV*, C-284/16, [2018] ECLI:EU:C:2017:699 [*Achmea*]. See Csongor Istvan Nagy, “Intra-EU Bilateral Investment Treaties and EU Law after Achmea: ‘Know Well What Leads You Forward and What Holds You Back’ ” (2018) 19:4 German Law Journal 981; see also Vivek Kapoor, “Slovak Republic v Achmea: When Politics Came Out to Play”, *Kluwer Arbitration Blog* (1 July 2018) online: Kluwer <<http://arbitrationblog.kluwerarbitration.com/2018/07/01/slovak-republic-v-achmea-politics-came-play/>>; George A Bermann, “European Union Law as a Jurisdictional and Substantive Challenge to Investor-State Arbitration” (2017) 5:2 European International Arbitration Review 51.

²⁹⁴ Gaillard, *Legal Theory of International Arbitration*, *supra* note 292 at 35.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

determination.”²⁹⁷ The foundation of arbitration is its autonomy. This, on a primary level, translates into the system’s autonomy and independence from “norms by which adjacent legal orders are governed”.²⁹⁸ On a secondary level, the autonomy transcends into the core governing principles of arbitration: through the autonomy of the arbitration clause, the party autonomy, and even the autonomy of the arbitrator to establish its own competence.

228. The first premise upon which is staked international arbitration’s claim of legitimacy is party autonomy. This refers to the fact that arbitration is founded upon the parties’ consent. In most respects, the procedure is that of the parties. They bear the choice of the applicable rules, the selection and appointment of the arbitrator(s) and the administering institution. While parties will not initiate proceedings with a blank slate and will refer to either models of clauses to insert into contracts, or upon appearance of the dispute, enter into a compromissory clause with the adverse party, or evidently, in ISDS, refer to the treaty under which it files a claim. The parties, as Bermann emphasizes, are “the architects of their own means of dispute resolution”.²⁹⁹

229. The core feature of this autonomy revolves around the selection and appointment of the arbitrator who will hear the case. This ability for the parties provides a unique opportunity to present their case to an expert which they have designated, considering that their interest would best be represented. This is the feature which provokes most ire from detractors of the system.³⁰⁰ How may one ascertain the objectivity, independence and impartiality of an adjudicator after being marred by its selection? Will that individual not, consciously or not, be biased in favor of its appointee? While this concern addresses a gaping lacuna in ISDS and arbitration in general, we remain of the opinion that there already exist mechanisms in place, which may be strengthened, that provide sufficient and appropriate controls in this regard. The purpose of this thesis is to examine these claims and ascertain their merit. Following the described research question, we will assess whether the rule of law is strengthened by any of the proposed reforms to ISDS and specifically whether the issues with independence and impartiality of arbitrators are resolved.

²⁹⁷ Bermann, 2020, *supra* note 292 at 221.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid* at 223.

³⁰⁰ Alvarez, “The Long View”, *supra* note 55.

230. The source of legitimacy of arbitration differs between commercial and investment cases. While for commercial arbitration, the legitimacy is founded upon the consent of the parties and their consensualism, in ISDS it is inscribed in the treaty which contains the ISDS provision.³⁰¹ This, certainly, justifies the “crisis of legitimacy” proper to investment cases. Indeed, the consent was obtained in the case of ISDS not by the parties who will be involved in the dispute but by their states. The extent to which they are far from the active decision of agreeing to arbitration has an impact on the scope of the legitimacy recognized for the process. The asymmetry of investment protection and the possibility for a private party to pursue remedies against a state regulating public interest stand as reason to justify the main critics. In this sense, if both commercial and investment arbitration are to be said to be part of the International Arbitral Order referred to by Gaillard, they so exist at different levels of autonomy and in a capacity which bears distinguishing.

231. The second function of autonomy of arbitration is that of the arbitration agreement, in commercial cases. The principal of severability of the arbitration clause from the contract is one upon which the entire system is constructed. It reveals its presence in the French version of this principle which claims “*l’autonomie de la clause compromissoire*”.³⁰²

232. This “self-styled autonomy of international arbitration” does not, however, come without its challenges.³⁰³ Widely denounced since the famously coined phrase of Susan Franck, the “legitimacy crisis of ISDS” is premised upon the very nature of arbitration as an independent and autonomous system. The self-regulation of the order, and development of a body of independent and interrelated rules to ensure the efficiency of the system, has unfortunately left open some gaping holes. One of these is arbitrator ethics, another the regulation of public interest by the state. The thesis does not address the second, if only in a roundabout manner, as the ISDS reform proposals all address these two aspects in priority.

233. The remarkable lack of a framework to govern ethics of adjudicators is by no means a recent issue.³⁰⁴ It is one, however, which has recently been brought to the forefront of the

³⁰¹ Bermann, 2020, *supra* note 292 at 223.

³⁰² *Ibid* at 224-25; Jean-Pierre Ancel, “L’actualité de l’autonomie de la clause compromissoire” (1994) 11 *Travaux du Comité français de droit international privé* 75.

³⁰³ Bermann, 2020, *supra* note 292.

³⁰⁴ *Ibid*.

denunciations of ISDS as a biased, unfair and illegitimate system. Interestingly, the critiques of the system are described as both “highly normative and highly politically salient”.³⁰⁵

234. As remarks Bermann,

According to a growing critique, investor-state arbitration endows ad hoc arbitral tribunals, composed of a relatively small number of individual “repeat-player” arbitrators, with outsized authority and insufficient accountability, while at the same time exerting a powerfully chilling effect on states’ right to regulate in the public interest.³⁰⁶

235. In identifying the current challenges to the autonomy of the system, Berman denotes that transparency and ethics are at the forefront of the concerns. The autonomy from regulation enjoyed by arbitrators has shocked many a conscience as a rare, unimaginable legal situation. The dearth, not to say the total absence, of ethical rules applicable to actors of international arbitration, ranging from counsel, experts to arbitrators, is staggering.³⁰⁷ The extent of this “ethical vacuum” is immense and Bermann paints a dire portrait:

It is difficult to identify any class of service providers, performing services as consequential as the adjudication of legal disputes, that go as unregulated as international arbitrators do. In most jurisdictions, an arbitrator need not be a member of the bar, and even for those who are, sitting as arbitrators does not constitute the practice of law. It has been said, with little exaggeration, that international arbitrators operate in a professional ethical ‘vacuum’. The constraints on the practice of international arbitration, such as they are, emanate largely from self-regulation, which is in itself among the purest signs of autonomy.³⁰⁸

236. This finding sets the table for our analysis. The reform proposed by the EU in the ICS provides for a seminal evolution to arbitrator ethics. It goes from the ISDS self-regulated system of free standing norms and practices which provide for arbitrator independence and impartiality, to mandatory regulation for arbitrators both within the treaty (CETA, eg) and

³⁰⁵ *Ibid* at 229-30.

³⁰⁶ *Ibid* at 230; Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2014) at 177: “Arbitration is under recurrent attacks by those who fear that it may undercut the authority of regulation and regulators.” See also mandate and work of UNCITRAL Working Group III on Investor-State Dispute Settlement Reform: UNCITRAL, “Working Group III”.

³⁰⁷ Catherine A Rogers, “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration” (2002) 23:2 *Mich J Int’l L* 341 at 341. See also Catherine A Rogers, *Ethics in International Arbitration* (New York: Oxford University Press, 2014) at 17-19.

³⁰⁸ Bermann, 2020, *supra* note 292 at 229. This is not a new concern. See J Noble Braden, “Sound Rules and Administration in Arbitration” (1934) 83:2 *U Pa L Rev* 189; Catherine A Rogers, “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration” (2002) 23:2 *Mich J Int’l L* 341 at 341. See also Catherine A Rogers, *Ethics in International Arbitration* (New York: Oxford University Press, 2014) at 17-19.

with a mandatory Code of conduct. The only gap left in Bermann's assessment is that of the regulation of ethics of counsel and witnesses.

237. The challenges to legitimacy that remain in ISDS are prevalent in its very nature of self-regulation. The EU has stepped in the direction of judicialization, away from the defining aspect of an autonomous legal order and closer to that of a standing tribunal, with mechanisms proper to national courts. And yet, many aspects of the hybrid creature that is the ICS remain rooted in international arbitration. The investment court system will be examined below in detail in order to assess the aspects in which it answers the critics of ISDS' legitimacy.

238. For his part, Bermann situates himself in the arbitration field, and does not head the EU's call to arms. He concludes that apparent challenges to the legitimacy may be resolved by a strengthened system but refuses to abandon its core mandate of self-determination. He concludes that:

Autonomy has become a veritable leitmotif of international arbitration. The regime has, in diverse and far-reaching ways, claimed for itself a remarkable degree of self-determination, in the sense of freedom from certain norms and disciplines otherwise prevailing in law and society. For reasons that remain to be explored, it has enjoyed substantial success in maintaining that freedom, enabling it not only to survive but also to develop very largely as it sees fit, often in exceptionalist mode. But the regime is also experiencing strains and stresses that implicate its long-term legitimacy. To meet the associated challenges, the solution does not reside in abandoning self-determination, but rather in deploying it, both self-protectively and affirmatively, to safeguard a legitimacy that it may have for too long taken for granted.³⁰⁹

SECTION 2. ASSESSING THE INVESTMENT COURT SYSTEM – BRIDGING THE GAP BETWEEN ISDS AND EU VALUES WITH THE RULE OF LAW

The “rule of law” is undoubtedly one of the most powerful expressions in the modern world. In a sense, it has become an activity in itself, a mental-social phenomenon which exists within human consciousness and acts independently within physical social reality, like a pat on the back or a slap in the face.

S. Beaulac, *The Rule of Law in International Law Today*³¹⁰

³⁰⁹ Bermann, 2020, *supra* note 292 at 232.

³¹⁰ Stéphane Beaulac, “The Rule of Law in International Law Today” in Gianluigi Palombella, ed, *Relocating the rule of law* (Oxford: Hart, 2009).

239. In this section, we examine how the rule of law as a value is used to assess the reform of ISDS with the ICS, the MIC and the other reform proposals. In sum, how it is used to bridge the gap between the two autonomous and self-regulated legal orders that are the EU legal order and the international arbitral order.

A. The Rule of Law in EU Law

1. The European Union Values Enshrined in the Treaty on the European Union

240. The project of the European Union was constructed upon common principles. It was not until the Lisbon Treaty, however, that they became part of EU constitutional law. Article 2 of the Lisbon Treaty provides that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

241. An evolution of the principles consecrated since the European Coal and Steel Community has led to this « union of values » being enshrined in article 2 TEU as the basis for the political and legal construction of the European Union.³¹¹ The first sentence of article 2 provides a defined list of fundamental values, which correspond each to a chapter of the European Charter of Human Rights (ECHR),³¹² for each of the six values listed (1) the respect for human dignity, (2) freedom, (3) democracy, (4) equality, (5) the rule of law and (6) the respect for human rights, including the rights of persons belonging to minorities.

242. The development of an axiology of the European Union stems from fundamental rights and values and a strong humanist tradition. Labayle surveys the origin of these values,

³¹¹ Simon Labayle, “L’appréhension des valeurs dans la jurisprudence récente du juge de l’Union. Une approche spécifique, au cœur de l’Europe du droit” (Special Issue December 2020) QJIL 517, online : SQDI =<https://www.sqdi.org/fr/lapprehension-des-valeurs-dans-la-jurisprudence-recente-du-juge-de-lunion-une-approche-specifique-au-coeur-de-leurope-du-droit/> [Labayle, 2020].

³¹² *Ibid.*

first through a succession of declarations and texts, before they appeared formally from the Maastricht Treaty, until their ultimate consecration in the TEU through the Lisbon Treaty.³¹³

243. Labayle traces the beginning of the integration of values in legal texts in the European Communities in 1973, through the Declaration on the European Identity³¹⁴ followed by another declaration with the Solemn Declaration on the European Union of 1983³¹⁵, and finally a treaty, in 1986, with the Single European Act.

2. The European Union Values Enshrined in its Investment Policy

244. On 14 October 2015, the European Commission presented its new trade and investment strategy entitled: “Trade for All, Towards a more responsible trade and investment policy”.³¹⁶ Responding to the public contestation at the time of the TTIP negotiations, prior to their indefinite suspension, this policy detailed the view of the European Commission and its approach founded on three key principles: “effectiveness, transparency and values”.³¹⁷ The very foundation of the EU’s trade policy was clearly structured around EU values, with a specific approach regarding recognition and implementation.

245. In this regard, a specific section of the Trade for all strategy is devoted to the European values,³¹⁸ divided into, first, the approach to “the public’s expectations on

³¹³ Simon Labayle, *Les valeurs de l’Union européenne* (LL D Thesis, Université Laval & Aix-Marseille Université, 2017), online : ULaval <<https://corpus.ulaval.ca/jspui/bitstream/20.500.11794/28087/1/33335.pdf>>; “L’Union européenne et les 60 ans du Traité de Rome : Enjeux et défis contemporains” (Special Issue November 2018) QJIL, *Les valeurs européennes (deux décennies d’une union de valeurs)*.

³¹⁴ Also entitled “*Déclaration de principes entre les États-Unis et la Communauté européenne et ses États membres.*” CE, “L’identité européenne” (1973) no 12 Bulletin des Communautés européennes 127 [*Déclaration sur l’identité européenne*].

³¹⁵ CE, “*Déclaration solennelle sur l’Union européenne*” (1983) no 6 Bulletin des Communautés européennes 26 [*Déclaration solennelle sur l’Union européenne*].

³¹⁶ European Commission, *Trade for All – Towards a more responsible trade and investment policy* (Luxembourg, Publications Office of the European Union, 2015), online: EC <https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> [*Trade for All*].

³¹⁷ European Commission, “Trade for All – New EU Trade and Investment Strategy”, online: EC <<http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/>>.

³¹⁸ *Trade for All*, *supra* note 316 at 20, s 4: “A trade and investment policy based on values”.

regulations and investment”, and second, the promotion in the trade agenda of “sustainable development, human rights and good governance”. Commissioner Malmström indicated that to put this strategy into practice:

The new approach also involves using trade agreements and trade preference programmes as levers to promote, around the world, values like sustainable development human rights, fair and ethical trade and the fight against corruption.³¹⁹

246. In addition, the Commission often refers to transparency as necessary to the implementations of EU values. Accordingly, in the section presenting a “more transparent trade and investment policy”, the emphasis is on the necessity for the Commission to

pursue a policy that benefits society as a whole and promotes European and universal standards and values alongside core economic interests, putting a greater emphasis on sustainable development, human rights, tax evasion, consumer protection and responsible and fair trade.³²⁰

247. The Commission’s objective is to go beyond what is simply policy making in trade and assess substantive issues like regulation and investment in trade agreements to ensure “the consistency of EU trade policy with broader European values.”³²¹

248. In addition to its will to ensure consumer protection and promote better regulatory cooperation³²², the strategy presents a “new approach to investment”.³²³ Recognizing the climate of controversy, and urgent need for reform, the Commission considers that the “EU is best placed – and has a special responsibility – to lead the reform of the global investment regime, as its founder and the main actor”.³²⁴ A bold statement and approach, the Commission then proceeds to detail its strategy in this regard.

249. First, problems with the current system are outlined, including the criticism of investment protection and the arbitration system and threats posed to the states’ capacity to regulate (often referred to as “regulatory chill), as well as the potential for conflicts of interest and lack of independence and impartiality of arbitrators. To reform this situation, the Commission proposes to include modern provisions for investment protections, as well as a

³¹⁹ *Ibid* at 5.

³²⁰ *Ibid* at 18

³²¹ *Ibid* at 20.

³²² *Ibid* at 20, s 4.1.1: “Ensuring consumers can be confident in the products they buy in a global economy”.

³²³ *Ibid* at 21, s 4.1.2: “Promoting a new approach to investment”.

³²⁴ *Ibid* at 21.

new permanent court for investments. In parallel, the Commission promises to engage partners for the implementation for a “permanent International Investment Court”, and even indicates its supports in the long term for “the incorporation of investment rules into the WTO”, as this “would be the opportunity to simplify and update the current web of bilateral agreements to set up a clearer, more legitimate and more inclusive system”. Finally, prior to the end of the mandate, it wishes to review the 2010 communication on international investment” to “map out the way forward”.³²⁵

250. The integration of EU values into the trade agenda is also reflected through the promotion of sustainable development, human rights and good governance.³²⁶ The promotion of sustainable development includes stronger provisions governing the development of trade policies in line with high labor and environmental standards, as well as health and safety protections. This stance was recently followed by the EU in FTA negotiations with the systematic inclusion of chapters or provisions linking trade and sustainable development.³²⁷

251. The promotion of sustainable development through trade policy having recently been reaffirmed through the 2030 Agenda for Sustainable Development Agenda, including the Sustainable Development Goals, this also includes the EU supporting inclusive growth in developing countries.³²⁸

252. Aligning trade and European Union values also calls for ensuring the responsible management of supply chains, with sustainability criteria for biofuels, or corporate transparency on payments to extractive and logging industries, for example.³²⁹ The promotion of fair and ethical trade schemes, contributing to developing sustainable trade opportunities with small producers of small countries is also identified as part of the EU’s objectives.³³⁰

³²⁵ *Ibid* at 22.

³²⁶ *Ibid*.

³²⁷ *CETA*, *supra* note 220 ch 23. See also mentions in Preamble. It is important to note that many of these provisions have the value of principle, and that of having integrated the substantive part of the treaty, although there are no sanctions attached to their breach.

³²⁸ *Trade for All*, *supra* note 316.

³²⁹ *Trade for All*, *supra* note 316 at 24.

³³⁰ *Ibid* at 25.

253. The defense and promotion of human rights through trade policy includes fighting breaches to global supply chains through “child labour, forced prison labour, forced labour as a result of trafficking in human beings and land grabbing.”³³¹ Amongst the measures proposed, and the constant evaluation and dialogues with partners, the EU proposes an “ambitious modernization of the EU’s policy on export controls of dual use goods, including the prevention of the misuse of digital surveillance and intrusion systems that results in human rights violations.”³³²

254. Lastly, the EU identified the fight against corruption and promotion of good governance as essential to the rule of law, which are to be integrated into its trade policy, through increased transparency and the simplification of customs procedure. This was hoped to counter effects of corruption such as “distorting public procurement, wasting scarce public funds, discouraging investment, hampering trade and creating unfair competition.”³³³

255. The external action of the European Union through its values and policies is therefore firmly reflected in its trade and investment policy. When expounding the EU values to international investment agreements in an attempt to determine whether we can identify an axiology of this complex regime of agreements, we are drawn to provisions previously discussed providing exceptions for public policy to allow for indirect expropriation in rare circumstances, as well as all new, modern and progressive provisions found in the latest generation agreements, such as sustainable development and the promotion and protection of human rights.

256. Through this dissertation, we focus on the EU value of the rule of law as set out in its founding treaties and its investment policies.

3. *The Rule of Law in the EU Treaties*

257. The rule of law is embodied in the EU Treaties in a precise manner, beyond what the above referenced provisions which establish the EU values provide. Article 47 of the Charter

³³¹ *Ibid.*

³³² *Ibid* at 26.

³³³ *Ibid.*

of Fundamental Rights of the EU (the “Charter”) provides for the right to an effective remedy and to a fair trial. It is the founding stone for the reasoning of the CJEU in *Opinion 1/17* which we use as a guiding matrix for our analysis based on the rule of law.

258. Article 47 provides as follows:

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

259. In addition, we must bear in mind Article 6 of the European Convention on Human Right, which, in its first paragraph, also provides to the right to a fair trial, as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

260. Bungenberg and Hazarika make an important and relevant contribution to setting out the rule of law in the EU as part of the International Law Association Committee on the Rule of Law and International Investment Law.³³⁴ They write, in relevant part, on the relevance of the EU Rule of Law in International Investment Law as follows:

It is suggested that to ensure the rule of law and protect European investments abroad, adequate emphasis should be laid on the inclusion of Investor-state Dispute Settlement (ISDS) provisions in EU investment agreements. This has the potential to contribute to the rule of law as an EU value that has to be taken into account in all external policy actions of the Union. However, if the Union wants to include rule of law components into investment agreements with third states, the success of such efforts depends upon the political capability of the Union to induce the other parties to the agreements to accept such provisions. With a global economic

³³⁴ Marc Bungenberg & Angshuman Hazarika, “Rule of Law in the EU Legal Order” (2019) 22:3 Zeitschrift für Europarechtliche Studien 383.

weight equal to nearly half of global foreign direct investment (FDI) outflows, the EU's potential in investment negotiations is more than evident.

From a European perspective, the inclusion of ISDS in EU investment agreements will serve the immediate purpose to protect EU nationals investing abroad. ISDS will be a crucial tool to remedy deficiencies in the legal system of host states. In addition to the immediate political goal of increasing the level of protection of European investors abroad, the inclusion of ISDS is likely to serve an important long-term goal in line with the EU's value system: it is likely to have a positive spill-over effect on the legal system of host states, exercising a push towards rule of law disciplines and thus developing improved administrative practices to comply with IIA obligations that also benefit national citizens and residents.

Significantly, a new proposed Multilateral Investment Court (MIC), which the EU is promoting, as well as chapters on investment protection in free trade agreements concluded by the EU will have to fulfil inter alia all conditions set up by the rule of law principle as being one of the leading constitutional principles of EU law. In its recent Opinion 1/17, the CJEU has laid down that dispute settlement mechanisms in future trade and investment agreements concluded by the EU will need to comply with the 'constitutional framework' unique to it. Any international agreement concluded by the EU will have to comply with the founding values of the EU, which includes the rule of law.

The CJEU has also discussed the right under Art. 47 CFREU to an independent and impartial tribunal and 'effective access to justice' and determined that any ISDS mechanism formed as a result of an international agreement by the EU will have to comply with these requirements. The Court explicitly mentioned 'strict application of rule of law' as one of the key elements of the right to access to an independent tribunal. These observations by the Court are crucial since they will shape the Commission's policies in negotiating future trade and investment agreements and in the formation of a MIC."³³⁵ (Emphasis added)

261. The rule of law is truly enshrined in the founding treaties and the "constitutional framework" of the European Union. In order for the right to a fair trial to be respected, parties must also have access to an independent tribunal. It is to these elements that the EU rule of law refers when evoked within the context of the Investment Court System and the proposed Multilateral Investment Court. We find here the clear link between the rule of law in the EU and its impact on the ICS and MIC. This sets the stage for the comparison to the value in international investment law to determine its impact on the reform of ISDS on the independence and impartiality of arbitrators.

B. The Rule of Law in International Investment Law

³³⁵ This excerpt was reproduced without its related footnotes, for ease of reference.

262. The rule of law is a fundamental standard by which international law,³³⁶ including international investment law, can be measured. The difficulty resides in establishing a clear working definition. To measure, we must first have a yardstick.

263. Although the rule of law concept stems originally from domestic law, it, evidently, also applies to international investment arbitration.³³⁷ The International Law Association Committee on the Rule of Law and International Investment Law (the “ILA Rule of Law Committee”) was established in 2015 “to assess the manner in which the rule of law intersects with international investment law”.³³⁸ The Committee recognizes that “conceptions of what the ‘rule of law’ vary widely, both in domestic law and in international law contexts”.³³⁹

³³⁶ David Rivkin, *supra* note 92, Machiko Kanetake & André Nollkaemper, eds, *The Rule of Law at the National and International Levels: Contestations and Deference* (Oxford: Hart Publishing, 2016); Andreas Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No. 19 (Kluwer Law International, 2017) [Menaker]; Payam Akhavan, “The Contribution of Investment Arbitration to the Rule of Law” in Menaker; Langford et al, *supra* note 2121 at fn 7: “Early studies were mostly positive on the evidence or potential of the investment regime in enhancing foreign direct investment and domestic rule of law”, citing: Eric Neumayer & Laura Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” (2005) 33:10 *World Development* 1567; Peter Egger & Michael Pfaffermayer, “The Impact of Bilateral Investment Treaties on Foreign Direct Investment” (2004) 32 *Journal of Comparative Economics* 787; Benedict Kingsbury & Stephan W Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law” (2009) IILJ Working Paper 2009/6 (Global Administrative Law Series), Mary Hallward-Driemeier, “Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite” (2003) Policy Research Working Paper 3121. TUNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (New York: United Nations, 2009); Alex Berger et al, “Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box” (2014) 32:4 *Journal of Comparative Economics* 788; Shiro Armstrong & Luke Nottage, “Mixing Methodologies in Empirically Investigating Investor-State Arbitration” in Daniel Behn, Ole Kristian Fauchald & Malcolm Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge: Cambridge University Press, 2022); Jennifer Tobin & Susan Rose-Ackerman, “When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties” (2010) 6 *Review of International Organizations* 1; Todd Allee & Clint Peinhardt, “Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment” (2011) 65:3 *Intl Org* 401; Emma Aisbett, Matthias Busse & Peter Nunnenkamp, “Bilateral Investment Treaties Do Work; Until They Don’t” (2016) Kiel Working Paper 2021.

³³⁷ Emanuel Castellarin, “Investment arbitration and the international rule of law” in Martin Belov, ed, *Rule of Law at the Beginning of the Twenty-First Century* (The Hague: Eleven, 2018) 211 at 211, n 1 [Castellarin] citing: James Crawford, “International Law and the Rule of Law” (2003) 24:1 *Adelaide Law Review* 3; Tom Bingham, “The Rule of Law in the International Legal Order”, in Robert McCorquodale, ed, *The Rule of Law in International and Comparative Context* (London: British Institute of International and Comparative Law, 2010) 1; Kolleg-Forschergruppe, “The International Rule of Law - Rise or Decline?”, online: KFG <<http://www.kfg-intlaw.de/index.php?ID=1>>.

³³⁸ International Law Association, *Sydney Conference (2018): Rule of Law and International Investment Law*, (ILA, 2019) at 1, online: ILA <https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Investment_RuleofLaw.pdf> [ILA, *Draft Report* (2019)].

³³⁹ *Ibid* at 33.

264. The scope of this project is meant to reflect on a working concept of the rule of law fit for both procedural and substantive issues which can be mobilized in international investment law. Reckoning with “the difficulty of defining the multifaceted aspects of the concept of the rule of law”, the ILA Rule of Law Committee undertook to examine the “complex and ambiguous” term and determine an overarching definition of the rule of law in international investment law.

265. From the onset, the group recognized the “difficult problem of ascertaining whether there can be agreement on the content of the rule of law that can be used in an international context as a benchmark to assess international investment law and investor-State dispute settlement. “[T]he term itself continues to remain open-ended, contested as well as burdened with conflicting normative assertions: while it conjures community as well as insists on authority and emphasizes rule-boundedness as well as promises enforceability, it does not say very much outright as to its stakeholders and its constituents, those who give it legitimacy and those who are affected by it.” This is particularly the case now given what appears to be an ever-expanding list of elements which conflict with others and there have been complaints of “ideological abuse and generally have been deemed implicit within the rule of law.”³⁴⁰

266. Although the project is only expected to come to fruition in 2022, draft reports of 2018 and a final report of 2020 inform the group’s progress with respect to the content of such definition. The division between the substantive and procedural nature of the rule of law was firmly established from the onset. In 2016, the group agreed on a methodology “to develop a working concept of the ‘rule of law’, which can serve as a conceptual framework for the Committee’s analysis of the interactions of international investment law and investor-state dispute settlement with the rule of law.”³⁴¹ It was therefore “to undertake a preliminary assessment of the understanding of the concept of the rule of law through a survey of various domestic and international legal regimes on the basis of a questionnaire that was drafted and distributed to ILA country representatives entitled “Domestic Rule of Law Questionnaire” (“the Questionnaire”). This Questionnaire addressed both the general conceptual approaches

³⁴⁰ *Ibid* at 2. Peer Zumbansen, “The Rule of Law, Legal Pluralism, and Challenges to a Western-centric View: Some Very Preliminary Observations” (2017) Research Paper No 2017-05 (Osgoode Legal Studies Research Paper Series) at 4; Lord Bingham, “The Rule of law” (2007) 66:1 Cambridge Law Journal 67.

³⁴¹ ILA, *Draft Report* (2019), *supra* note 339 at 5.

to the concept of the rule of law, asked for the sub-elements this concept is understood to mean in the legal order concerned, and asked specifically for the impact the concept of the rule of law has had on the settlement of disputes, both between private commercial actors, and in relations between private and public actors, through arbitration.”³⁴²

267. The results of the Questionnaire are striking. Encompassing both issues of procedure and substance, it reveals the extent to which the rule of law faints away inexorably in a number of countries where it should, instead, prevail.³⁴³ For our purposes, we examine the results which reveal the jurisdictions positions with respect to the independence and impartiality of the tribunals, including appointment of arbitrators, limits on their roles (double hatting), remuneration, roster and general ethical issues.

268. At the moment, the substantive exercise for the determination of the rule of law appears to have yielded more results, or at least have communicated publicly their results, contrary to the procedural aspect investigation. While this dissertation focuses on the procedural determination of the rule of law, our analysis is nevertheless informed by the results of the substantive approach.

269. The ILA’s Rule of Law Committee first conducted a survey of 15 of its member jurisdictions to determine the definition, scope, implementation and overarching approach in domestic situations to the rule of law. The procedural and substantive concerns with respect to international investment law were included in the survey, which provided the occasion for the ILA Rule of Law Committee to assess whether the rule of law in a specific jurisdiction was “thick” or “thin”. The abundant literature on the rule of law in international law has long attempted to provide a working classification to identify the elements of the rule of law by which to abide on the international plane. The rule of law has either been categorized as formal and substantial or thick or thin.³⁴⁴ We retain the latter identification for the purposes of this dissertation.

³⁴² *Ibid* at 6.

³⁴³ *Ibid*.

³⁴⁴ ILA, *Draft Report* (2019), *supra* note 338. ILA, *Draft Report* (2019), *supra* note 338.

270. Following the 2018 report on the domestic survey on the rule of law, the results of which revealed that “to some extent the concept is used differently in the different domestic legal systems”³⁴⁵, the substantive and procedural groups undertook to further their analysis of the rule of law term within the above defined scope.

271. The definition adopted for the 2004 UN SG *Report on the Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies* served as a starting point for the discussions in 2018 and 2019 for the substantive standards of international investment law from a rule of law angle:

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

272. The 2018 Report, in addition to domestic jurisdiction, also provides reports on the United Nations and the European Court of Human Rights, as “in order to study the development of the rule of law in the international context, [the ILA Rule of Law Committee] also asked members to prepare reports on the approach of various international organizations.”³⁴⁶ The founding stones here are set out for our research, by which concepts of European and international investment law, are intertwined. Examined below, in turn, we set out the summaries of the reports for the United Nations, the European Union, the European Convention on Human Rights and the World Trade Organization. Taken as a whole, these reports on how these international organizations have mobilized a working concept for the international rule of law informs our analysis and research. As the Committee observes “[T]here is a certain amount of cross-fertilization as between international

³⁴⁵ Report, 2018, *supra* note 339; ILA, *Draft Report* (2019), *supra* note 338; International Law Association, *Interim Report (2020): Rule of Law and International Investment Law* (ILA, 2020) at 2, online: ILA <<https://www.ila-hq.org/images/ILA/docs/kyoto/SG%20Rule%20of%20Law%20and%20Int%20Investment%20Law%20Kyoto%20Report%202020.pdf>> [ILA, *Interim Report* (2020)].

³⁴⁶ ILA, *Draft Report* (2019), *supra* note 338 at 14.

organizations regarding the development of rule of law principles, though various institutions have their own approaches suitable to the context in which they operate.”³⁴⁷

273. The United Nations report, prepared by Professor August Reinisch, also head of the ILA Rule of Law Committee, examines the UN documents established that can be used to guide the rule of law analysis and the criteria which may be derived from their interpretation. As part of the ILA’s work on the issue, Professor Reinisch’s seminal summary may be used to determine the impact of the rule of law as harnessed in the United Nations systems on the rule of law in international investment law.

274. Reinisch establishes a list of elements of the UN Concept of the Rule of Law:

On the basis of the above findings, it appears that the following elements can be regarded as universally accepted because they are found in UN resolutions adopted by consensus:

§ Core notions of due process and a fair trial referred to as ‘[...] an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice [...].’

§ Access to such dispute settlement, as expressed in ‘the right of equal access to justice for all [...].’

§ Judicial independence and impartiality, identified as ‘essential prerequisite for up- holding the rule of law.’

§ In addition to these, the following elements can probably also be regarded as part of inherent rule of law-requirements for dispute settlement.

§ Consistency and predictability of dispute settlement outcomes as well as transparency.

It seems that there is also some considerable overlap of these UN notions of the rule of law with what the Venice Commission has identified as elements of rule of law requirements for Council of Europe countries.

Although the above-outlined UN concept of the rule of law seems to focus on the qualities of judicial or quasi-judicial dispute settlement methods, it also contains important demands for the other branches of government, requiring the legislator to adopt ‘just, fair and equitable laws’ and the executive branch – just as much as the judiciary – to afford ‘equal protection of the law’ ‘without any discrimination’.³⁴⁸ (Emphasis added)

³⁴⁷ *Ibid.*

³⁴⁸ August Reinisch, “The UN Concept of the Rule of Law” (2019) 22:3 ZEuS Zeitschrift für Europarechtliche Studien 337 at 343.

275. On the relevance of the UN Rule of Law Concept for International Investment Law, Professor Reinisch writes as follows:

This UN notion of the rule of law offers a useful yardstick for the purposes of the ILA Committee on the Rule of Law and International Investment Law. It permits an analysis to assess whether and to what extent the ‘substantive protections found in treaties attempt to ensure government decision-making based on the rule of law.’ Given the focus of the UN’s concept on judicial guarantees, most likely the fair trial or due process aspects contained in the obligation to accord fair and equitable treatment will be of special importance.

At the same time, these procedural elements of the UN’s rule of law-concept offer benchmarks to assess whether and to what extent ‘investment arbitration itself operates in a manner that is consistent with the rule of law.’ This second question has been critically examined by academics and then been adopted by states, questioning the legitimacy of the entire investment arbitration system. The UN concept will again serve as a useful yardstick to assess the rule of law character of investor-state arbitration.³⁴⁹ (Emphasis added)

276. As the findings and conclusions of the group have not yet been published, including the agreed upon definition for the rule of law, whether under the substantive or procedural umbrella, it was not possible to base our research on the working concept as defined by the ILA Rule of Law Committee. However, no matter the complexity and diversity of existing definitions, the criteria which compose the rule of law are reflected through the various definitions.

277. The reform initiated in 2015 by the EU was founded on a preoccupation to strengthen the rule of law in the private system of investment arbitration. Interestingly, the EU considered that to bring the ISDS model to a stricter rule of law standard, a permanent court would comply with criteria which define the rule of law. As Professor Emmanuel Castellarin writes: “as shown by the European Union’s approach in this field, investment arbitration can only be a useful complement to the rule of law within the State if it is reformed to incorporate some elements of permanent courts”.³⁵⁰

278. Castellarin remarks that the introduction of a standing court allows for a strengthened rule of law through legal certainty, procedural fairness and transparency. Legal certainty is confirmed by the introduction of an appeal level. The judicialization of the body and the standard elements of tenured judges, or members, also contribute to an increase in legal

³⁴⁹ *Ibid* at 344.

³⁵⁰ Castellarin, *supra* note 337.

certainty. Procedural fairness is sustained through the nomination of adjudicators on a permanent basis, and transparency is ensured through a variety of mechanisms including the publication of procedural orders, challenges, awards and the holding of public hearings.

279. The rule of law functions as a “model or a value with a strong normative function. As such, it does not only help describe, analyze and legitimize positive law, but also to criticize it and to assess debates about possible reforms.”³⁵¹

280. In the wake of the EU’s reform of ISDS with the introduction of the ICS, a number of legal proceedings were initiated both domestically (Germany, France) and in the EU (Request for *Opinion 1/17*) to assess the compatibility of the new mechanism with the rule of law in these jurisdictions. Germany’s constitutional court ruled in 2016 that the signature and provisional application was constitutional, provided certain conditions.³⁵² France’s *Conseil Constitutionnel* considered the ratification of the CETA to be constitutional by a decision of July 2017.

281. The compatibility of investment arbitration with the rule of law due to its particular nature, has been analyzed both on the substantive and procedural level.³⁵³ ISDS is an essential component of international investment law, and historically has replaced measures of diplomatic protection. Specific issues to procedural aspects have arisen and been debated by legal doctrine.³⁵⁴ For this reason, it is possible to assess only the rule of law’s compatibility with ISDS without also referring to substantive investment protections.

³⁵¹ *Ibid.*

³⁵² Bundesverfassungsgericht, 13 October 2016, 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16; 7 December 2016, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16.

³⁵³ Castellarin, *supra* note 337 at 212, n 13, citing: Yves Fortier, “Investment Protection and the Rule of Law: Change or Decline?” in Robert McCorquodale, ed, *The Rule of Law in International and Comparative Context* (London: British Institute of International and Comparative Law, 2010) 119; Norah Gallagher, “The Rule of Law and Investment Protection” in Robert McCorquodale, *supra*, 137; Photini Pazartzis, “Committee on the Rule of Law and International Investment Law : Working Session” (2016) 77 *International Law Association Reports of Conferences* 331.

³⁵⁴ Castellarin, *supra* note 337 at 213, n 18, 19, citing: Gus Van Harten, “Investment Treaty Arbitration, Procedural Fairness and the Rule of Law” in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 627; John P Gaffney, “The Rule of Law and Alternatives to Investment Arbitration” (2016) 1 *European Investment Law and Arbitration Review* 267; August Reinisch, “The Rule of Law in International Investment Arbitration” in Photini Pazartzis & Maria Gavouneli, eds, *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Oxford: Hart, 2016) 291; Rule of Law Institute of Australia, “International Investment Arbitration and the Rule

282. Backlash against ISDS and real and perceived issues of legitimacy justify a rule of law analysis of its compatibility and contribution with ISDS and ICS. Indeed, “it has become clear that unconditional acceptance of investment arbitration cannot be taken for granted”.³⁵⁵

283. Alvarez summarizes the relevance of assessing the rule of law with respect to the legitimacy crisis of ISDS:

Like good disciples of Tom Bingham, lawyers aspire to adjudicative methods that respect well known rule of law principles: the equal application of the law, a public process leading to clear, consistent, and predictable outcomes, the good faith exercise of interpretative powers by persons who respect the limits of that delegated power, respect for due process for all litigants – all achieved without prohibitive cost or unwarranted delay. Precisely those features which render arbitration attractive as compared to litigation in local court – the possibility for discrete settlement or a formal ruling without publicity, the expeditious avoidance of appellate review, the potential to limit participation to only the two litigants and not transform a discrete bilateral dispute into a messy polymorphous one, and the prospect of selecting adjudicators chosen for their special expertise under a variety of ad hoc arbitral forums – make it an easy bull’s eye for rule of law critiques.³⁵⁶

284. Castellarin cuts across the rich body of literature which attempts to define the rule of law concept by proposing a simple three prong approach, and focuses on (1) legal certainty, (2) procedural fairness and (3) transparency. This, in the words of Professor Reinisch, is the “yardstick”, that will be applied in this dissertation.³⁵⁷

285. **Legal certainty, as the first criteria**, is characterized by clarity, accessibility and predictability of the law.³⁵⁸ It is certainly a core concern in ISDS and central to a rule of law analysis. Indeed, the absence of the *stare decisis* principle in international arbitration poses the risk, *prima facie*, of inconsistency in the body of law created by arbitrators. While it has been shown that, despite the lack of an obligation to follow precedent, arbitrators strive to do

of Law”, *Rule of Law* (12 April 2017) online: Rule of Law <<https://www.ruleoflaw.org.au/international-investment-arbitration/>>; Christian Tietje, “Investor-State Arbitration as Part of the International Rule of Law”, *Völkerrechtsblog* (4 July 2016) online: Völkerrechtsblog <<https://voelkerrechtsblog.org/investor-state-arbitration-as-part-of-the-international-rule-of-law/>>; John Doe, “Investor- state arbitration: rationale and legitimacy. A reply to Christian Tietje”, *Völkerrechtsblog* (6 July 2016) online: Völkerrechtsblog <<https://voelkerrechtsblog.org/investor- state-arbitration-rationale-and-legitimacy/>>.

³⁵⁵ Castellarin, *supra* note 337 at 212.

³⁵⁶ Alvarez, “The Long View”, *supra* note 55 at 9-10; Tom Bingham, *The Rule of Law* (Penguin 2010).

³⁵⁷ August Reinisch, “The Rule of Law in International Investment Arbitration” in Photini Pazartzis & Maria Gavouneli, eds, *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Oxford: Hart, 2016) 291; Rule of Law Institute of Australia, “International Investment Arbitration and the Rule of Law”, *Rule of Law* (12 April 2017) online: Rule of Law <<https://www.ruleoflaw.org.au/international-investment-arbitration/>>.

³⁵⁸ Castellarin, *supra* note 337.

so, there are no safeguards provided to this effect in ISDS. Coupled with the finality of arbitral awards, i.e. the limited grounds for annulment of awards and lack of an appeal mechanism, it can be understood that staunch critics have repeatedly denounced the lack of legal certainty as falling below the rule of law value. While there have been reports of inconsistent awards making different findings on the same issue (see *CME v. Czech Republic* and *Lauder v. Czech Republic*³⁵⁹), there are some justifications as to why perfect legal certainty may not be attainable in the current ISDS. First, BITs sometimes provide for different definitions of similar terms, are outdated or simply of a general nature. In this respect, some have argued that the system is able to self-regulate.³⁶⁰ With more precise treaties building on a wider body of case law, issues of inconsistency are bound to diminish.

286. The proposed EU Investment Court System, as a permanent court, would increase the legal certainty by rendering the ISDS system compatible with precedent and cassation. The appointment of members to a roster for fixed five-year terms, as well as the possibility to review errors of law provided by the appeal level, would also strengthen the rule of law by guaranteeing consistency.

287. **Procedural fairness, as the second criteria**, also stands to be strengthened as a central element of the rule of law. The standing court aims to resolve real and perceived issues of bias in arbitrators. An entire structure of checks and balances exists in ISDS, through framework of arbitral rules, international BITs, domestic laws and soft law instruments to guarantee the fundamental principles of independence and impartiality of adjudicators. Increased access to justice for small and medium enterprises and the strengthening of investor obligations can also help decrease the perceived bias. Indeed, due to the asymmetrical nature of international arbitration which only allows the investor to sue the state, the perceived legitimacy bias has been reported as though awards are vastly in favor of investors. While often denounced as an intrinsically pro-investor system, the evidence does not support this conclusion. Numbers repeatedly reported show only a slight percentage of arbitral awards to be in favor of investors versus of the state. In 2018, for example, Castellarin reported that

³⁵⁹ *CME Czech Republic BV v The Czech Republic* (2003) (UNCITRAL); *Ronald S Lauder v The Czech Republic* (2001) (UNCITRAL).

³⁶⁰ Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?" (2018) 17:1 Chinese Journal of International Law 137.

based on the UNCTAD's database "Investment Dispute Settlement Navigator", 36.5% of awards resulted in a pro-investor finding compared to 27.9% in favor of the state. The rest of the cases being settled or discontinued, it is not possible to provide a wider report.

288. Furthermore, the issue of repeat appointments by the same party is another illustration of the real and perceived issue of bias in appointment of arbitrators.³⁶¹ It bears emphasizing that the flexibility for parties to appoint "their" arbitrator is one of the central tenets of the entire arbitration regime. The selection of expertise and preferred arbitrators does not provide a line of control to the arbitrator's decision. But the perceived legitimacy issue with this system is easily understood. There are, however, no studies proving that arbitral awards are directly linked to favorable decisions in favor of the nominating party.³⁶² There is, however, much literature devoted to the small pool of arbitrators amongst which the vast majority of cases are attributed, the perceived issues with legitimacy and the unconscious bias that might be created by the selection and appointment of arbitrators, and the immense impact of this process on the ISDS legitimacy crisis.³⁶³ The introduction of a roster with fifteen permanent members in the ICS seeks to provide certainty, consistency and end any issues regarding bias. The CETA joint committee is to proceed to appointments for a five-year non-renewable term. Provisions for remuneration and a monthly retainer also mean to reduce any opposition with bias. Lastly, the introduction of a Code of conduct for adjudicators with strict and unprecedented terms is currently contemplated to complete the permanent roster of members. By way of example, a more moderate approach could have been modeled on the WTO's DSB

³⁶¹ Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20:2 *Journal of International Economic Law* 301 [Langford, Behn & Lie, "Revolving Door"].

³⁶² Even in the case of repeat appointments that were challenged for specific arbitrators, they have been consistently rejected. Other than a perceived bias, there is consequently no evidence of real bias.

³⁶³ Langford, Behn & Lie, *supra* note 361; Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2014) at 177: "Arbitration is under recurrent attacks by those who fear that it may undercut the authority of regulation and regulators." See also mandate and work of UNCITRAL Working Group III on Investor-State Dispute Settlement Reform: UNCITRAL, "Working Group III".

³⁶³ Catherine A Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration" (2002) 23:2 *Mich J Int'l L* 341 at 341. See also Catherine A Rogers, *Ethics in International Arbitration* (New York: Oxford University Press, 2014); Charles N Brower & Charles B Rosenberg, "The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded" (2013) 29:1 *Arbitration International* 7, *inter alia*. Langford, Behn & Lie, "Revolving Door", *supra* note 361.

and AB appointment process by providing a mixed method of party selection from a fixed roster.³⁶⁴

289. The dissertation revolves to a large extent to the modifications of the ICS with respect to the appointment of adjudicators and the strengthening of independence and impartiality. The research questions the necessity of such a drastic overhaul on the part of the EU. There exists a slew of other options which are currently envisaged as part of the ISDS reform discussions at UNCITRAL by WGIII.

290. **Procedural transparency, as the third criteria**, finally, is assessed for its use in investment arbitration. Rule of law requires publicity and transparency as a core concept.³⁶⁵ To ensure procedural transparency, the “law must be publicly available and accessible”.³⁶⁶ Because of the public nature of arbitration proceedings and public monies when the state is involved, there is an argument for the necessity of increased transparency. Accordingly, the much sought-after confidentiality of proceedings which is favored by the parties and justify their recourse to arbitration, is now excluded from the system. Already, a number of measures have been adopted to increase and posit transparency as a norm. The entry into force of the 2015 Mauritius Convention on Transparency or the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State provide for a mandatory publicity of awards.³⁶⁷ The ICS and MIC proposed by the EU also contain a number of provisions meant to guarantee a transparent approach of proceedings.

291. **In conclusion**, as the CJEU has now ruled in Opinion 1/17 that the ICS is compatible with EU law, this dissertation focuses on examining whether the rule of law in the EU (1) is the same and (2) can be used to strengthen the rule of law in international investment law.³⁶⁸

³⁶⁴ Castellarin, *supra* note 337 at 215.

³⁶⁵ *Ibid* at 216; Anne Peters, “Towards Transparency as a Global Norm” in Andrea Bianchi & Anne Peters, eds, *Transparency in International Law* (Cambridge: Cambridge University Press, 2013) 534. On investment arbitration, Mathias Wolkewitz, “Transparency and Independence of Arbitrators in Investment Arbitration: Rule of Law Implications” (2016) 1 European Investment Law and Arbitration Review 288.

³⁶⁶ Castellarin, *supra* note 337 at 216.

³⁶⁷ This provision is inspired by a measure which was already in force in a number of countries for their ISDS proceedings, such as the publication by Canada of briefs and awards in NAFTA Chapter 11 proceedings.

³⁶⁸ The Castellarin test is for the rule of law in ISDS. It is not the test for the rule of law in the EU, nor is it meant to be. However, this is not the scope of the dissertation. We seek to apply the ISDS rule of law test to the EU proposal. One criticism could be that the Castellarin test predates the ISDS reform efforts in light of the

The Multilateral Investment Court proposed by the EU to act as a standing court for international agreements complies with the EU rule of law as it is modeled on the ICS. We examine this analysis in the first part of the dissertation.³⁶⁹ The question, however, is whether the rule of law in international investment law requires such a heightened standard. In other words, would it not be possible to consider that other proposals for reform of ISDS might strengthen the rule of law in the system and be considered as compatible, and sufficient, to provide a system conforming to the rule of law? We turn to this investigation in the second part of the dissertation.³⁷⁰ The conclusion of this research will therefore determine whether the EU's reform was not only the unique but also the best way to provide a strengthened rule of law model for international investment law.

292. The scope of the envisaged fundamental reform proposed, both by the EU and before UNCITRAL, render these efforts less likely to succeed in the near future and have been the focus of much critic to this effect. We agree with Emmanuel Castellarin who writes that:

the case of investment arbitration shows that positive law is not always the carbon copy of the rule of law model. In spite of recent developments, ISDS has a still a lot of room for improvement. Solutions in this field can only be effective if they are multilateral. In the hopes of the European Commission, the future network of EU investment protection agreements should lead the evolution from investment arbitration to a permanent multilateral investment court... Nonetheless, the rule of law model will continue to inspire and encourage evolution.³⁷¹

293. The efficient three prong model harnessed by Castellarin will be used as the matrix to assess the extent to which the EU reform, on the one hand, and the international reform initiatives discussed at UNCITRAL to reform ISDS, on the other, provide for a thicker or thinner rule of law model. The theoretical assessment of the models may provide an answer which is satisfactory on the rule of law scale, while proving completely unworkable in practice.³⁷² It is an accepted hypothesis that all reform models proposed for ISDS are, at the

efforts at WGIII. As these efforts are ongoing, there is no way to devise the test for what is a yet to be defined reformed. We argue that this existing test for the rule of law developed by Castellarin in 2018 is actual and developed in full awareness of the ongoing alleged "legitimacy crisis". Sundaresh Menon, "Arbitration's Blade: International Arbitration and the Rule of Law (2021) 38:1 Journal of International Arbitration Volume 38, Issue 1 (2021) 1 – 26.

³⁶⁹ See Part I, below.

³⁷⁰ See Part II, below.

³⁷¹ Castellarin, *supra* note 337 at 217.

³⁷² Charles N. Brower and Jawad Ahmad, 'For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court' (2018) 41 Fordham Int'l L. J. 791; Alvarez, "The Long View", *supra* note 55.

basic level, already more than satisfactory to arrive at the conclusion of a thicker rule of law.³⁷³ Indeed, we submit the fundamental tenets of the rule of law will be satisfied even by the ISDS systems as it currently exists. However, the finesse of the assessment resides in the determination of whether the proposed reform proposes a system by which the rule of law is adequate for the most efficient system to resolve disputes by investors against a foreign state.

294. In sum, as the ILA Committee concludes, “An overarching question is how much leeway there is in establishing the constituent factors of the rule of law. For example, does investment arbitration provide greater access to arbitration albeit with less equality? Or does the rule of law require a constellation of all these principles?”³⁷⁴ This, too, we shall seek to resolve.

CHAPTER 3 THE EUROPEAN LEGAL FRAMEWORK FOR ISDS REFORM

SECTION 1. THE LISBON TREATY AND THE EXPANSION OF COMPETENCES OF THE COMMON COMMERCIAL POLICY TO INCLUDE INVESTMENT

A. The Governance of the Common Commercial Policy by the Commission and the Council before the Lisbon Treaty

295. Before the entry into force of the Lisbon Treaty in 2009, Member States directly negotiated their BITs, and no European investment policy existed as such. It could only be referred to, as Professor Titi suggests, as the best practice of its Member States.³⁷⁵ At the time, France, the Netherlands and Germany had model BITs and were reluctant to give over their competence to the EU.³⁷⁶ The Commission however assured Member States that the EU investment policy would do no more than “be inspired by best practices that Member States

³⁷³ Except for the school which proposes to do away entirely with dispute settlement and a return to Calvo, proponents of which are Sornarajah for the Global South and Sen. Elizabeth Warren for the Global North, among many others.

³⁷⁴ ILA, *Draft Report* (2019), *supra* note 339 at 32; Malcolm Langford, Daniel Behn & Maria Chiara Malaguti, “The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement” (2019) *Academic Forum on ISDS Concept Paper 2019/12* [Langford, Behn & Malaguti, “The Quadrilemma”].

³⁷⁵ Titi, 2015, *supra* note 172.

³⁷⁶ Lavranos, 2013, *supra* note 173.

ha[d] developed”.³⁷⁷ It is important to note that even before the Lisbon Treaty, Member States did not have a full competence for the negotiation of investment treaties, as the EU already had exclusive competence on market access, which covers the pre-establishment phase of the investment. This is the manner in which the EU was already involved in the “elaboration of international investment law norms”.³⁷⁸ The Member States then only had competence over the post-establishment norms. Accordingly, the EU negotiated free trade agreements covering market access and the pre-establishment phase, basing itself on the “EU Minimum Platform on Investment”, which served as a template for the negotiation of EU free trade agreements.³⁷⁹

296. The desire to strengthen the EU’s external economic action, and specifically to “enhance its role in the elaboration of international investment norms” justified the transfer of competence from Member States to the EU of “foreign direct investment” in the Lisbon Treaty.³⁸⁰ The addition of “foreign direct investment” at article 207(1) TFEU, however, triggered a heated debate. Practitioners, academics and policy makers were at odds on the scope of the new power of the EU regarding investment, and in particular as to whether ISDS was a shared competence.³⁸¹

B. The Rebalancing of Institutional Power with The Lisbon Treaty and the Introduction of an Increased Role for the Parliament

³⁷⁷ EC, *Resolution 296*, *supra* note 174 at paras 9, 18, 19; EC, *COM(2010)343 final*, *supra* note 174 at 5.

³⁷⁸ Fina and Lentner 2016.

³⁷⁹ E.g., *EU-CARIFORUM*; *EU-Korea*, *supra* note 176. See Titi 2015, *supra* note 172. (“EU Council, Minimum Platform on Investment, online: Doc. 15375/06, 27 November 2006, <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1208&context=scujil>).

³⁸⁰ Bungenberg & Hobe, 2015, *supra* note 180.

³⁸¹ Bungenberg, Griebel & Hindelang, 2011, *supra* note 181; Bungenberg, 2010, *supra* note 181; Marianne Dony, “L’avis 2/15 de la Cour de justice : un ‘jugement de Salomon’?” (2017) 53:3 RTDE 525 at 548 [Dony, 2017]. Professor Dony analyzes the findings of the Court that chapter 9 of the EU-Singapore Agreement is of shared competence (para 243 of *Opinion 2/15*) and concludes therefore that the agreement may not be signed by the EU alone (para 244). This conclusion has baffled academics and practitioners alike, as there is no legal obligation that an agreement be mixed if a part is of shared competence, it could be signed by the EU itself. It is therefore more of a political decision. Kleinman and Kübek also confirm this interpretation: David Kleimann & Gesa Kübek, “The Future of EU External Trade Policy - Opinion 2/15: Report from the Hearing”, *EU Law Analysis* (4 October 2016) online: EU Law Analysis <<http://eulawanalysis.blogspot.com/2016/10/the-future-of-eu-external-trade-policy.html>> [Kleimann & Kübek, “The Future”, 2016].

297. The Lisbon Treaty had three major impacts on the CCP.³⁸² First, to “increase the coherence and the efficiency of the European Union’s external action”, it meant to combine all external actions from the EU, including its trade policy. This means that when deciding on its trade policy, the Commission must go further than simply considering the economic liberalization agenda and take into account considerations pertaining to all external action of the EU. Second, the Treaty granted more power to the EU Parliament to decide and approve trade policy. The EU legislation for the implementation of trade policy would now effectively be decided by the EU Parliament and the Council.³⁸³ Additionally, the Commission is now under the obligation to report regularly to the special committee of the Parliament on the state of negotiations.³⁸⁴ At any rate, the Parliament must give its consent prior to the adoption of any new agreement. Finally, the third major modification was to clarify the competences of the EU in trade.³⁸⁵ Although it has now been demonstrated that even more clarity might have been appropriate, with recent Opinion 2/15 confirming EU’s shared competence for ISDS and portfolio investments only.³⁸⁶

298. The transfer of competence of foreign direct investment to the EU per article 207(1) was also accompanied by an increased power granted to the European Parliament and the Council in their approval of the CCP. The ordinary legislative procedure (art. 207(2)) was introduced in the Common commercial policy. The EU Parliament was therefore granted the most new power, with article 218(6) TFEU, providing for its necessary consent to any

³⁸² Anne Pollet-Fort, “Implications of the Lisbon Treaty on EU External Trade Policy” (2010) Background Brief No 2 (EU Centre in Singapore).

³⁸³ TFEU, *supra* note 171, art 207(2): “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.”

³⁸⁴ *Ibid*, art 207(3), *in fine*: “Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.”

³⁸⁵ Marise Cremona, “Shaping EU Trade Policy post-Lisbon : Opinion 2/15 of 16 May 2017 : ECJ, 16 May 2017, Opinion 2/15 *Free Trade Agreement with Singapore*” (2018) 14:1 *European Constitutional Law Review* 231.

³⁸⁶ *Opinion 2/15*, *supra* note 181 at para 305; Dony, 2017, *supra* note 381 at 527; Kleimann & Kübek, “The Future”, 2016, *supra* note 381.

agreement covering foreign direct investment for their adoption.³⁸⁷ In addition, the Parliament was also granted the right to regular information on negotiations' progress (art. 207(3), 218(10) TFEU).

299. The EU investment policy shift between the old Member States practices and the new standards in the new generation agreements (CETA, TTIP, EU-Singapore) represents the shifting paradigm in the evolution in the investor state dispute settlement systems.³⁸⁸ Besides causing new internal challenges regarding existing intra-EU BITs³⁸⁹, as well as on the role of subnationals³⁹⁰, the content of the new EU investment policy can be considered as modern and innovative in many regards. Stemming from a dispute resolution model inspired by international commercial arbitration and thus ensconced in private international law, the EU's investment policy and proposal for the ICS now positions its treaties and dispute resolution mechanism squarely within public international law.

300. Professor Titi noted that with its nascent investment policy

Europe marks its distances with the old approach of the member states and appears eager to set its own "model". While broadly in harmony with the new generation of North American investment treaties, the nascent EU policy aims to improve international investment law in innovative ways, targeting both substantive and procedural protections, and leading to a yet newer generation of international investment treaties³⁹¹.

301. Professor Titi was then exploring whether the EU would manage, by setting a new EU standard, to "change the face of international investment law as we know it".³⁹²

302. Effecting a powerful change at the procedural level, with the replacement of ISDS with a permanent court system; playing an instrumental role in the initiation of work by WGIII at UNCITRAL on the reform of ISDS and the potential multilateral investment court (MIC), as well as on the substantive level, with increased investor protections, balanced with

³⁸⁷ Catharine Titi, "The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead" (2017) 14:1 Transnational Dispute Management.

³⁸⁸ The paradigm shift referred to here is from the arbitration system proposed traditionally in BIT, and which the EU has done away with and replaced with a permanent investment court, modelled on the WTO.

³⁸⁹ *Achmea*, *supra* note 293.

³⁹⁰ The blockage by Wallonia of Belgium's signature of CETA, resulting in *Opinion 1/17*, Request from Belgium to CJEU on compatibility of ICS to EU law, and other questions related to CETA, 6 September 2017.

³⁹¹ Titi, 2015, *supra* note 172 at 639.

³⁹² Titi, 2015, *supra* note 172.

the recognition of the State to regulate, together with the inclusion of progressive measures, one could already conclude that the new EU standards change the face of international investment law. But while these modifications make for an innovative positioning of the EU, a number of other factors should be considered before coming to this conclusion. China's impact on the geopolitical redistribution³⁹³ and the new American approach favoring bilateralism with a disclosed intent on destroying multilateralism compete with the EU's innovative approach to establishing itself as a leader in investment policy. Their aggressive approach to trade may either dampen the EU's innovative stance or allow it to establish itself as leader.

C. A New Era of EU PTAs: Benefits and Limits for the Regulation of Foreign Investments

303. New generation trade agreements now follow comprehensive and progressive trade agendas. These new treaties are characterized by the widened scope of trade agreements. Previously former FTAs that dealt solely with tariffs and trade barriers, these new generation agreements now include chapters on ecommerce, movement of business persons, environmental and social norms. BITs have been increasingly included into new generation FTAs, such as the TTIP, the CPTPP or the CETA, to name but a few of the more recent comprehensive mega-regional agreements.

304. One of the most important developments in the new generation agreements is the inclusion of human rights and social and environmental norms. Since 2011, chapters in EU FTAs on sustainable development which include environmental and social rights. The focus is not anymore only on the free but also on the fair trade. The non-binding promotional approach of these chapters is often the focus of criticism, whilst others are considering it a major evolution. Responding to critics that free trade is detrimental to social, environmental

³⁹³ Desierto, *supra* note 187.

and human rights, the integration of provisions on the issue answers the detractors of the agreements.³⁹⁴

305. While we notice a proliferation of agreements on these issues separately (Paris Agreement, UN convention on business and human rights, e.g.), the meeting of trade with environment, social and human rights issues is a long overdue one.

306. There is a specific tie between investment specifically and environmental, social and human rights. The values of the EU define its progressive trade agenda. The inclusion of chapters integrating social and environmental norms can be considered as major progress. While other instruments are increasingly taking them into account, even considering entire instruments on these topics alone (such as the new convention on business and human rights), the integration of human rights, social rights and environment is done both horizontally and vertically, i.e. through dispositions throughout the FTAs and specific chapters.

307. One of the main criticisms is that these provisions have no mandatory force, ie that they are not obligations as there are no sanctions. They are often qualified of promotional, rather than mandatory or sanctionable, provisions. This is nonetheless a spectacular development, whose evolution can be traced through the recent agreements signed by the EU.³⁹⁵ Much will of course ride on the EU's partner, especially in the case of human rights. We can thoroughly expect the EU-China BIT to contain very different provisions on human rights than CETA or examine the exceptions in certain agreements themselves, such as the case of Vietnam in the CPTPP.

³⁹⁴ Jean-Michel Marcoux, *International Investment Law and the Evolving Codification of Foreign Investors' Responsibilities by Intergovernmental Organizations*, 2017, online: <<https://dspace.library.uvic.ca/handle/1828/7942>>.

³⁹⁵ Nour Nicolas, "Recent Clauses Pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laudable Success or Disappointing Failure?", *Kluwer Arbitration Blog* (23 July 2019) online: Kluwer <<http://arbitrationblog.kluwerarbitration.com/2019/07/23/recent-clauses-pertaining-to-environmental-labor-and-human-rights-in-investment-agreements-laudable-success-or-disappointing-failure/>>.

SECTION 2 THE LIMITS ON THE EUROPEAN UNION COMPETENCE ON INVESTMENT

A. CETA: an Innovation with Unforeseen Legal Consequences

308. On 30 October 2016, Canada and the EU signed the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). The most ambitious agreement to date, the agreement covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers. The EU took the occasion to present a fundamental reform to ISDS by introducing the Investment Court System (ICS). This unexpected and rapid reform stunned most actors. The myriad of challenges that need to be addressed by CETA and the new EU investment policy providing for the ICS goes far beyond the scope of a doctoral dissertation. We focus on a core tenet of the reform introduced by the ICS, pertaining to the modifications to the selection of adjudicators, with the view of strengthening the rule of law, quelling worries about the independence and impartiality of arbitrators and therefore restoring legitimacy to the dispute resolution method between investors and states in international treaties.

309. Aside from the ICS, the MIC and the introduction of new provisions of a wider scope of the agreement (human rights, environment, labor standards), all related to the substance of the CETA, there are a number of structural issues with the CETA. First, we examine the issue of provisional application and ratification, before turning, second, to the evolution of the EU's approach to intra-EU BITs.

B. Issues with CETA's provisional application and ratification

310. The entry into force of the Lisbon Treaty in 2009 had a major impact on the sharing of competences and their distribution, clarifying their legal origin in the founding treaties while codifying the criteria developed by case law. By confirming the rebalancing of institutional powers and granting a stronger participation to the Court and Parliament in a number of fields, the Lisbon Treaty confirmed the evolution of the EU founding treaties. By simplifying the procedures introduced by the Treaties of Maastricht, Nice and Amsterdam,

the Lisbon Treaty fills a number of legal gaps, among which the negotiation and ratification of treaties by the EU. But we may wonder what the use is of having the power to negotiate a treaty if it is then not possible to ensure its implementation? That is the question which Member States and the EU must answer regarding CETA's ratification. It makes it seem that the Lisbon Treaty did not go far enough in its modifications to the distribution of competences. This section reviews the distribution of competences under the Lisbon Treaty, and evaluates their impact on the negotiation and ratification of treaties.

311. The recognition of the EU's legal personality grants the latter its power to conclude treaties. Yet, despite major improvements such as the elimination of the pillars in the former treaties, and the framing of external policies in a more cohesive framework,³⁹⁶ we regret that the external competences were not integrated together within a common section of the Treaty.³⁹⁷ In order to properly analyze the issues of the impact of the distribution of competences on the negotiation and ratification of treaties, the elements found in various parts of the Lisbon Treaty, which has codified many developments in jurisprudence, should be regrouped. It is also necessary to take into account the latest interpretations of the Court, which have, *inter alia*, modified the distribution of competences related to the common commercial policy. It is a good illustration of the eternal conflict between "the classic theories of international organizations and the ambitious aims of a European integration."³⁹⁸ Such a distribution of competences also brings about a devolution of the competences of Member States to the European Union.

312. That is the question to which an answer is sought as Member States have undertaken the ratification process for CETA, which leads us to believe that the amendments to the Lisbon Treaty on distribution of competences did not go far enough.

313. There remain many problems at the level of the external actions of the European Union under the Lisbon Treaty, due to the disintegration of the distribution mechanisms and

³⁹⁶ Isabelle Bosse-Platière, *L'article 3 du Traité UE : recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne* (Bruxelles : Bruylant, 2009). See also Eleftheria Neframi, *Objectifs et Compétences dans l'Union européenne* (Bruxelles : Bruylant, 2012). Article 21 TEU enumerates the principles and objectives upon which lies the UE foreign relations policy.

³⁹⁷ Myriam Benlolo-Carabot, Ulas Candas & Eglantine Cujo, eds, *Union européenne et droit international, En l'honneur de Patrick Daillier* (Paris : Pedone, 2012) at 266 [Benlolo-Carabot, Candas & Cujo].

³⁹⁸ *Ibid.*

the various and different sectorial approaches that remain. The consequences of the distribution of competences on the negotiation and ratification of treaties is thus examined mainly in terms of the evolution of the common commercial policy and general economic relations. “These basic tenants of the external action of the EU”³⁹⁹ which are based on the founding treaties of a policy which, is supposedly founded on exclusive competence, have never ceased to evolve and develop. It is also the most recent example of the problems attributed to the distribution of competences, and of the fact that the Treaty of Lisbon is far from clear, coherent and concise in this regard.

314. The crucial issue is at the level of the ratification of treaties, in particular of mixed agreements, although one must not forget the challenges posed by the negotiation of treaties *per se*. In fact, the negotiation process might be where one may find solutions to ensure the ratification and implementation of mixed agreements when Member States do not ratify a treaty, or only ratify part of it.

315. The EU has the right to conclude treaties by itself in areas of exclusive external competence, either explicitly (art. 3 TFEU) or implicitly (art. 216 TFEU), which codifies case law in this regard. However, when a treaty also deals with shared competences, the EU can only conclude a mixed agreement, which is subject to a specific negotiation process, and requires ratification by Member States. To compensate for the inevitable delays due to the ratification by Member States, most of them having to respect internal procedures based on national law, agreements can be implemented on a provisional basis.

316. The evolution of the distribution of competences since the entry into force of the Lisbon Treaty has however clearly shown there remain some issues, for example caused by the introduction in the Common commercial policy on the issue of foreign direct investments, and the unending discussions which led the CJEU to declare that the mechanism for the resolution of disputes between investors and States and the issue of investment portfolios was a shared competence. The issues with regard to the distribution of competences and the challenges posed by the ratifications underway are an excellent example of these problems. Moreover, *Opinion 1/17* of the Court on the compatibility with European law of the new

³⁹⁹ *Ibid* at 269.

permanent court on investments within CETA, the ICS, was eagerly anticipated⁴⁰⁰ and led many to imagine worst case scenarios. Thankfully for the EU, the CJEU confirmed the ICS' compatibility with EU law, including fundamental rights, in its *Opinion 1/17* of 30 April 2019. A decision by the Court confirming this incompatibility could have had a major impact, forcing the Commission to completely overhaul its commercial and investment policies.

317. This analysis leads us to conclude that the EU, due to the distribution of competences with its Member States, risks being considered as an unreliable partner for the negotiation of treaties if it does not resolve these pressing internal issues. Recent developments which have impacted the distribution of competences between the EU and its Member States, in particular concerning mixed agreements, make it possible to deal with a classic problem in a new way, and demonstrates the conflicts between compatible but different jurisdictional frameworks such as international law and European law.

1. *The negotiation and ratification of treaties by the European Union under the Lisbon Treaty*

318. In order to put into proper context the new challenges brought about by the modifications of the Lisbon Treaty as regards the EU's capacity to conclude international agreements, it is essential that the distribution of competences under the Treaty be properly understood in so far as it relates to exclusive, shared or supporting competences in matters of external action by the EU, and to differentiate explicit and implicit external competences. The objective is to clear a path through this "jungle of competences."⁴⁰¹

⁴⁰⁰ Advocate General Bot, in his conclusions issued on January 29, 2019, determines that the new investor-state dispute settlement mechanism proposed by the EU in CETA, the permanent investment tribunal, is compatible with European law, including fundamental rights. At the time this Opinion was issued, it was foreseen that the impact of this decision could be major and force the Commission to completely review its approach to the settlement of investor-State disputes, in the event that the Court were to conclude that it is incompatible with European law. The conclusions of the Advocate General did not, however, make it possible to presume the decision of the Court. Indeed, in the latest decisions of the Court on the matter, e.g., *Opinion 2/15*, the Court did not follow the conclusions of the Advocate General.

⁴⁰¹ Marcus Klamert, *The principle of loyalty in EU Law* (Oxford : Oxford University Press, 2014). It is always useful to clear the jungle first, before refining our analysis of the threats lurking there. See also Gesa Kübek, "The non-ratification scenario: legal and practical responses to mixed treaty rejection by Member States" (2018) 23:1 European Foreign Affairs Review 36.

319. The Lisbon Treaty has confirmed the legal personality of the European Union (art. 47 of the TEU), and its ability to conclude and negotiate international agreements on matters of its competence (Arts. 216-219 TEU).⁴⁰² The EU is governed by the principle of specialty which allows for its exercise of the competences attributed by its Member States in matters governing the conclusion of international agreements, in combination with the principle of the distribution of competences.⁴⁰³

2. Exclusive, shared and supporting, coordinating and complimentary competences

a. Exclusive Competences

320. The Lisbon Treaty has greatly contributed to the clarification of the distribution of competences. Exclusive competences are explicitly mentioned in Part 1, Articles 2 to 6; they are attributed to the European Union, which is alone able to legislate and adopt binding acts (art. 2(1)). The EU has exclusive competence in matters related to the customs union, competition rules, monetary policy, commercial policy and the protection of marine resources.⁴⁰⁴

321. The Common commercial policy has widened these competences in so far as it now includes direct foreign investments, trade in services and the commercial aspects of intellectual property (art. 201(7) TFEU). It was previously limited to trade in goods, as confirmed by *Opinion 1/94* which had not recognized the external exclusive competence of the European Community to conclude agreements under the WTO and had excluded

⁴⁰² But not beyond (*Declaration no 24* annexed to the *Lisbon Treaty*).

⁴⁰³ Benlolo-Carabot, Candas & Cujo, *supra* note 397397 at 266; Loïc Grard, “L’Union européenne sujet de droit international” (2006) 110:2 RGDIP 337 at 341.

⁴⁰⁴ *TEU*, *supra* note 90, art 3(1) : “The Union shall have exclusive competence in the following areas : (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.”

intellectual property from its exclusive competences.⁴⁰⁵ The Lisbon Treaty now includes these new areas which are considered to be part of a wider commercial policy, particularly for new generation trade agreements. Transports remain however excluded from the common commercial policy (art. 207(5)) in so far as they are specifically dealt with in Arts. 90-100 TFEU). Agreements can only be concluded by the EU alone if the criteria for implicit external competence are satisfied. The consequences of such an enlargement of the scope of the CCP by way of Article 207 and their impact on the negotiation and ratification of treaties are examined below.

b. Shared Competences

322. Article 4 lists the shared competences and adds that any competence that is not specified in Articles 3 to 6 is a shared competence.⁴⁰⁶ Member States thus share their competence, and must ratify agreements regarding the internal market, social policy, environment, energy, area of freedom, security and justice (e.g. Readmission Agreements under art. 79 (3)). It should be noted however that the EU maintains its competence to carry out activities in the areas of research, technological development and space, as well as development cooperation and humanitarian aid, without Member States being prevented from exercising theirs (e.g. through administrative agreements of cooperation) (art. 4 (3)(4)).

323. These provisions are supplemented by Title V of the TFEU, which deals with the external activities of the EU and allows the distribution of competences in international

⁴⁰⁵ *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94 [1994] ECR I-05267 [*Opinion 1/94*].

⁴⁰⁶ *TEU*, *supra* note 90, art 4: “1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 2 B and 2 E. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.”

agreements, including specific provisions related to foreign policy and common security (CFSP, Arts. 23 to 46). Even though the Lisbon Treaty eliminated the three pillars from the former treaties and included the CFSP in the external competences of the EU, the CFSP is still subject to particular rules.

324. The EU bases in particular its competence to conclude international agreements on Article 3(2)⁴⁰⁷ in so far as it can impact common rules or modify their scope. It must therefore be read in conjunction with Article 216(1) to the extent that it recognizes the EU's competence to conclude international agreements. These two articles recognize the implicit exclusive competence of the EU and are analyzed below.

325. Finally, Article 218 of the TFEU constitutes the foundation for international agreements concluded by the EU, outlining the process for their development and management. This article also allows for the conclusion of association agreements (art. 217 of the TFEU) and neighborhood agreements (art. 8(2) of the TFEU).

c. Explicit and Implicit External Competences

326. The principle of distribution of competences recognizes *a priori* explicit competence as defined in the Lisbon Treaty. However, implicit competence⁴⁰⁸, based on jurisprudence, is also codified by Articles 216(1) and 3(2) of the Treaty. Article 216(1) thus recognizes the jurisprudence of the Court by acknowledging that the competence of the EU to conclude international treaties can be implicit or explicit:

⁴⁰⁷ TFEU, *supra* note 171, art 3(2) reads as follows : “The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”

⁴⁰⁸ This theory has been widely discussed by the doctrine. See for instance, Benlolo-Carobot, Candas & Cujo, *supra* note 425 at 270270, n 97, citing : Valérie Michel, “Les compétences externes implicites : continuité jurisprudentielle et clarification méthodologique” (2006) no 10 Europe; Jean Raux, “Le droit des relations extérieures, La dynamique des compétences implicites en question” in *Les dynamiques du droit européen en début de siècle : Études en l’honneur de Jean-Claude Gautron* (Paris : Pedone, 2004) 793; Alan Dashwood, “Implied external competence in the EC” in Martti Koskenniemi, ed, *International Law Aspects of the European Union* (The Hague: Kluwer Law International, 1998) 113.

The Union may conclude an agreement with one or more third countries or international organizations where the treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the union's policies, one of the objectives referred to in the treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

327. Article 3(2) confirms the exclusive competence of the EU in matters related to Article 216(1) in so far as it specifies that:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

328. Although now codified by the Lisbon Treaty, it may be useful to give an overview of the jurisprudence which clarified these principles. The ERTA Opinion constitutes the basis for the recognition of the theory of implicit external competence,⁴⁰⁹ which is based on the existence of an internal competence. In its review of the European Agreement on Road Transport in order to answer the question whether the exclusive competence should be expressly specified, the Court answered in the negative, and recognized the principle of parallelism between internal and external competences, stipulating that such competence results “not only from an explicit distribution by the treaty (...) but can also be the result of

⁴⁰⁹ The doctrine is prolific on this issue. See Denys Simon, “Les relations extérieures de la Communauté économique européenne à la lumière de l'arrêt de la Cour de justice des Communautés, *Commission contre Conseil*” in Denys Simon, E. Grillo Pasquarelli & Nicole Kleman, eds, *La Communauté économique européenne dans les relations internationales* (Nancy : Centre européen universitaire de Nancy, 1972) 3-131; Louis, Jean-Victor, “Compétence internationale et compétence interne des Communautés” (1971) *Cahiers de droit européen* 479 ; Michel Waelbroeck, “L'arrêt AETR et les compétences externes de la Communauté économique européenne” (1971) *Integration* 79; Franklin Dehousse & Carole Maczkovics, “Les arrêts open skies de la Cour de justice: l'abandon de la compétence externe implicite de la Communauté?” (2003) no 102 *Journal des tribunaux - Droit européen* 225; Paolo Mengozzi, “The EC External Competencies: From the ERTA Case to the Opinion in the Lugano Convention” in Luis Miguel Poeso Pessoa Maduro & Loic Azoulai, eds, *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford : Hart Publishing, 2010) 213 [Poeso Pessoa Maduro & Azoulai, *The Past and Future of EU Law*]; Robert Kovar, “L'affaire de l'AETR devant la Cour de justice des Communautés européennes et la compétence internationale de la CEE” (1971) *Annuaire français de droit international* 386, W J Ganshof van der Meersch, “Les relations extérieures de la CEE dans le domaine des politiques communes et l'arrêt de la Cour de justice du 31 mars 1971” (1972) *Cahiers de droit européen* 127 ; Piet Eeckhout, “Bold Constitutionalism and Beyond” in Poeso Pessoa Maduro & Azoulai, *The Past and Future of EU Law, supra*, 218; D O, “L'arrêt du 31 mars 1971” (1971) *Revue du Marché Commun* 211 ; John Temple Lang, “The ERTA Judgment and the Court's Case-law on Competence and Conflict” (1986) *Yearbook of European Law* 183, Joël Rideau, “Recueil Dalloz Sirey” (1972) *Jur* 456; Jean Raux, “La Cour de justice des Communautés et les relations extérieures de la CEE” (1972) *Revue générale de droit international public* 36.

other articles of the treaty or of actions taken, in application of these provisions, by institutions of the Community.”⁴¹⁰

329. The “Open Skies”⁴¹¹ Opinions that followed clarified the criteria for common distribution, by excluding any international action by Member States in an area already considered or covered by common rules, which means in effect that when common rules have already been established by the EU, it has exclusive competence, either explicit or implicit.⁴¹²

330. A few years after its fundamental decision in the ERTA Opinion, the Court further enlarged its interpretation of the distribution of competences by recognizing the possibility of an implicit external competence, even if common rules had not been previously established. In its *Opinion 1/76*,⁴¹³ it recognized this possibility if such rules were “adopted upon the conclusion and implementation of an international agreement.”⁴¹⁴ The Commission had asked the court’s opinion on whether the Treaty was compatible with the Draft Agreement establishing a European laying-up fund for the inland waterways vessels. The Court recognized in its *Opinion 1/94* the possibility of adopting an internal legislation to

⁴¹⁰ *Commission of the European Communities v Council of the European Communities*, C-22/70, [1971] ECR I-0026 at para 16 [*AETR*]. Although the literature on the subject is rich, the contribution of France Morrisette deserves to be underlined by her original approach and her participation in the parallel discussion of European and Canadian skills, by a final section of the book drawing lessons from the European experience, comparing it with Canadian treaty-making powers: France Morrisette, *Le “parallélisme” comme principe général sous-jacent à la compétence de conclure des traités: Leçons à tirer de l’Union européenne* (Montreal: Winston & Lafleur, 2014).

⁴¹¹ *Commission of the European Communities v Kingdom of Denmark*, C-467/98, [2002] ECR I-09519; *Commission of the European Communities v Kingdom of Sweden*, C-468/98, [2002] ECR I-9575; *Commission of the European Communities v Republic of Finland*, C-469/98, [2002] ECR I-09627; *Commission of the European Communities v Kingdom of Belgium*, C-471/98, [2002] ECR I-09681; *Commission of the European Communities v Grand Duchy of Luxembourg*, C-472/98, [2002] ECR I-09741; *Commission of the European Communities v Republic of Austria*, C-475/98, [2002] ECR I-09797; *Commission of the European Communities v Federal Republic of Germany*, C-476/98, [2002] ECR I-09855; *Commission of the European Communities v Kingdom of the Netherlands*, C-523/04, [2007] I- 03267

⁴¹² *AETR*, *supra* note 438 at para 17 : “In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.”

⁴¹³ *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion 1/76, [1977] ECR I-00741 at para 3 : “The Court has concluded *inter alia* that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.”

⁴¹⁴ *Ibid* at para 4.

establish an implicit external competence, thus allowing institutions to negotiate with third countries by way of a flexibility clause (art. 352 TFEU).⁴¹⁵

331. The distribution of competences, although clarified by the Lisbon Treaty, could still benefit from a further revision in the interest of the cohesiveness of the policies of the EU, as stipulated in Article 21 of the TFEU, which recognizes the objective of cohesiveness. Having thus described how competences are distributed, their scope and their basis, it is now possible to outline in the next section the process of negotiation and ratification of international agreements on exclusive and shared competences.

3. The process of negotiation and ratification and the role of European Institutional Actors

a. The negotiation process

332. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy of the CFSP, initiates negotiations by submitting a proposal to the Council in the areas of the competence of the EU (art. 218(3)). For economic and monetary policy, they are submitted by the Council either directly by the European Central Bank, or the Commission after consultation with the European Central Bank (art. 219 (1)).

333. The negotiation mandate is then adopted by the Council, who, depending on the subject of the agreement considered, designates a negotiator (art. 218 (3)). It is at this point where an obligation of loyalty by Member States is crucial; they can only act in close

⁴¹⁵ TFEU, *supra* note 172, art 352(1): “ If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.” See also Jurisclasseur Europe, Fasc. 192-1, Accords internationaux, para 13 [Jurisclasseur Europe]; Jean-Victor Louis, “La compétence de la CE de conclure des accords internationaux” in Jean-Victor Louis, Marianne Dony & Jacques Mégret, eds, *Le droit de la CE de l’Union européenne : Commentaire J. Mégret*, vol 12 (Bruxelles : Éditions de l’Université de Bruxelles, 2005) at 73-74.

cooperation with the Union when negotiating international agreements. This is vital to guarantee the cohesiveness of the EU's actions and its international representation.⁴¹⁶

334. The Council designates the negotiator in all cases, except for the negotiations of commercial agreements, which are carried out under the aegis of the Commission (art. 207 (3)) and those for the CFSP, which are led by the High Representative of the Union for Foreign Affairs and Security Policy. The Commission is associated with the negotiations on economic and monetary policy. The Council may address directives to the negotiator and designate a special committee (art. 218 (4)). For the commercial policy only, the Commission must report regularly to a special committee (art. 207 (3)). In practice, the Commission has gained in importance and regularly intervenes in the negotiations. The European Parliament is also regularly informed during negotiations on commercial policy (art. 207(3)). For all other negotiations, the European Parliament is regularly and fully informed at all stages of the procedure (art. 218(10)). Negotiations are concluded by the signature of the agreement by the negotiator, who submits a final report to the Council at the conclusion of the Agreement.

335. When an agreement covers shared competences, it is automatically concluded as a mixed agreement, requiring ratification by the EU and each of its Member States. In order to obviate the delays inherent in the ratification by all Member States, who are subject to their own internal legislation requiring in most cases the holding of a referendum, and sometimes also legislative amendments, mixed agreements can enter into force on a provisional basis.

336. The negotiation process for a mixed agreement follows the general procedure provided for agreements under the exclusive competence of the EU, and that of Member

⁴¹⁶ *Commission of the European Communities v Grand Duchy of Luxembourg*, C-266/03, [2005] ECR I-04805, as referred to in *Commission of the European Communities v Federal Republic of Germany*, C-433/03, [2005] ECR I-06985 at para 43, 66, respectively : “If Member States were free to conclude international agreements affecting the common rules, that would compromise the attainment of the objective pursued by those rules as well as the Community’s tasks and the objectives of the Treaty (Case C-266/03 *Commission v Luxembourg* [2005] ECR I-0000, paragraph 41)”; “The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation (Case C-266/03 *Commission v Luxembourg*, paragraph 60).”

States. The obligation of close cooperation, inherent in the obligation of loyalty enshrined by Article 4 (3) of the TFEU, guides the relations between Member States and the Union.⁴¹⁷

337. In short, the negotiation procedure for treaties in areas of exclusive competence of the EU are simple. And the European Parliament has greater powers, if only because it must be fully and regularly informed on the negotiations. It is at the level of the negotiation of mixed agreements, and in particular their ratification by Member States and by the EU, that the impact of the distribution of competences is most strongly felt.

b. The procedure for ratification

338. Mixed agreements are concluded in a joint but differentiated manner; joint in so far as they are signed and ratified by the European Union and its Member States but differentiated to the extent that different timelines are involved.⁴¹⁸

339. Mixed agreements must be ratified by Member States following their national legislation, which may often entail holding a referendum.⁴¹⁹ The various steps to be followed are outlined in Article 218, although nothing is provided for the specific effects of mixed agreements, from their ratification to their provisional implementation.

340. Obvious deficiencies in the substantive texts, and the lack of jurisprudence in this regard, leads one to expect new impacts on the distribution of competences on the ratification of treaties. The threat by several States to refuse to ratify CETA offers some indications of what could be done in this specific case.

4. The delicate balance between institutional powers and the role of various institutional players

⁴¹⁷ Hillion Christophe, “Cohérence et action extérieure de l’Union européenne” in Eleftheria Neframi, ed, *Objectifs et Compétences dans l’Union européenne* (Bruxelles : Bruylant, 2012).

⁴¹⁸ Jurisclasseur Europe, *supra* note 415 at paras 61-64.

⁴¹⁹ For *CETA*, this was the case for the Netherlands.

341. The Lisbon Treaty, while defining with greater clarity the scope of external competences, has also enabled a review of the role of European institutions. The European Parliament is thus invested with greater responsibilities in many areas, including the negotiation and conclusion of international agreements. This section attempts to identify the responsibilities of various institutions within the framework of the CCP only, thus bringing into context the analysis that follows in the second section.

342. The Commission is always responsible for negotiations on the CCP, and the Council decides on the terms of reference. The Parliament must be frequently informed subsequently on the progress of negotiations and give its approval before an agreement can be concluded. Finally, the Court still plays a fundamental role, either through its Opinions or subsequent decisions. Its most recent decisions continue to define the scope of competences for trade and investment by correcting the deficiencies observed in the Lisbon Treaty. Its fundamental contribution is determining systematically how the European Union is using its external competence, and we shall see how it provides a most opportune contribution to the recent decision on the free-trade agreement between the European Union and Singapore (*Opinion 2/15*), which had a profound impact by its decision that the system for the resolution of disputes between investors and States was a shared competence (and not an exclusive one as claimed the Commission). This decision was of major importance for the following negotiations on commercial matters. Following this decision, the Commission approved a new approach: chapters on investments were extracted from general free-trade agreements and thus negotiated and concluded separately.

343. The fundamental role of the Court as the guardian of Treaties must not be forgotten – preliminary rulings and interpretation requests are the foundation of the legal legitimacy of the system. The following sections will review in part the impact of the interpretations of the Court on the subject at hand.

C. Challenges in the sharing of competences between the European Union and its Member States

344. Although the Lisbon Treaty clarified many issues, there remains several unanswered questions about the distribution of competences. The CCP, a long-standing subject of discussion on its evolution as an exclusive external competence, is at the heart of the matter. The impact of the distribution of competences between the EU and its Member States can be illustrated by the two most recent agreements that have been concluded since the entry into force of the Lisbon Treaty, the EU-Singapore Free Trade Agreement (EUSIFTA), and the CETA (CETA), and the travails of their negotiation and ratification.

1. *Recent evolution of the exclusive competence in the common commercial policy: the impact of Opinion 2/15 on the ratification of treaties on trade and investment policy*

345. The many benefits of the Lisbon Treaty in clarifying and delineating competences have been widely acknowledged, but there remain many difficulties associated with the interpretation of the scope of various new elements included in Article 207 of the TFEU which defines the common commercial policy. The question was already quite controversial before its inclusion into the Lisbon Treaty. The conclusion of the first “new generation” free trade agreement under the regime of the Treaty of Lisbon between the EU and Singapore helped to clarify the matter. Thus, upon the conclusion of the Lisbon Treaty, the Commission invoked Article 218(11) of the TFEU and asked the CJEU which agreements were of the exclusive competence of the EU and which were of the shared competence of Member States.⁴²⁰ The issue concerned the scope of provisions on direct foreign investment, including the dispute resolution mechanism between investors and States, as well as investments portfolios, trade in services and the commercial aspects of intellectual property.⁴²¹

⁴²⁰ *Opinion 2/15*, *supra* note 181 at para 59.

⁴²¹ Marise Cremona, “Shaping EU Trade Policy post-Lisbon : Opinion 2/15 of 16 May 2017 : ECJ, 16 May 2017, *Opinion 2/15 Free Trade Agreement with Singapore*” (2018) 14:1 *European Constitutional Law Review* 231; Dony, 2017, *supra* note 381; Nikos Lavranos, “Mixed exclusivity : The ECJ’s Opinion on the EU-Singapore FTA” (2017) 2 *European Investment Law and Arbitration Review* 3 [Lavranos, 2017]; Marise Cremona, “EU external relations : Unity and conferral of powers” in Loïc Azoulay, ed, *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014); Piet Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2011); Eleftheria Neframi, “Mixed Agreements as a Source of European Union Law” in Enzo Cannizzaro, Paolo Palchetti & Ramses A Wessel, eds, *International Law as Law of the European Union*, vol 5 (Leiden: Martinus Nijhoff Publishers, 2012) 325.

346. The Commission, despite the uncertainty of its competence to negotiate, nevertheless entered into discussions with the United States (TTIP), Canada (CETA), Vietnam and Japan, amongst others. Negotiations with the United States were suspended at the end of 2016⁴²², in part because of the difficulties posed by the dispute resolution mechanism on between investors and States, but they were concluded successfully with Canada on July 5, 2016, at which date the Commission formally proposed to the Council the signature of the agreement.

347. On 19 October 2016, Canadians were shocked to learn that Wallonia had the power to prevent Belgium from signing the CETA, creating a situation of crisis in the European Union and in Canada. This act of bravado by Paul Magnette, then Minister-President of Wallonia, a region of Belgium, blocked the signature of the agreement for 12 days, and illustrated a new approach by Member States (and their sub-national entities).⁴²³ The active participation of Member States and their demonstrated interest in the negotiation of commercial agreements by the EU are new elements that must be taken into account by the European institutions as there may be an exclusive competence on matters of Common commercial policy, but a shared competence in many areas that are now included in new generation agreements.

348. Since Member States now wish to participate actively, to the extent of the competences recognized by the Lisbon Treaty, European institutions must for the present ensure this opportunity. In order to avoid situations where Member States exert pressure on the EU by threatening to refuse to ratify an agreement (as did Italy and France for CETA), the Commission should further develop its policy to better involve States in the negotiations. Another sign of this approach is the decision of the Council to make the negotiation mandates public, as was done for the negotiations with Australia and New-Zealand in 2018.

349. The decision in *Opinion 2/15* of 16 May 2017 caused a shockwave for the EU institutions, provoking a waterfall of decisions. Following the decision that the Investor-State dispute settlement mechanism was a shared competence, the Commission had to modify its

⁴²² Trade EU, “Overview”, *supra* note 74.

⁴²³ Relationships between states and subnationals are regulated by national legislation, often of constitutional nature. While the present section is not directly focused on this issue, we note that this is a crucial issue which must be addressed by the EU.

policy on commercial negotiations. And so, in July 2017, the Commission decided to separate the chapters on investments from those on trade into two parallel agreements.⁴²⁴

350. The ratification procedures were also modified. As the first agreement concerned solely trade policy, an exclusive competence of the European Union, the procedure for its ratification was simpler and could be implemented immediately. The agreement on investments however, now being defined as a shared competence, has to be submitted to Member States for their ratification. This new approach offers the advantage of avoiding the provisional application, or delayed approval, of a new generation trade agreement. This new policy was implemented as a consequence of *Opinion 2/15* of the CJEU, and we note that the agreements with Singapore, Vietnam and Japan were thus duly separated between investments and trade. The modification of the policy of the Commission on the negotiation of treaties, and the separation into separate agreements on trade and on investments are two direct consequences of this distribution of competences on the negotiations of treaties.

351. The distribution of competences is analyzed at length in the conclusions of the Advocate General Sharpston (paras. 514-544 on Investor-State dispute settlement) and in the Opinion of the Court (para. 59) in *Opinion 2/15*. Based on the ERTA Opinion, and on Article 216(2) to justify the need for action, which justifies its analysis of the distribution of competences, it attempts to determine whether the EU misinterpreted the principle of loyal cooperation (art. 4 (3)) in its negotiations of the agreement as if it had been of its exclusive competence (para. 68).

352. European institutions remain concerned by the present situation. In March 2019, a workshop of the International Trade Affairs (INTA) Committee of the European Parliament was dedicated to this question, analyzing various options for a more cohesive system on dispute settlement that would be in conformity with this new distribution of competences and with European bilateral treaties on investments.⁴²⁵ The Commission thus reviewed the

⁴²⁴ David Kleimann & Gesa Kübek, “The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15” (2016) Working Paper No 2016/58 (EUI RSCAS, Global Governance Program) [Kleimann & Kübek, “The Case of CETA”, 2016].

⁴²⁵ Steffen Hindelang & Stephan Schill, “Workshop report – EU investment protection after the ECJ opinion on Singapore: Questions of competence and coherence” (2019) Study PE 603.476, online: Steffen Hindelang <<https://www.steffenhindelang.de/en/publications/stocktaking-of-investment-protection-provisions-in-eu->

advantages and disadvantages of the new policy of the Commission on the conclusion of separate agreements on trade and investments. It noted the advantage offered by comprehensive agreements that may increase the chances of success of the agreement, but also that this could be its main disadvantage in that it may create a focus for the opposition and create a majority opposing the agreements. There is another risk posed by this new division of agreements in that agreements on investments may never see the light of day – as seems to be the case in the negotiations with Japan.⁴²⁶ These delays will only have as a consequence the postponement of existing BITs with Member States.

353. Since this solution cannot be applied to the CETA, as it is already implemented on a provisional basis, the question remains: can a Member State block CETA's implementation, and even possibly terminate the agreement, by its refusal to ratify it? That is the question examined below.

2. Non-ratification of mixed agreements and available solutions

354. What is new in the usual discussion of the difficulties posed by mixed agreements is that the Lisbon Treaty has established new limits for the distribution of competences. The Treaty, while clarifying the distribution of competences between the EU and its Member States, did not anticipate the latest developments. Does a Member State which refuses to ratify a treaty have the power to terminate it? That is the question to be answered concerning the ratification of CETA, as demonstrated by the problems which arose at signature, and the opposition of Wallonia which blocked the process, as well as by the case of the Netherlands

agreements-and-member-states-bilateral-investment-treaties-and-their-impact-on-the-coherence-of-eu-policy/>.

⁴²⁶ *Ibid* at 23; Szilárd Gáspár-Szilágyi, “Opinion 2/15 : Maybe it is time for the EU to conclude separate trade and investment agreements”, *PluriCourts Blog* (23 June 2017) online: University of Oslo <<https://www.jus.uio.no/pluricourts/english/blog/szilard-gaspar-szilagy/opusion-2-15-seperate-trade-and-investment.html>>. The author notes that *Opinion 2/15* encourage the Commission in its new policy for the sharing of competences for trade and investment, suggesting the way to follow for the future: “Opinion 2/15 also points in this direction. If one looks at the Annex to this post, which illustrates how the Advocate General and the CJEU decided on the issues of competence over the various chapters, one can see a clear split between the various areas relating to trade and those relating to investment. It is as if the CJEU is telling the Commission to split the agreements into two separate ones.”

which, the year before, held a referendum on its refusal to ratify the EU-Ukraine Association Agreement?⁴²⁷

355. The renewed interest shown by Member States since the adoption of the Lisbon Treaty in participating in the negotiation and conclusion of treaties has opened up the possibility that Member States may refuse to ratify and could even block the ratification of a treaty. Several alternatives are proposed to resolve this potential blockage.

356. Multilateral mixed agreements can be implemented in part. They can be designated as partial or incomplete mixed agreements, as was done with the United Nations Convention on the Law of the Sea, or more recently the Paris Agreement. The United Nations Convention on the Law of the Sea entered into force for the EU and some of its Member States on April 1, 1998, Denmark and Luxemburg not having ratified it at that date.

357. Bilateral mixed agreements, by their very nature, cannot *a priori* benefit from a provisional implementation. When an agreement is concluded between only two parties, it is thus designated as a bilateral mixed agreement. The issue of implementation is therefore more acute since the refusal of one of the parties makes it impossible to implement the agreement for the other party, which is contrary to the basic tenants of the law of treaties. The CETA is a bilateral mixed agreement between the EU and Canada. Can the agreement then be implemented without the Member States who have refused to ratify it? Various solutions have been put forward.

358. CETA's ratification is still underway in Member States. The threat by some States to refuse ratification underline the urgency of the issue and the need to negotiate an end to this crisis by the EU. European institutions seem to have been hard at work for some time, as illustrated by the changes to the policy on the negotiations of trade and investment agreements implemented in July 2018. The merit of such a solution to avoid non-ratification cannot be ignored, but it does not obviate the possible blocking of an agreement.

⁴²⁷ Guillaume Van der Loo & Ramses A Wessel, "The non-ratification of mixed-agreements: legal consequences and solutions" (2017) 54:3 Common Market Law Review 735 [Van der Loo & Wessel].

359. In order to consider the possible blocking or extinction of a treaty by a Member State Van Der Loo and Wessel take the example of CETA and the EU-Ukraine Association Agreement.⁴²⁸ The referendum in the Netherlands in 2015, and its subsequent refusal to ratify the agreement, make it a choice example for this study. The authors note in particular the paradox that, although it is widely held that the scope of the CCP was widened by the Lisbon Treaty, free trade agreements concluded since its entry into force have all been mixed agreements.

360. The discussion centers on the question of whether it is possible or not for one Member State to block completely an agreement. There is no general agreement on an ideal solution, but both European institutions and academics are hard at work to find a remedy. Outlined below are some solutions, both legal and political, that are considered.

a. Declarations

361. The solution to the impasse on the ratification by the Netherlands of the EU-Ukraine Association Agreement, with a certain degree of legal creativity, was a declaration by 28 States. Such a declaration only has a certain political weight, and not a legal one. Yet, a declaration in that case paved a way out of a dead end. Thus, the Netherlands, despite a low level of participation in the referendum and the narrow margin for its approval, considered it was bound by this democratic exercise.⁴²⁹

362. Interpretative instruments can also serve the same purpose. The joint interpretative instrument appended by Canada and the EU to the CETA is an attempt at answering specifically the concerns expressed by its Members States, and thus encourage them to ratify the treaty. Such an instrument can also be considered in the process of ratification by Member States despite, once again, its weaker legal value.

⁴²⁸ *Ibid.*

⁴²⁹ Van der Loo and Wessel, in their analysis, note that while the referendum results must be respected by the state, the Netherlands could have, in this instance, refused to follow the results and announced their ratification of the agreement nevertheless.

b. Reservations

363. The possibility of entering a reservation to a treaty has also been discussed. Reservations can only be entered before the signature of a treaty which presumes that states have gone through the process of consulting their subnational entities and have anticipated difficulties. Unfortunately, it is too late for CETA, which has already been signed, and is provisionally implemented since 21 September 2017.

c. Modification of the clauses on the entry into force of agreements

364. Another alternative envisaged in the case of a potential blockage to implementation through the refusal of Member States is the modification of the scope of the ratification by Member States. As Member States can only ratify legally the parts of an agreement which are of shared competence, this practice would clarify the procedure.⁴³⁰ Clauses in bilateral mixed agreements presently allow the entry into force once the parties have been notified that Member States have completed their national procedures (e.g. art. 30 (1)(2) of CETA). Amending the clauses on the entry into force of bilateral mixed agreements would thus delineate the provisional implementation.

365. A ratification threshold, as can be found in multilateral treaties, could also offer another solution. For example, a threshold of 2/3 of Member States could be set for the complete entry into force of an agreement. Once again, this seems to be a borderline solution in terms of international law and European law – and one can easily foresee arguments that could be put forward by some that this is contrary to European law.

d. Provisional Application

366. The mechanism of provisional application merits further discussion. There is no time limit attached to the provisional application and it is effective only after formal notification by the Council. Several authors have argued that without such a notification, an agreement

⁴³⁰ Gesa Kübek, “The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States” (2018) 23:1 European Foreign Affairs Review 21 [Kübek].

could endure indefinitely. This possibility could however be the source of a political crisis if the Council were to ignore the will of Member States, thus violating the principles of European law on the distribution of competences in mixed agreements. It appears, however, that CETA could not be applied in this fashion as the Council has officially declared that the agreement would not be implemented if it was not ratified by one of its Member States.⁴³¹

367. There remains however one solution – that retained concerning the European Economic Space. Once that treaty was concluded, Switzerland, which had originally been party to the agreement, decided to withdraw. An amendment protocol was adopted to modify the treaty, thus withdrawing Switzerland from the treaty, but without modifying the text. This possibility could be considered to withdraw from a treaty any and all Member State that refuse ratification. However, this solution, while seemingly attractive, could be contrary to the basic principles of European law.

e. Modification of the structure of agreements

368. Finally, there is the decision, outlined above, of the Commission to modify the structure of agreements in order to tackle at the level of the negotiations the concerns of Member States. The publication of the negotiation mandate, which was not the practice in the past, is an attempt to involve Member States from the beginning, and to integrate them into the negotiation process so as to avoid them changing their minds at the end of the process.

369. Evidently, nothing done at the level of negotiations can guarantee ulterior ratification by Member States. Nevertheless, it remains necessary that there be a closer cooperation between the European institutions and those of Member States involved in the negotiations on various aspects of the external activities of the EU which are of shared competence. The duty of sincere cooperation laid down in Art 4(3) of the TEU could also be applied more strictly to their relations.⁴³²

⁴³¹ Kübek, *supra* note 430; Van der Loo & Wessel, *supra* note 427.

⁴³² Kübek, *supra* note 430; Van der Loo & Wessel, *supra* note 427.

3. Conclusion: the false peril of a non-ratification of CETA

370. The European Union is now recognized as a major actor on the international scene.⁴³³ However, because the legal framework for the distribution of competences is far from clear and somewhat disjointed, the democratic legitimacy, and the status of the EU as a global, credible and effective actor, is being put into question.⁴³⁴

371. The Lisbon Treaty has undeniably clarified the distribution of competences, and thus integrated into its text the criteria developed by jurisprudence and practice. One could have hoped that legislators would have shown greater clarity on mixed agreements and their ratification. Since Member States have shown a greater willingness to participate in the negotiation of international agreements, in particular on trade matters, there remains the issue of what will be the future impact of a refusal to ratify a treaty by a Member State, in particular on the treaty itself.

372. To consider revising treaties might seem a task that is somewhat too onerous, but the actual practice of the Commission seems to be the solution for the present times. Using mixed agreements as a pragmatic solution by European institutions to avoid a nebulous delineation of the distribution of competences seems to be coming to an end. The EU wants to remain a credible, legitimate and effective global actor on the world stage, and the objective of cohesiveness which guides the founding treaties should encourage the EU to bring to completion its European policy on investments. This will then offer the EU the opportunity to extend this new approach to various issues related to the wider question of the impact of the delineation of competences on the negotiation and ratification of treaties.

373. A “crisis”, a “failure”, a “source of inconsistency - these have been the qualifications used for the EU to moderate the impact of the negotiation and ratification of treaties. European institutions have tried to circumscribe this debate from the very beginning, but they seem to suffer from chronic indecision. While it can be noted that as the EU Founding

⁴³³ Former Article 2 TEU which prescribed that the one of the objectives of the EU was “to assert its identity on the international scene”.

⁴³⁴ Benlolo-Carobot, Candas & Cujo, *supra* note 397 at 51, n 80: “Ce sont les membres du groupe de travail VII ‘Action extérieure’ constitué au sein de la Convention sur l’avenir de l’Union qui ont mis en exergue cette quête de ‘crédibilité et d’efficacité de l’Union sur la scène internationale’.”

Treaties have been revised, clauses on the distribution of competences, and on the external activities of the EU have been clarified, they regrettably continue to remain too vague.

374. Ten years after the entry into force of the Lisbon Treaty, the European Union seems to have reached a crossroad.⁴³⁵ European institutions must maintain the present delicate balance and avoid the foreseen crisis in case mixed agreements are not ratified. Cohesiveness must guide the EU's actions to eliminate once and for all the uncertainty surrounding the distribution of competences in the conclusion of treaties.⁴³⁶

D. The EU's new approach – Separating Trade and Investment Agreements

1. Opinion 2/15: ISDS as a Shared Competence

375. On 16 May 2017, the CJEU delivered its long-awaited *Opinion 2/15* on the allocation of competences between the EU and its Member States for the conclusion of the EU-Singapore Free Trade Agreement (the EUSFTA).

376. The central issue in this Opinion was whether the EU had an exclusive competence to conclude the EUSFTA and similar free trade agreements or whether the EU shared this competence with its Member States.⁴³⁷

377. The EUSFTA was negotiated by the EU and Singapore on a bilateral basis. Once the Agreement was signed, however, the Commission submitted a request for an Opinion by the CJEU to determine whether the EU had exclusive competence to conclude, or if it was shared with Member States.

378. In its *Opinion 2/15*, the CJEU concluded that the EU enjoyed exclusive competences over almost all matters covered by the EUSFTA (such market access, intellectual property

⁴³⁵ “Le Traité de Lisbonne, 10 ans après : Une Union à la croisée des chemins?” (Conference delivered at the Institut d'études européennes, Université Libre de Bruxelles, 29-29 March 2019), online: [blogdroiteuropeen <https://blogdroiteuropeen.files.wordpress.com/2019/03/programme-confc3a9rence-sur-le-traitc3a9-de-lisbonne.pdf>](https://blogdroiteuropeen.files.wordpress.com/2019/03/programme-confc3a9rence-sur-le-traitc3a9-de-lisbonne.pdf).

⁴³⁶ Christophe Hillion, “Cohérence et action extérieure de l'Union européenne” in Eleftheria Neframi, ed, *Objectifs et compétences dans l'Union européenne* (Bruxelles: Bruylant, 2012) 229.

⁴³⁷ *Opinion 2/15*, *supra* note 181.

rights, foreign direct investment), without requiring the approval of the 28 Member States. Exceptions to this exclusive competence were found for two fields: (i) non-direct foreign investment (e.g. portfolio investments); and (ii) investor-State dispute resolution, in which case they fell in shared competence.

379. To address this decision, the Commission announced that it would design its agreements in a new manner, by dividing the investment chapters from the trade agreements. Accordingly, since this decision, Investment and Trade Agreements are concluded separately.

380. The risks linked to this decision are manifold. Firstly, it may put the EU in a more difficult position towards third countries, to adopt a coherent position in investment negotiations. Secondly, this could also risk impacting the developing ICS and the negotiations surrounding the MIC. Not all trading partners, however, can boast of a systematically unified investment policy. The politics of diplomacy require that the agreements be adapted to the negotiating partner. For this sensible reason, it is understandable that the EU acts within a set framework, without going beyond the red lines it sets for itself. The reality may simply be that, while ideally the investment agreement would contain reference to the now formal ICS, negotiators may overlook this set limit to conclude successful agreements with partners who are not willing to accept this position, as was the case recently with Japan.

2. *The Impact of Opinion 2/15 on the Investment Court System*

381. While the CJEU did not address the ICS's compatibility with EU law in its *Opinion 2/15*, and, in fact, specifically noted in several instances that it was not within its remit to do so, *Opinion 1/17* was an evident follow up to *Opinion 2/15*. The Court, in *Opinion 2/15*, strongly hinted that it would require a subsequent request for an Opinion to determine that question.⁴³⁸ This message was clearly received, when, shortly after the issuance of *Opinion*

⁴³⁸ *Opinion 2/15*, *supra* note 181.

2/15, the Kingdom of Belgium submitted its request for an Opinion on the compatibility of the ICS with EU law in September 2017.⁴³⁹

382. Taking stock of *Opinion 2/15*, the Commission announced in July 2018 that its new approach would consist in concluding separate trade and investment agreements, thereby resolving the conundrum for the entry into force of the agreements.

383. To date, it has separated the Singapore, Vietnam and Mexico agreements in this manner. The EU Japan, China and UK agreements have also been separated between investment and trade agreements, although, importantly, the investment agreement does not include the Investment Court System. No other information is available regarding the New Zealand and Australia Investment Agreements. Finally, it appears that the EU-Mexico should include the ICS, although the final text (after scrub) has not been released.

384. While the EU continues to strive towards the unification of its investment policy internally a variety of issues are unearthed. The relationship of Member States with the ECT has only been partly clarified, Member States, despite their engagement to withdraw from their intra-EU BITs remain in practice loathe to comply, and important negotiation partners persist in resisting the new dispute resolution model (the ICS) proposed by the EU.

E. Conclusion on the EU investment policy

385. Although fairly recent, the history of the EU's investment policy is one conducted under the seal of action, evolution and innovation. Initially a conservative approach following Member States' practices at the entry into force of the Lisbon Treaty in 2009, an important evolution has taken place since 2014. Stemming from the wide-ranging contestation of ISDS and leading to the EU consultation on investor protections and ISDS in the TTIP, the introduction of an entirely new dispute resolution mechanism was enacted from 2016. Including the ICS into the CETA, EU-Vietnam Investment Agreement, and EU-Singapore Investment Agreement, and inspiring the consultation on a reform of ISDS at the multilateral

⁴³⁹ EC, *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17)*, [2017] OJ, C 369/2 [*Request for an opinion*].

level at UNCITRAL, the EU's (over)active strategy in terms of trade and investment must be recognized. Whether the EU achieves its sought-after status of a global actor is an entirely separate issue.

SECTION 3 ASSESSING THE COMPATIBILITY OF THE INVESTMENT COURT SYSTEM WITH EU LAW

A. Opinion 1/17: the Framework for the Assessment of Compatibility to the Rule of Law of the ICS in EU law

386. After having introduced the field of study, the context of the question examined in this dissertation, and set the background with respect to the new EU investment policy, we turn to the core of our analysis. We examine below the CJEU's analysis of compatibility of the ICS with EU law. Building on that finding, we will then turn to the comparison between ISDS and the ICS in the rule of law framework for independence and impartiality of arbitrators and members. The terms selected to identify our analysis and used in the above-referenced title are of the uttermost importance. The assessment of the *conformity* of the rule of law in the ICS and ISDS aims to examine the extent to which the new tribunal established provides additional safeguards and *conforms* and *contributes* to the rule of law as defined in EU law (Opinion 1/17).

387. Our objective is not to determine whether the ICS is *compatible* as the CJEU did in *Opinion 1/17* with EU law. Rather, we examine whether it *conforms* and to some extent *contributes* to the protection and promotion of the rule of law. The choice of terms is inspired by a Special Issue of ICCA entitled: "International Arbitration and the Rule of Law: Contribution and Conformity".⁴⁴⁰ This language was selected as the appropriate terminology as it provides a scope within which we can determine the extent of contribution, whether it is merely an addition, a significant change or a useless modification, with the rule of law both in EU law and in ISDS outside the EU (Part II).

1. *The Request for an Opinion on the Investment Court System in CETA*

⁴⁴⁰ Andreas Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No. 19 (Kluwer Law International, 2017) [Menaker]; Payam Akhavan, "The Contribution of Investment Arbitration to the Rule of Law" in Menaker.

388. In October 2016, Canada was astounded to discover that Wallonia, a small region in the Kingdom of Belgium, otherwise renowned for its beers, chocolate and fries, had the power to block the signature of the world's largest trade agreement. Waiting with bated breath for a resolution to this dispute, members of the Canadian legislature and trade experts alike rapidly familiarized with exotic notions of EU separation of competences and, more appropriately, the immense power which could be yielded by a most unimportant and small trade partner. Paul Magnette's hold up of the CETA's signature process was a political, and legislative, feat. The ploy was successful. Magnette obtained leverage and parlayed a resolution of the crisis he had created. He agreed to give his approval for the signature by Belgium of the CETA, provided that, in return, Belgium take the issue of the compatibility of the CETA with EU law to the CJEU.

389. The CETA was ultimately signed on 30 October 2016 and entered provisionally into force on 21 September 2017. It has not yet been concluded following the meaning of article 218(6) TFEU. Indeed, the conclusion of the EU will only be possible after the completed ratification of the Member States, which is still ongoing.⁴⁴¹

390. Following *Opinion 2/15*, in which the Court found that indirect foreign investment such as portfolio investment and ISDS were shared competences under the Lisbon Treaty⁴⁴², Member States now have to ratify the CETA before it can enter into force as an international agreement. CETA was declared to be a mixed agreement by the Commission⁴⁴³, as some of

⁴⁴¹ Alessandra Arcuri et al, "Expropriating democracy: on the right and legitimacy of not ratifying CETA", EJIL: Talk! (20 October 2020), online: EJIL Talk <<https://www.ejiltalk.org/expropriating-democracy-on-the-right-and-legitimacy-of-not-ratifying-ceta/>>.

⁴⁴² *Opinion 2/15*, *supra* note 181 at paras 291-92.

⁴⁴³ Although this was a political choice since the Commission thought that CETA was entirely of exclusive competence. However, *Opinion 2/15* concludes that the Commission was wrong and some of its provisions are of shared competence. See Opinion of AG Szpunar delivered on 24 April 2017 in *Federal Republic of Germany v Council of the European Union*, C-600/14, [2017] ECR (ECLI:EU:C:2017:935) at para 84: "As Advocate General Wahl noted in his Opinion in Opinion procedure 3/15, (55) 'the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence ... is generally a matter for the discretion of the EU legislature'". See more generally the entire section on the EU system of competences at paras 62-90. See also Dony, 2017, *supra* note 381. Professor Dony analyzes the finding of the Court that chapter 9 of the EU-Singapore Agreement is of shared competence (para 243 of *Opinion 2/15*) and concludes therefore that the agreement may not be signed by the EU alone (para 244). This conclusion has baffled academics and practitioners alike, as there is no legal obligation that an agreement be mixed if a part is of shared competence, it could be signed by the EU itself. It is therefore more of a political decision. Kleinman and Kübek also confirm this interpretation, in "The Future of EU External Trade Policy - Opinion 2/15 : Report from the Hearing", *supra* note 381.

the issues in the text fall within exclusive competences and some within shared competence.⁴⁴⁴ For the moment, the provisional application of the agreement concerns the majority of the text, with the main exception of ISDS.⁴⁴⁵

391. The Request, submitted by Belgium on 7 September 2017, reads as follows:

Is Chapter 8 ('Investments'), Section F ('Resolution of investment disputes between investors and states') of the [CETA] between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?⁴⁴⁶

392. Section F, Chapter 8 of CETA established the ICS: the two-level permanent tribunal to rule on investment disputes, replacing the originally included ISDS mechanism. It should be noted that despite the new form adopted for the permanent mechanism, Opinion 1/17 still qualifies the new Investment Court System as "ISDS".⁴⁴⁷

393. More specifically, the introduction of this two-level permanent court with the CETA Tribunal and Appellate Tribunal⁴⁴⁸ is the introductory step to the Investment Court System designed by the EU as a replacement for *ad hoc* ISDS. This institutionalization would be the precursor of the establishment of the Multilateral Investment Court (the "MIC"), a reference to which is included in the CETA and is currently discussed in Working Group III on ISDS reforms at UNCITRAL.⁴⁴⁹

2. Attorney General Bot's Opinion of 29 January 2019

394. On 29 January 2019, Attorney General Bot issued his Opinion in accordance with EU law. As a general rule, the AG's preliminary opinion in anticipation of the CJEU's decision

⁴⁴⁴ For a discussion of *Opinion 2/15*, the qualification of CETA as a mixed agreement and the resulting impact on the trade and investment policy of the EU, see eg Kleimann & Kübek, "The Case of CETA", 2016, *supra* note 424; Lavranos, 2013, *supra* note 173; Nikos Lavranos, "Mixed Exclusivity: The CJEU's Opinion on the EU-Singapore FTA" (2017) 2:1 European Investment Law and Arbitration Review 3; Van der Loo & Wessel, *supra* note 427.

⁴⁴⁵ European Commission, News Release, "EU-Canada trade agreement enters into force" (20 September 2017), online: European Union <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3121>.

⁴⁴⁶ *Request for an opinion*, *supra* note 439.

⁴⁴⁷ *Opinion 1/17*, *supra* note **Erreur! Signet non défini.** at para 6.

⁴⁴⁸ *Ibid* at para 7.

⁴⁴⁹ The MIC is analyzed in depth in the Part II of this dissertation.

is always eagerly awaited. It does not always presage of the Court's direction but gives interpretation material to all who are awaiting the Decision. In this case, the Attorney General's Opinion did not follow the latest trends in recent CJEU decisions regarding the EU's trade and investment policy. While the Attorney General's Opinion was not followed by the Court in *Opinion 2/15* or the *Achmea* case, where in both cases the AG's Opinion greatly differed from that of the Court, it was closely mirrored in the Opinion 1/17 of the Court of 30 April 2019. We first examine below the legal analysis, and sometimes political assessment, of Attorney General Bot of 29 January 2019, before turning to the Court's Opinion.

395. Belgium's question to the CJEU was meant to obtain clarification on the compatibility of the new ICS system with the current EU law, and to "make known to the Court its doubt".⁴⁵⁰ These doubts concerned

the effects of that part of the agreement [Section F, Chapter 8] on the exclusive jurisdiction of the Court over the definitive interpretation of EU law, the general principle of equal treatment, the requirement that EU law is effective and the right of access to an independent and impartial tribunal.⁴⁵¹

In sum, the compatibility of EU law with the fundamental rights was put in doubt.

396. Attorney General Bot recalled that investment arbitration and ISDS have been criticized with regard to "the lack of legitimacy and of guarantees that the arbitrators are independent, the lack of consistency and foreseeability of the awards, the inability to review the award made, the risk of 'regulatory chill' and the high costs of the proceedings".⁴⁵²

397. The political and legal challenges which the EU faced in designing a reformed system of ISDS was to find a balance between addressing criticism of the functioning of arbitral tribunals whilst being "consistent with the main principles governing the dispute settlement mechanisms within the EU legal order".⁴⁵³ It is interesting to note the recognition by Attorney General Bot of the importance of arbitration, when he writes that "one of the most significant of those challenges is to define a model which allows the European Union and its Member

⁴⁵⁰ *Opinion 1/17*, *supra* note **Erreur! Signet non défini.** at para 9.

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid* at para 15.

⁴⁵³ *Ibid* at para 17.

States to take as a basis an arbitration practice which constitutes the rule in relation to the settlement of disputes concerning the protection of foreign investments”⁴⁵⁴.

398. The resulting compromise, a hybrid form between arbitration and an international court, addresses the above criticism for some, while it poses new problems for others. The EU’s solution to have recourse to institutionalization, “legislating the mechanism for settling investment disputes, striking a balance between tradition and innovation in terms of investment arbitration.”⁴⁵⁵ Attorney General Bot pushes his reasoning further, noting the “experimental dimension [...] since the European Union is at the forefront of a movement the future of which will determine whether – from a legal standpoint – it is likely to be continued”.⁴⁵⁶ This last editorial comment feels more like a ringing endorsement than a legal analysis and previews the upcoming legal analysis.

399. Although the new system is covered in Section F of Chapter 8, the CETA Joint Committee “is responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement” (Article 26.1(3)).

400. The new dispute settlement mechanism features a permanent tribunal composed of fifteen members appointed for a five year, once renewable term by the CETA Joint Committee.⁴⁵⁷ Members must possess the qualifications for appointment to judicial office in their countries, demonstrated expertise in public international law, be independent and comply with conflict of interest rules. Appointed on a rotating basis, to ensure a random and unpredictable composition of the tribunal, cases are heard by a three-person division. The same qualifications are required of the Appellate Tribunal members.

401. The permanent Appellate Tribunal will hear appeals based on “errors of law or manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law”.⁴⁵⁸ These grounds for appeal have a far-reaching scope, well beyond the traditional limited grounds for annulment in domestic legislation.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid* at para 18.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid* at para 25.

⁴⁵⁸ *Ibid* at para 27.

402. In addition to the CETA were signed (1) a Joint Interpretative Instrument, which specifically refers to the ICS, as well as (2) Statement No 36 entered into at the time of the signature by the Commission and Council, setting out measures to be adopted for the establishment of the ICS.

403. We now turn to examining the analysis of the Court with regard to the interrelationship between the autonomy of EU law and fundamental rights, and their compatibility with the ICS.

B. CJEU's Opinion 1/17 of 30 April 2019: the autonomy of EU law and fundamental rights

404. The Court examines in turn the autonomy of the EU legal order, the conditions for reciprocity of protection afforded to investors of each party, the consistency of the ICS with CETA's lack of direct effect, the impact of *Achmea* on the compatibility of the ICS and requirement of autonomy of the EU legal order, and the guarantees provided by the parties to preserve the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law. The Court then confirms that the ICS does not affect the role of national courts in ensuring the effective application of EU law, as well as the consistency with the EU's external action's objectives, before finding that establishing a mechanism for the prior involvement of the Court and possibility for the full review of the award by the tribunals of Member States is not necessary.

405. The Court, in its Opinion delivered on 30 April 2019, therefore found that the Investment Court System was compatible with EU law, including the fundamental rights.⁴⁵⁹ This decision was a surprise to many detractors and EU law specialists, who believed that the autonomy of the EU legal order required that a single order of tribunals, here the EU Courts and the CJEU, exist to rule on disputes. In view of the past case law of the Court on proposed dispute resolution mechanism, and in particular *Opinions 1/91* and *2/13*, where new

⁴⁵⁹ *Ibid.*

tribunals were systematically refused, specialists felt confident that the ICS would be found incompatible with EU law. They were proven wrong.

406. The Attorney General Bot's exercise to find the compatibility is precise, detailed and at times appears either political or subjective. The Court, which follows substantially AG Bot's Opinion, is particularly explicit on the autonomy of the EU legal order. The Court appears to have seized the opportunity to respond to critics of the ICS and ensure that there would be no further questioning of the new EU proposal.

407. The Court also focuses on the fundamental rights protected by the EU texts and Charter, in response to the prejudicial question posed by Belgium, when it writes that "autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, which states that the Union 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights'".⁴⁶⁰

408. In examining the autonomy of EU law,⁴⁶¹ the Court finds that the CETA "does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of that agreement."⁴⁶² Due to the structure proposed for the first instance and appellate tribunal, it will not be possible for tribunals from the ICS to render a decision which might adversely affect the autonomy of the EU legal order.

409. Additionally, because CETA and the Joint Interpretative Instrument contain provisions preventing any effect on the right to regulate, and therefore protects measures tied to public morals, the environment, consumer protection or fundamental rights, the Court found that it could not be considered to adversely affect the autonomy of the EU legal order.

410. The right to equal treatment and the principle of effectiveness are examined by the Court in light of Article 20 of the Charter "which provides that 'everyone is equal before the

⁴⁶⁰ *Ibid* at para 110.

⁴⁶¹ *Ibid* at paras 106-61.

⁴⁶² Court of Justice of the European Union, Press Release, 52/19, "Opinion 1/17 – The mechanism for the resolution of disputes between investors and States provided for by the free trade agreement between the EU and Canada (CETA) is compatible with EU law" (30 April 2019), online: Curia <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190052en.pdf>>.

law’, and with Article 21, paragraph 2 which states that ‘within the scope of application of the Treaties and without prejudice to any of their specific provisions, discrimination on grounds of nationality shall be prohibited’.⁴⁶³

411. The Court starts with determining whether

the request for an opinion, which asks the Court to state its position on the compatibility of Section F of Chapter Eight of the CETA ‘with the Treaties, including fundamental rights’, does or does not call for an examination with regard to the Charter.

On that subject, it must be recalled that international agreements entered into by the Union must be entirely compatible with the Treaties and with the constitutional principles stemming therefrom (see, inter alia, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 67, and judgment of 27 February 2018, Western Sahara Campaign UK, C-266/16, EU:C:2018:118, paragraph 46).⁴⁶⁴

412. The Court refers to AG Bot’s Opinion before determining that there is no breach or adverse effect with regard to the autonomy of EU law:

173. Admittedly, as observed by the Council, Article 20 of the Charter does not oblige the Union to accord, in its external relations, equal treatment to different non-Member States (judgment of 21 December 2016, Swiss International Air Lines, C-272/15, EU:C:2016:993, paragraphs 24 to 26 and the case-law cited).

174. However, as the Advocate General stated, in points 198 and 199 of his Opinion, that case-law does not preclude an examination of whether an international agreement, to the extent that it establishes a difference in treatment, within the Union itself, of persons of a non-Member State and persons of Member States is contrary to Article 20 of the Charter.⁴⁶⁵

413. The right to access an independent tribunal⁴⁶⁶, and Belgium’s submission with respect to Article 47 of the Charter, are also closely examined by the Court. Here, the lengthy examination of the Court’s case law, and the guarantees of independence, impartiality and accessibility, are explained in the Court’s analysis. The Court poses the question as follows:

It is necessary, consequently, in order to assess the compatibility of Section F of Chapter Eight of the CETA with Article 47 of the Charter, to examine whether the provisions, contained in Section F and in the texts that determine the effect of Section F, on improving the financial accessibility of the envisaged tribunals for natural persons and for small and medium-sized enterprises, represent commitments that a body of rules to ensure the level of accessibility required by

⁴⁶³ *Opinion 1/17*, supra note **Erreur! Signet non défini.** at para 52, as raised by Belgium in its submissions before the Court.

⁴⁶⁴ *Ibid* at paras 164-65.

⁴⁶⁵ *Ibid* at paras 173-74.

⁴⁶⁶ *Ibid* at paras 189-244.

Article 47 of the Charter will be put in place as soon as those tribunals are established.⁴⁶⁷

414. By referring to the Joint Interpretative Instrument, the Court finds that the requirements for the right to access to an independent tribunal are compatible with EU law, including Article 47 of the Charter.

415. Without examining the entirety of the legal reasoning, the below excerpt illustrates the reasoning of the Court with respect to access by the more vulnerable users to the courts:

217. However, Statement No 36 states that ‘there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals’ and provides, to that end, that the ‘adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA ... will be expedited so that these additional rules can be adopted as soon as possible’ and that, ‘irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court’.

218. It is clear that, by means of that Statement, the Commission and the Council have given a commitment to implement, rapidly and adequately, Article 8.39.6 of the CETA and to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises, even if work within the CETA Joint Committee were to be fruitless.

219. That commitment is sufficient justification, in the context of the present Opinion proceedings, for the conclusion that the CETA, as an ‘agreement envisaged’, within the meaning of Article 218(11) TFEU, is compatible with the requirement that those tribunals should be accessible.⁴⁶⁸

416. We note that the Court analyzes the legality of referring to the development of further rules for a future time. Indeed, in the CETA text, several provisions regarding fundamental rights touching upon the right to an independent tribunal, remain to be written. The Code of Conduct for CETA Members, the rules on their remuneration, availability and nomination, and a number of other provisions remained to be detailed. For such essential provisions as these fundamental rights, it can appear necessary to justify that they are not fully defined in advance (when the treaty has to be signed and ratified through such a complex mechanism, the lack of a substantial part which will not be subject to scrutiny can appear to be contrary to regular process). These are the very measures and rules that will be analyzed in this dissertation as part of the rule of law in the EU. Since the provisional entry into force of the

⁴⁶⁷ *Ibid* at para 214.

⁴⁶⁸ *Opinion 1/17, supra* note **Erreur! Signet non défini.** at paras 217-219.

CETA, as provided for in the text of the Treaty, these subsequent provisions are progressively being detailed.

417. In fact, the Court determines that

It is neither illegitimate nor unusual, under international law, for provision to be made that the Parties to an international agreement may clarify, as their joint wishes concerning the effect of that agreement develop, the interpretation of that agreement. Such clarification may be introduced by the Parties themselves or by a body set up by the Parties on which they confer a power to adopt decisions that will be binding on them.⁴⁶⁹

418. Following this analysis, and after noting that many of the core guarantees remain to be defined⁴⁷⁰, the Court nevertheless concludes that the CETA contains sufficient safeguards to ensure the independence of the members of the envisaged tribunals.⁴⁷¹ The legal reasoning and demonstrations followed both by Attorney General Bot and the Court may appear to the more critical observer to be facilitated by a political will leading to a finding that the ICS is compatible to EU law. Indeed, a contrary finding by the Court would have led to a disavowal by the Court of a highly publicized and defended original solution introduced by the Commission in 2014.

419. The consequences of an adverse decision to the ICS would not have been unprecedented – the Court has often issued judgements refusing new courts or separate judicial systems (such as in *Opinions 1/91, 2/13*). But the very public and pro-active approach of the EU’s Commission to reform and resolve all controversies stemming from ISDS would have been met by a public rejection. At a time where the role of the EU in the international order is questioned, as well as the functioning and balance of its institutions, it can seem, to the unlearned observer, that the Opinion finding the ICS to be compatible with EU law was a most fortunate finding.

1. *The compatibility of the independence and impartiality standard in the ICS with EU law*

⁴⁶⁹ *Ibid* at para 233.

⁴⁷⁰ *Ibid*.

⁴⁷¹ *Ibid*.

420. The CJEU's analysis with respect to the compatibility of the independence and impartiality as set out in the CETA ICS with EU law, including fundamental rights, i.e. art 47 of the Charter, is the starting point of our analysis in this dissertation.⁴⁷²

421. In its Request for an Opinion, as well as in its arguments before the Court, the Kingdom of Belgium set forth its doubts with regard to several aspects internal and external to independence and impartiality of Members, and in a larger sense, to the ethics of adjudicators involved. Writ large, Belgium submits its “Doubts as to the compatibility of the envisaged ISDS mechanism with the right of access to an independent tribunal” in the following terms:

56 The Kingdom of Belgium seeks to ascertain whether Section F of Chapter Eight of the CETA is compatible with the fundamental right of access to an independent tribunal, as enshrined, in particular, in Article 47 of the Charter.

422. Belgium's arguments regarding independence of the ICS and its Members concerning remuneration, appointment, removal, ethics and limits on multiple roles are summarized as follows:⁴⁷³

60 The Kingdom of Belgium is uncertain, second, as to the compatibility of the conditions governing the remuneration of the Members of the CETA Tribunal and Appellate Tribunal, as laid down in Articles 8.27.12 to 15, and 8.28.7(d) of the CETA, with the right of access to ‘an independent and impartial tribunal previously established by law’, enshrined in the second paragraph of Article 47 of the Charter. Since those remuneration conditions are not primarily set out in the actual text of the CETA, but left to a great extent to the discretion of the CETA Joint Committee, it is permissible to question their compatibility with the principles applicable in relation to the separation of powers.

61 The fact that the CETA provides that the remuneration of the Members of the Tribunal will not, or at least not yet, consist of a fixed and regular salary, but of a monthly retainer fee to which will be added fees depending on the number of working days devoted to a dispute, might be incompatible with the right of access to an independent tribunal. In that regard, the Kingdom of Belgium refers to Article 6 of the European Charter on the statute for judges, adopted on 10 July 1998 by the

⁴⁷² On independence and impartiality: Giorgetti et al, *supra* note 5 at 444-45. See *Opinion 1/17, supra* note **Erreur! Signet non défini.** at paras 189–204 (assessing the compatibility of the ‘investment court system’ provided for in the *Comprehensive Economic and Trade Agreement Between Canada and the European Union (EU)* the demands for independence and impartiality expressed in art 47 of the *Charter of Fundamental Rights of the EU*).

⁴⁷³ We do not include the arguments set forth in paras 57-59 with respect to the requirement for accessibility to the tribunal which include legal aid, access for SMEs and the risk that the investor bears the entire costs of the proceedings. While we agree that these are relevant issues to the independence of the court as a whole, they are not strictly relevant to the analysis of internal and external factors of independence related to the new ICS and its members.

Council of Europe, in accordance with which the remuneration of judges must be fixed ‘so as to shield them from pressures aimed at influencing their decisions’.

62 That European Charter on the statute for judges also makes reference to recommendations adopted within the Council of Europe, in accordance with which the remuneration of judges must be determined on the basis of a general scale. It is however apparent from the conditions governing remuneration as currently laid down in the CETA that the remuneration of Members of the CETA Tribunal is partially dependent on the number of disputes brought by investors. Consequently, the development of case-law favourable to investors could have a positive impact on the remuneration of those Members and could thereby give rise to a conflict of interest.

63 The Kingdom of Belgium is uncertain, third, as to the compatibility, with the second paragraph of Article 47 of the Charter, of the rules concerning the appointment of the Members of Tribunal and of the Appellate Tribunal, as laid down in Article 8.27.2 and 8.27.3, and in Article 8.28.3 and 8.28.7(c), of the CETA.

64 The Kingdom of Belgium observes that those Members are to be appointed by the CETA Joint Committee, which is to be co-chaired by the Minister for International Trade of Canada and the Member of the Commission responsible for Trade (or by their respective designees). It is however clear from the European Charter on the statute for judges, to which reference is made by the recommendations of the Consultative Council of European Judges (CCJE), that where judges are appointed by the executive, such appointments must necessarily take place following a recommendation by an independent authority composed, in significant numbers, of members of the judiciary.

65 Fourth, the Kingdom of Belgium has doubts as to the compatibility, with the second paragraph of Article 47 of the Charter, of the conditions governing the removal of Members of the CETA Tribunal and Appellate Tribunal, as laid down in Article 8.30.4 of the CETA, the effect of that provision being that a Member may be removed by decision of the CETA Joint Committee. However, it follows from the European Charter on the statute for judges and from the recommendations of the CCJE that any decision to remove a judge must involve an independent body, be given in accordance with a fair procedure that respects the rights of defence, and be open to an appeal before a higher judicial body. In any event, in order to guarantee the independence of judges, it should not be possible for them to be removed by the executive.

66 Fifth and last, the Kingdom of Belgium questions the compatibility, with the second paragraph of Article 47 of the Charter, of the rules of ethics with which the Members of those Tribunals will have to comply under Article 8.28.4, Article 8.30.1 and Article 8.44.2 of the CETA.

67 The Kingdom of Belgium observes that those provisions essentially provide that those Members will have to comply with the IBA Guidelines, pending the adoption of a code of conduct by the Committee on Services and Investments. It follows, however, from the Magna Carta of Judges, adopted on 17 November 2010 by the CCJE, that the rules of ethics applicable to the judges must be developed by the judges themselves or, at the very least, that the judges should play a major role in the adoption of those rules.

68 The Kingdom of Belgium observes that since the IBA Guidelines are intended for arbiters and not for judges, they may contain standards of independence that are not adapted to those acting in a judicial capacity.

69 The Kingdom of Belgium also comments that the CETA provides in Article 8.30.1 thereof that the Members of the CETA Tribunal and Appellate Tribunal are to ‘refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement’, but does not require those Members to declare their outside activities nor a fortiori that those activities should be subject to prior approval. The relevant international instruments, however, such as the European Charter on the statute for judges, state that the exercise of such activities must be declared and must be the object of a prior authorisation.”

423. The Kingdom of Belgium’s main concerns stand in opposition to the proposed system with respect to the members by comparison to judges in the EU system. This goes from their selection to the rules they are governed by, be it the code of conduct or the IBA guidelines devised for “arbiters”, both of which Belgium deem insufficient as to attain the same legal standard of independence and impartiality provided by the correlated existing system of the Magna Carta for judges. One of the elements frequently put forth by Belgium was that judges are called to participate in the drafting of the Magna Carta, i.e. the chart governing their own conduct. This is a fundamental right under EU law, and one that is not reflected in the new ICS system.

424. The criteria enumerated by the Kingdom of Belgium for selection, appointment, disclosure, challenge and limit to the roles of the members will be the guiding markers of our analysis. They are the criteria deemed relevant in the assessment of independence and impartiality, and, in fact, have been so reflected in the continued analysis of Working Group III at UNCITRAL. Throughout the dissertation, we assess and compare the validity of ISDS, the ICS, MIC and the other reform alternatives with these criteria as a benchmark to establish where it befalls upon the rule of law scale. To wit, the comparative table which sets out the relevant provisions in different sets of rules, reform proposals and codes of conduct, should be referred to at any moment in the dissertation to obtain a global view of the provisions at issue.⁴⁷⁴

425. The Court also sets forth submissions presented by other Member States during the hearing, with respect to above-referenced issues:

97 As regards, second, the conditions governing the remuneration of the Members of the CETA Tribunal, those governments, the Council and the Commission consider that the Kingdom of Belgium is wrong to classify the CETA Joint

⁴⁷⁴ Annex V, UNCITRAL/ICSID Summary of Codes of Conduct in FTAs.

Committee as an ‘executive body’. They observe, in that regard, that any decision taken by that Committee that entails legal effects will have to comply with the procedure laid down in Article 218(9) TFEU, which will mean that the Council and Commission will be called on to play an essential role in that decision-making process.

98 Article 8.27.12 of the CETA, which provides that the CETA Joint Committee is to fix the monthly retainer fee of the Members of the CETA Tribunal, therefore raises no difficulties. Moreover, in the light of the requirement of independence specified in Article 8.30.1 of the CETA, that Committee will have to ensure that the amount of that retainer fee and method of determining it do not call into question the independence of those Members. The same could be said with respect to the regular salary referred to in Article 8.27.15 of the CETA and the remuneration of the Members of the Appellate Tribunal, the subject of Article 8.28.7(d) of the CETA.

99 Further, it is argued that, since the remuneration of the Members of the CETA Tribunal, as provided for in Article 8.27.14 of the CETA, will be determined on the basis of a fixed scale established by the Secretary General and the President of the ICSID, the Kingdom of Belgium is wrong to assert that that remuneration will depend on the workload of those Members.

100 As regards, third, the appointment of Members of the CETA Tribunal, the majority of the governments that have submitted observations and the Council and the Commission state that the Members of international courts and tribunals are appointed by the governments concerned and therefore by the executive.

101 With respect to, fourth, the conditions concerning the removal of Members of the CETA Tribunal, the above governments and institutions comment that it is normal to provide that the Parties to an agreement establishing an international court or tribunal have the option of discharging the Members of that court or tribunal. That is the case, for example, with respect to the International Criminal Court.

102 As regards, fifth, the rules of ethics applicable to the Members of the envisaged tribunals, it is asserted that the Kingdom of Belgium is mistaken in its observation that those Members will not have to declare their outside activities. It follows from Article 8.30.1 of the CETA that those Members will have to comply with the IBA Guidelines or with any other rule adopted by the CETA Committee on Services and Investment under Article 8.44.2 of the CETA. The IBA Guidelines provide for a wide transparency obligation with respect to all facts and circumstances that might affect the impartiality or independence of the judges.

103 While, for the remainder, the Members of the envisaged tribunals will be able to pursue outside activities, that is justified by the fact that, initially, those Members will not be employed full time. For that reason, Article 8.27.12 of the CETA provides that, where there is no dispute, a monthly retainer fee will be paid to those Members to ensure their availability.

104 If, in those circumstances, the Members of the envisaged tribunals were not permitted to pursue an outside activity, they would have no guarantee of sufficient income.”

426. The Member States’ opinions differ from that submitted by the Kingdom of Belgium. Unfortunately, memorials are not publicly available and Member States are not named. The

Member States' position stands opposite, in large part, to that of Belgium. First, with respect to remuneration, it is recalled that pursuant to Article 8.27.12 and 8.27.14, remuneration will be fixed by the EU Commission and Council, should be made as a monthly salary and based on a scale. The remuneration should not vary with the workload of the Members. The retainer fee as well as the salary will have to be determined in a manner which does not affect the independence of the Members.

427. Second, regarding appointment of the Members, Member States submit that they will mostly be nominated by the executive, i.e. the governments, as is the case with international courts and tribunals. Third, they observe that provisions regulating removals of members are standard within international courts and tribunals.

428. Fourth, and perhaps most importantly, the Member States have contradictory views to that of Belgium as regards the ethical obligations of Members. Pursuant to Article 8.30 CETA and the IBA Guidelines, Members will be obligated to disclose their outside activities (contrary to what was presented by Belgium). Further, the Members will be able to pursue their outside activities as a sole revenue from their work as ICS Members would be insufficient.

2. *The CJEU's Analysis*

429. In response to these concerns, the Court starts by recalling the requirement for the Committee on Services and Investments to draft and propose a Code of Conduct for Members, enshrined at art. 8.44.2, which provides as follows:

2. The Committee on Services and Investment shall, on agreement of the Parties, and after completion of their respective internal requirements and procedures, adopt a code of conduct for the Members of the Tribunal to be applied in disputes arising out of this Chapter, which may replace or supplement the rules in application, and may address topics including:

- (a) disclosure obligations;
- (b) the independence and impartiality of the Members of the Tribunal; and
- (c) confidentiality.

The Parties shall make best efforts to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement, as the case may be, and in any event no later than two years after such date.’ (our emphasis)

430. In addition, further to Article 30 which states that ‘the protocols, annexes, declarations, joint declarations, understandings and footnotes to this Agreement constitute integral parts thereof’, a number of instruments were adopted together with the CETA which serve to interpret the requirements of the ICS.

431. At the time of signature of the CETA, the European Union and its Member States and Canada established a Joint Interpretative Instrument (“the Joint Interpretative Instrument”).⁴⁷⁵ Its Preamble describes its object:

a) The European Union and its Member States and Canada make the following Joint Interpretative Instrument at the time of signature of the Comprehensive Economic and Trade Agreement (CETA).

b) CETA embodies the shared commitment of Canada and the European Union and its Member States to free and fair trade in a vibrant and forward-looking society. It is a modern and progressive trade agreement which will help boost trade and economic activity, while also promoting and protecting our shared values and perspectives on the role of government in society.

c) CETA creates new opportunities for trade and investment for Europeans and Canadians, its outcome reflects the strength and depth of the EU-Canada relationship, as well as the fundamental values that we cherish. In particular, we wish to recall:

that integration with the world economy is a source of prosperity for our citizens;

our strong commitment to free and fair trade, whose benefits must accrue to the broadest sections of our societies;

that the principal purpose of trade is to increase the well-being of citizens, by supporting jobs and creating sustainable economic growth;

that Canada and the European Union and its Member States recognise the importance of the right to regulate in the public interest and have reflected it in the Agreement;

that economic activity must take place within a framework of clear and transparent regulation defined by public authorities.

d) The European Union and its Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, safety, environment, public morals, privacy and data protection and the promotion

⁴⁷⁵ OJ 2017 L 11, p. 3.

and protection of cultural diversity. CETA will also not lower our respective standards and regulations related to food safety, product safety, consumer protection, health, environment or labour protection. Imported goods, service suppliers and investors must continue to respect domestic requirements, including rules and regulations. The European Union and its Member States and Canada reaffirm the commitments with respect to precaution that they have undertaken in international agreements.

e) This interpretative instrument provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a clear and unambiguous statement of what Canada and the European Union and its Member States agreed in a number of CETA provisions that have been the object of public debate and concerns and provides an agreed interpretation thereof. This includes, in particular, the impact of CETA on the ability of governments to regulate in the public interest, as well as the provisions on investment protection and dispute resolution, and on sustainable development, labour rights and environmental protection.

432. The Joint Interpretative Instrument also provides, in Point 6, that:

CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems in the European Union and its Member States and Canada, as well as international courts such as the International Court of Justice and the European Court of Human Rights. Accordingly, the Members of these Tribunals will be individuals qualified for judicial office in their respective countries, and these will be appointed by the European Union and Canada for a fixed term. Cases will be heard by three randomly selected Members. Strict ethical rules for these individuals have been set to ensure their independence and impartiality, the absence of conflict of interest, bias or appearance of bias. The European Union and its Member States and Canada have agreed to begin immediately further work on a code of conduct to further ensure the impartiality of the Members of the Tribunals, on the method and level of their remuneration and the process for their selection. The common aim is to conclude the work by the entry into force of CETA. (our emphasis)

433. Statement No 36 by the Commission and the Council on investment protection and the Investment Court System ('ICS'), issued at the signature of the CETA on 27 October 2016, provides further details with respect to the ethical guidelines mandated for members of the ICS:⁴⁷⁶

CETA aims at a major reform of investment dispute resolution, based on the principles common to the courts of the European Union and its Member States and of Canada, as well as to international courts recognised by the European Union and its Member States and Canada.

All of these provisions [in relation to disputes] having been excluded from the scope of provisional application of CETA, the Commission and the Council

⁴⁷⁶ Declaration from the Council of the European Union, *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, October 27, 2016, Statement No. 36 by the Commission and the Council on investment protection and the Investment Court System ('ICS') and Statement by the Kingdom of Belgium on the conditions attached to full powers of the Federal State and the federated entities, for the signing of CETA, para B, first paragraph.

confirm that they will not enter into force before the ratification of CETA by all Member States, each in accordance with its own constitutional procedures.

The Commission is committed to further review, without delay, of the dispute settlement mechanism (ICS), and allowing sufficient time so that Member States can consider it in their ratification processes, according to the following principles:

There will be a rigorous process for selecting all judges of the Tribunal and the Appellate Tribunal, under the control of the European Union institutions and the Member States, with the aim of guaranteeing the judges' independence and impartiality, as well as the highest degree of competence. As regards the European judges in particular, the selection process must also ensure that the richness of European legal traditions is reflected, above all over the long term. Consequently:

- Candidate European judges will be nominated by the Member States, which will also participate in the assessment of candidates.
- Without prejudice to the other conditions set out in Article 8.27.4 of [the CETA], the Member States will propose candidates who fulfil the criteria set out in Article 253(1) TFEU.
- The Commission, in consultation with the Member States and Canada, will ensure an equally rigorous assessment of the candidacies of the other judges of the Tribunal.

The judges will be paid by the European Union and Canada on a permanent basis. The system should progress towards judges who are employed full time.

The ethical requirements for Members of the Tribunals, already provided for in CETA, will be set out in detail as soon as possible and allowing sufficient time so that Member States can consider them in their ratification processes, in an obligatory and binding code of conduct (which is also already provided for in CETA). (our emphasis)

There will be better and easier access to this new court for [small and medium-sized enterprises] and private individuals. To that end:

The adoption by [the CETA Joint Committee] of additional rules, provided for in Article 8.39.6 of the CETA, intended to reduce the financial burden imposed on applicants who are natural persons or small and medium-sized enterprises, will be expedited so that these additional rules can be adopted as soon as possible.

Irrespective of the outcome of the discussions within [the CETA Joint Committee], the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court and the provision of technical assistance.

434. We note the reference to Article 253 TFEU, which requires, in relevant part, that:

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are juriconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. (our emphasis)

435. In sum, with the totality of these instruments taken together, i.e. the CETA Chapter 8 relevant provisions (Arts. 8.27 and 8.30), the Interpretative Note and Statement No. 36, an entire legal framework is developed to ensure the strictest ethical measures for adjudicators. Last, we must not forget to include in this scope the recently approved CETA Code of Conduct for Members on 28 January 2021, which completes the requirement set forth by the previously described framework.⁴⁷⁷ Pursuant to art. 8.44.2 of CETA, the new Code of Conduct replaces the reference to the IBA Guidelines on Conflicts of Interest.

436. The CJEU proceeds to its analysis regarding the external and internal aspects of independence in paragraphs 223 to 244 of the Opinion.⁴⁷⁸ For ease of reference, we set forth the Court's analysis below:

223 As regards the external aspect of the requirement of independence, which requires that the tribunals concerned exercise their functions wholly autonomously, it is clear that, first, the CETA provides, in Article 8.27.4 and 8.27.5, that the Members of the CETA Tribunal will be appointed for a fixed term and will have to possess specific expertise.

224 The CETA ensures, next, in Article 8.27.12 to 15, that the Members will receive a level of remuneration commensurate with the importance of their duties.

225 The CETA guarantees, last, the protection against removal of those Members, in that the possibility of their removal is, in Article 8.30.4 of the CETA, limited to the situation where a member's behaviour is inconsistent with the obligations set out in Article 8.30.1 thereof, in particular the prohibition on taking instructions from others or being in a position of conflict of interest.

226 Article 8.28 of the CETA extends the applicability of Article 8.27.4 and Article 8.30 of that agreement to the Members of the Appellate Tribunal. While the other abovementioned components of independence are not, with the same degree of detail, mentioned in Article 8.28, it is however apparent from the use of the term 'Tribunals' in Point 6(f) of the Joint Interpretative Instrument that the Parties impose on the Appellate Tribunal the same standards of independence as on the Tribunal. That finding is confirmed by the concordance table with respect to the Joint Interpretative Instrument and the CETA text, which is annexed to that instrument and mentions Article 8.28 of the CETA among the provisions corresponding to Point 6(f) of the Joint Interpretative Instrument.

227 In so far as the Kingdom of Belgium and some governments that have submitted observations have doubts as to the compatibility, with the external aspect of the requirement of independence, of the power that Article 8.27.2 and 8.27.3, together with Article 8.28.3 and 8.28.7, of the CETA, confer on the CETA Joint Committee to appoint the Members of the Tribunal and of the Appellate Tribunal

⁴⁷⁷ CETA Code of Conduct, online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/code-conduct-conduite.aspx?lang=eng>.

⁴⁷⁸ *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion 2/15, [2017] ECR (ECLI:EU:C:2016:992) [*Opinion 2/15*].

and to determine or adjust the number, by multiples of three, of Members of whom those Tribunals are to be constituted, consideration must be taken of the fact that the identity of the Members appointed will not be specified in advance in the CETA text and that the same is true of the increase or reductions which might in the future be required as regards the number of Members. The guarantees set out in paragraph 202 of the present Opinion can in no way be construed as precluding a non-judicial body, such as the CETA Joint Committee, from having the power to appoint, while complying strictly with the rules laid down in Article 8.27.4 and 8.27.5 of the CETA, those Members and to adjust, by multiples of three, the number of those Members. Nor do those guarantees preclude such a body from having the power, in accordance with Article 8.30.4 of the CETA, to remove those Members.

228 It is apparent, moreover, from Articles 26.1 and 26.3 of the CETA that the CETA Joint Committee will comprise representatives of both Parties, and that it will adopt its decisions by mutual consent. Those considerations mean, as the Advocate General observed in point 267 of his Opinion, that it can be held that neither the appointment nor any removal of a Member of the Tribunal or of the Appellate Tribunal will be subject to conditions other than those laid down in, inter alia, Article 8.27.4 and in Article 8.30.1 of the CETA.

229 For the same reason, it must be held that it was open to the Parties, without adversely affecting the requirement of independence, to stipulate, in Article 8.27.12 of the CETA, that the amount of the monthly retainer fee to ensure the availability of the Members of those Tribunals will be determined by the CETA Joint Committee and, in Article 8.27.15, that that body may decide to transform that retainer fee and fees and expenses into a regular salary, and decide applicable modalities.

230 The possibility that that power of the CETA Joint Committee with respect to remuneration may not be immediately exercised does not entail that the remuneration of those Members may, initially, be indeterminate. Under Article 8.27.14 of the CETA, the fees and expenses of the Members of the envisaged tribunals will be determined in accordance with Article 14(1) of the Administrative and Financial Regulations of the ICSID, which refers to the scale that is set from time to time by the Secretary-General of the ICSID.

231 As the Advocate General stated in points 260 and 261 of his Opinion, the fact that those provisions concerning the remuneration of Members of the CETA Tribunal and Appellate Tribunal are intended to evolve cannot be perceived as constituting a threat to the independence of those Tribunals, but conversely permits the gradual establishment of a court composed of Members who will be employed full-time.

232 Nor do Article 8.31.3 of the CETA, according to which the CETA Joint Committee may, in addition, adopt interpretations of the agreement that will be binding on the CETA Tribunal, and Article 8.10.3 of that agreement, which must be read in conjunction with Article 8.31.3, adversely affect the capacity of that Tribunal — or that of the CETA Appellate Tribunal — to exercise its functions wholly autonomously.

233 It is neither illegitimate nor unusual, under international law, for provision to be made that the Parties to an international agreement may clarify, as their joint wishes concerning the effect of that agreement develop, the interpretation of that agreement. Such clarification may be introduced by the Parties themselves or by a body set up by the Parties on which they confer a power to adopt decisions that will be binding on them.

234 In this case, it is clear that the CETA Joint Committee is, by virtue of Article 26.1.1 of the CETA, a committee composed of representatives of both Parties that, by virtue of Article 26.1.4 (e) and Article 26.3 of the CETA, has the power to adopt, by mutual consent, decisions that are binding, such as, in accordance with Article 26.1.5(e) and Article 8.31.3 of the CETA, decisions on the interpretation of that agreement that are binding on the Parties and on the Tribunals established by the CETA, without any breach of the requirements laid down in Article 47 of the Charter, and, in particular, the requirement of independence. Those interpretative acts have the legal effects stemming from Article 31(3) of the Vienna Convention, which states that account is to be taken, for the interpretation of a treaty, of ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’.

235 It must be observed that the participation of the Union in the determination, by the CETA Joint Committee, of such binding interpretations, is governed by Article 218(9) TFEU. The consent of the Union to any decision specified in Article 8.31.3 of the CETA will, consequently, have to comply with EU primary law, in particular the principles that are part of that law and that are set out or clarified in the present Opinion.

236 It is important, moreover, in the light of the requirement of independence of the CETA Tribunal and Appellate Tribunal, that interpretations determined by the CETA Joint Committee have no effect on the handling of disputes that have been resolved or brought prior to those interpretations. If it were otherwise, the CETA Joint Committee could have an influence on the handling of specific disputes and therefore participate in the ISDS mechanism.

237 Although that safeguard of no retroactive effect and no direct effect on pending cases is not expressly provided for in Article 8.31.3 of the CETA, it must again be observed that the consent of the Union to any decision specified in Article 8.31.3 of the CETA will have to comply with EU primary law and, in particular, with the right to an effective remedy enshrined in Article 47 of the Charter. Accordingly, Article 8.31.3 of the CETA cannot be interpreted, having regard to Article 47, as permitting the Union to consent to decisions on interpretation of the CETA Joint Committee that would produce effects on the handling of disputes that have been dealt with or are pending.

238 As regards the internal aspect of the requirement of independence, which concerns in particular impartiality, the maintenance of an equal distance from the parties to the proceedings, and the absence of any personal interest of the Members in the outcome of the proceedings, it must be observed, first, that an equal distance is guaranteed not only in Article 8.27.6 and Article 8.27.7 of the CETA, which provide that cases are to be heard by a division, the composition of which is to be random and therefore unpredictable for the Parties, consisting of three Members of whom one is to be a national of a Member State of the Union, one a national of Canada and one a national of a third country, but also by the reference, made in Article 8.30.1 of the CETA, to the IBA Guidelines, from which it follows, in accordance with the initial general principle stated in those guidelines, that the Members of the CETA Tribunal must be impartial and independent of the parties both at the time when a claim is brought before them and throughout the proceedings until those proceedings are terminated.

239 For that reason, it must also be held that the internal aspect of the requirement of independence is not called into question by the fact, highlighted by the Kingdom of Belgium in its request for an opinion, that the remuneration of the Members of the Tribunal will consist, at least initially, not only in a monthly retainer fee, but

also in fees calculated on the basis of the days of work devoted to a dispute. That is because any failure to meet the requirements set out in the IBA Guidelines, including the initial general principle stated in the preceding paragraph of the present Opinion, is liable to require the removal of the Member or Members concerned, in accordance with Article 8.30.4 of the CETA.

240 It is, further, stated, in Article 8.30.1 of that agreement that the Members ‘shall not be affiliated with any government’. While it is explained, in the footnote to that provision, that ‘the fact that a person receives remuneration from a government does not in itself make that person ineligible’, it must be held that that explanation is, as set out by the Commission during the oral procedure before the Court, linked to the fact that, initially, the Members of the envisaged tribunals will most likely not be employed full-time and may include, for example, Members, such as law professors, who receive remuneration from a State but are not however involved, directly or indirectly, in the determination of the policies of the government of that State.

241 As regards the fact that the third sentence of Article 8.30.1 of the CETA states that the Members of the CETA Tribunal ‘shall not take instructions from any organisation, or government with regard to matters related to the dispute’, it must be observed that that sentence must be read in the light of the requirement of independence contained in the first sentence of Article 8.30.1, which means that the Members may not, other than in the scenario defined in paragraphs 232 to 237 of the present Opinion, be subject to any instructions in exercising their duties, whether or not a particular dispute is concerned.

242 As regards, second, the absence of any personal interest of the Members in the outcome of the dispute, Article 8.30 of the CETA contains a general prohibition on conflict of interest, direct or indirect, which includes, by means of reference to the IBA Guidelines, rules of ethics in relation to outside activities.

243 Article 8.30 of the CETA makes reference to the power of the Committee on Services and Investment, the subject of Article 8.44 of that agreement, to adopt ‘supplemental rules’ in that regard, the use of the term ‘supplemental’ ensuring that that committee does not possess any power to diminish the effect of the prohibition on conflict of interest already contained in that agreement, but will have to confine itself, while maintaining the high standard of independence that stems from that prohibition, to adapting the rules stated in the IBA Guidelines to the realities of an investment tribunal that is primarily judicial in nature.

244 In the light of all the foregoing, it must be concluded that the agreement envisaged is compatible with the requirement of independence. (our emphasis)

437. In its analysis, the Court navigates the arguments submitted by Belgium pertaining to the equivalence necessary for the regulations of the selection, appointment, remuneration and governing of conduct of the ICS members to those existing within the EU for its Judges.

438. As with the rest of its analysis, the Court carefully carves out the fine line between the separate system that is the ICS and which stands outside of EU law in several respects. Another main concern that the Court addresses is the criticism that the ICS merely takes up and reformats the arbitral system under the guise of a judicial enterprise. A clear illustration

is the reference to the IBA guidelines in Art 8.30. As Belgium correctly underlines, these guidelines are used for the assessment of independence and impartiality of arbitrators.

439. Although the Court arrives at the conclusion that the proposed framework complies with “the requirement of independence”, several aspects can remain troubling. First, despite the Court’s provision that it is “It is neither illegitimate nor unusual, under international law, for provision to be made that the Parties to an international agreement may clarify, as their joint wishes concerning the effect of that agreement develop, the interpretation of that agreement”⁴⁷⁹, in practice, the entire ethical framework has been left to be developed by the CETA Joint Committee with only the bare of minimum of criteria set out in the Treaty. For a Court to determine that a proposed judicial framework complies with “the requirement of independence” when it notes that this specific requirement has neither been developed nor adopted, is, to say the least, a surprising leap of faith. The very doubts posed by Belgium are, in a circular reasoning, answered by the Court – one can only understand that critics of the system remained unsatisfied with the decision. It is largely unacceptable for the Court to itself write that it is “neither illegitimate nor unusual” for the parties to clarify and develop an interpretation of the agreement when in substance, the framework for independence is barely developed in the treaty itself.

440. Second, the analysis of remuneration continues to be worrying in a similar vein to that examined above. No provision is set out for specific determination of the remuneration. Instead, the Court indicates that a retainer will be determined “in Article 8.27.12 to 15, that the Members will receive a level of remuneration commensurate with the importance of their duties.”⁴⁸⁰ While by itself this provision can appear troubling as it provides no scope to fix such remuneration between, for example, the ICSID regular rates (which for most cases are fixed by the schedule at 375 US\$/hour) and that fixed by arbitrators themselves and agreed by parties in ad hoc proceedings and have no limits, ranging often closer to 750US\$/hour⁴⁸¹, a number of precisions and safeguards are provided for in the text. The Court recalls that, despite the fact that,

⁴⁷⁹ *Ibid* at para 233.

⁴⁸⁰ *Ibid* at para 224.

⁴⁸¹ With a few anecdotal arbitrators who refuse to take cases under 1000\$/hour.

it must be held that it was open to the Parties, without adversely affecting the requirement of independence, to stipulate, in Article 8.27.12 of the CETA, that the amount of the monthly retainer fee to ensure the availability of the Members of those Tribunals will be determined by the CETA Joint Committee and, in Article 8.27.15, that that body may decide to transform that retainer fee and fees and expenses into a regular salary, and decide applicable modalities.

230 The possibility that that power of the CETA Joint Committee with respect to remuneration may not be immediately exercised does not entail that the remuneration of those Members may, initially, be indeterminate. Under Article 8.27.14 of the CETA, the fees and expenses of the Members of the envisaged tribunals will be determined in accordance with Article 14(1) of the Administrative and Financial Regulations of the ICSID, which refers to the scale that is set from time to time by the Secretary-General of the ICSID.⁴⁸²

441. The question of remuneration remains central in an analysis of the independence of the members. Here, to a certain extent, we can remain disappointed by the vast scope and lack of clarity provided by CETA's text. While appearing to provide some guidelines and limits, the parties' powers to develop and interpret further rules on the issue of remuneration is protected by the applicable provisions. We can only conclude that the reasoning here is, just as is was with independence, tautological at best. An Opinion of the Court on these questions might have proven more useful once the referred texts and interpretations were devised by the CETA Joint Committee so that the CJEU could actually analyze and interpret the provisions as written rather than simply recognize that the bare minimum framework laid out in the treaty could be further developed.

442. As this section is dedicated to the analysis of the CJEU's position on the ICS with respect to independence of its Members, it is not necessary to include the newly adopted CETA Code of Conduct for Members. The comparative analysis in Chapter 4 below will address the difference between the ICS and ISDS regimes, and at that moment include the CETA Code of Conduct.

C. Conclusion: A disputed analysis to find the ICS compatible with EU law

443. Critics have denounced the Court's analysis of the compatibility of the ICS with the autonomy of EU law, including fundamental rights, as overstepping its mandate. Experts

⁴⁸² *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion 2/15, [2017] ECR (ECLI:EU:C:2016:992) [*Opinion 2/15*], paras 229, 230.

were divided with respect to *Opinion 1/17*. Some considered that a new tribunal could only be considered as incompatible with EU law, including fundamental rights, in accordance with, *inter alia*, *Opinion 2/13*.⁴⁸³

444. Yet, the analysis of Attorney General Bot and the Court proved that, with respect to the creation of the ICS, the issues of the autonomy of EU law and the respect of fundamental rights could be separated to some extent. The inclusion in the text of the treaty of the lack of a direct effect on EU law is one of the main factors which justifies these results. The recognition, perhaps set out more clearly by Attorney General Bot, but followed by the Court, that the ICS is a separate and hybrid judicial body, justifies that it does not fall within the EU constitutional regime or its prohibition to have separate courts as was decided in previous decisions (*Opinions 2/13* and *1/91*).

445. But the question may have been posed wrongly by detractors. The Court, and President Lenaerts, have confirmed that their purpose is not to impose an internal concept, the autonomy of EU law, to the legal external order through the creation of the ICS. Instead, it appears that they are simply trying to ensure that the evolution of the concept of autonomy of EU law is done in conformity with the contribution and increasing involvement of the EU in the international legal order, through its commercial and investment policy.

⁴⁸³ *Opinion 2/13*, *supra* note 239.

PART II THE ISDS AND EU REFORM FRAMEWORKS ON INDEPENDENCE AND IMPARTIALITY OF ADJUDICATORS

CHAPTER 1. THE IMPACT OF THE ISDS AND THE ICS FRAMEWORKS ON THE INDEPENDENCE AND IMPARTIALITY OF ADJUDICATORS

“[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should *manifestly and undoubtedly be seen to be done*”

R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256

446. The objective of this chapter is to examine the problematic at the heart of this dissertation: how exactly, does the Investment Court System enhance investor-State dispute settlement? In other words, within the framework chosen for the analysis, to what extent does the ICS conform or contribute to the rule of law in the EU and, more specifically, what is its impact on the independence and impartiality of adjudicators? It aims to answer the one central question: was the EU reform necessary to quell the controversy on ISDS? Or worst, will the EU have failed its trading partners? By proposing what Attorney General Bot in its *Opinion to 1/17* wrote was of an “experimental and dynamic nature”⁴⁸⁴, and which the EU attempted to pass as the only solution to provide a newfound coherence and resolve all contestation to ISDS, could the EU have only further contributed to (1) fragmentation and divisiveness of a system (international law, and arbitration in particular) already much criticized for this very factor and (2) lost credibility with its trading partners. Throughout this “experiment”, the EU continues to have a dissonant relationship with ISDS. We wonder whether the EU is only a “recalcitrant participant” or a global actor?⁴⁸⁵

⁴⁸⁴ *Opinion 1/17*, *supra* note **Erreur! Signet non défini.** at para 246.

⁴⁸⁵ Daniela-Olivia Ghicajanu, Fredrik Lindmark and Jose Antonio Rivas, “Washington Arbitration Week: Is the EU a Recalcitrant Entity?” Kluwer Arbitration blog, [February 21, 2022](http://arbitrationblog.kluwerarbitration.com/2022/02/21/washington-arbitration-week-is-the-eu-a-recalcitrant-entity) /, online: <http://arbitrationblog.kluwerarbitration.com/2022/02/21/washington-arbitration-week-is-the-eu-a-recalcitrant-entity>.

447. We conclude, after the below comparative analysis between ISDS and the ICS frameworks, that the EU's experience in unilateral reform was not entirely an exercise in style or futility. The EU must be credited with forcing the international community into action and kickstarting the reform process with UNCITRAL WGIII.⁴⁸⁶ In this sense, it fulfils its role as a global actor. While we believe that there is a strong likelihood that the MIC may never come to life, and the chosen solution will consist of an ISDS +, with an optional appeal mechanism, the contributory role of the EU in enabling the unprecedented reform process discussions can be recognized.

448. For the purposes of our research, we follow a “rule of law scale” with at each of its end, the minima standard set by ISDS and the maxima set by the EU ICS. This is the EU scale. We then increase the scope of the scale to include, in between, the alternative reform proposals for ISDS, i.e. a selection mechanism for arbitrators and a stand-alone appeal level. Of course, the maxima end of scale will become the MIC, which closely mirrors the ICS proposal. The analysis of these systems in their technical proposals therefore aims to situate the cursor on that scale to determine which proposal provides the sufficient safeguards for a strengthened rule of law in a dispute resolution mechanism for international investors and states while still providing an efficient, cost-effective and practical mechanism. In lay terms, which is the correct option for ISDS reform, which builds upon the existing ISDS, and corrects its flaws, without losing the many benefits of the system? Another determinant on the scale is the level of efficiency expected in correlation to the adopted measure or proposed system. These factors work in combination to arrive at a central area where rule of law and efficiency intersect. Lighter rule of law reforms will provide efficiency without offering legitimacy, while heavier or more robust ISDS reforms will provide increased rule of law with a side effect of impossibility to implement.⁴⁸⁷ We seek, with this research, to determine where to rule of law scale can be set to devise the new “gold standard” for dispute resolution of investor State disputes.⁴⁸⁸

⁴⁸⁶ UNCITRAL, “Working Group III”.

⁴⁸⁷ For a comparative compensatory framework similar to this analysis, see Langford, Behn & Malaguti, “The Quadrilemma”, *supra* note 374.

⁴⁸⁸ E.g., Nikos Lavranos, ‘In Defence of Member States’ BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs: A Member State’s Perspective’, 10(2) *Transnational Dispute Management* (2013).

449. This framework could be used for an all-encompassing analysis of ISDS, as is done before WGIII. For the purposes of the current dissertation, we focus on the subset of the rule of law with respect to the independence and impartiality of adjudicators. As explained above, the ethics of arbitrators stand at the heart of the legitimacy crisis of ISDS.⁴⁸⁹ Curing this singular issue will therefore provide a far-reaching solution to a viable reform proposal that will hopefully garner a greater acceptance of states, investors, NGOs and civil population alike.⁴⁹⁰

450. We examine below the similarities and differences between ISDS and the ICS in the categories that define independence and impartiality, following how the CJEU analysed these issues in *Opinion 1/17*.⁴⁹¹ For the purposes of this dissertation, we focus on the sole aspect of independence and impartiality of adjudicators.⁴⁹² The complexity of this issue and the ramifications envisaged in the comparison of the ICS with ISDS on this aspect provide ample material for the research. Its recognition as a core concern in the battle to restore legitimacy further confirms this decision.⁴⁹³

451. For this reason, we compare the existing regulatory system of ISDS with the new proposal of ICS with respect to the selection and appointment, the disclosure requirements, challenge and removal, conduct and ethics and remuneration. The rule of law assessment will be guided by the distilled matrix of the rule of law standards as set out by Professor Castellarin.⁴⁹⁴

A. The Existing Regulatory System of Investor-State Dispute Settlement for Arbitrators

⁴⁸⁹ Catherine Rogers, *Ethics International Arbitration* (Oxford: Oxford University Press, 2014).

⁴⁹⁰ As is set out in WGIII's mandate, partly.

⁴⁹¹ Opinion 1/17, supra note **Erreur! Signet non défini.**

⁴⁹² The CJEU in Opinion 1/17 examined, in turn, (1) equal treatment and effectiveness and 2) access to justice before turning to (3) the independence and impartiality of the tribunal to determine the compatibility of the ICS with EU law, including fundamental rights. We have chosen to focus solely on issues regarding arbitrator ethics which stand at the core of the legitimacy issues with ISDS.

⁴⁹³ Andrea Bjorklund et al, "Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform" (2019) Academic Forum on ISDS Concept Paper 2019/11 [Bjorklund et al, "Selection and Appointment"].

⁴⁹⁴ Castellarin, supra note 337.

“Concern with the selection and appointment of arbitrators has been central in the ‘legitimacy crisis’ surrounding investor-state dispute settlement (ISDS). The regime has been slated and criticized for the outsized role of litigating parties in appointment, the absence of transparency in the appointment procedure, the potential for conflicts of interests, and the lack of gendered and geographic diversity in selection with few demands for qualifications in public international law.”

Malcolm Langford, Daniel Behn and Maria Chiara Malaguti, *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*

452. The requirement for adjudicators to be independent and impartial goes beyond the realm of international dispute settlement.⁴⁹⁵ Domestic laws in rule of law states provide for rules and codes of conduct ensuring that magistrates are and remain independent and impartial. International tribunals, without fail, have also adopted regulation in this respect. The International Court of Justice Statute provides that its Court should “be composed of a body of independent judges”⁴⁹⁶, and the International Tribunal for the Law of the Sea (ITLOS) consecrates that its “independent” judges will be “persons enjoying the highest reputation for fairness and integrity”.⁴⁹⁷

453. Professor Giorgetti et al contend that ISDS provides with a greater level of specificity as, unlike with standing bodies which ascertain the independence and impartiality of judges upon their joining the bench and on a continuing basis for the totality of their work, arbitration provides for individual controls for each case where an arbitrator sits.⁴⁹⁸

454. The arbitrator’s remit is defined, in addition to his duties as adjudicator, by its obligation to conform with the two control mechanisms that are disclosure and challenge.⁴⁹⁹ Disclosure occurs at the beginning of the case and remains an obligation throughout the arbitration. It consists in the requirement by the arbitrator to inform the parties of any matter

⁴⁹⁵ Catherine Rogers, *Ethics International Arbitration* (Oxford: Oxford University Press, 2014).

⁴⁹⁶ *Statute of the International Court of Justice* (26 June 1945) 59 Stat 1055, art 2.

⁴⁹⁷ *Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea)* 1833 UNTS 3, art 2.

⁴⁹⁸ Giorgetti et al, *supra* note 5.

⁴⁹⁹ *Ibid*, Batifort & Baldwin, *supra* note 15.

which may affect his independence and impartiality, in accordance with the arbitration rules in force. A challenge, on the other hand, is introduced by a party against a specific arbitrator based on issues that were not disclosed and accepted by the parties and may so affect his independence and impartiality. When successful, the challenge will result in the removal of the arbitrator. We provide further detail on the obligation, scope and potential result of disclosure and challenge in the chapter below.

455. ISDS exists autonomously as a body of complex and intricate rules. As set out in introduction, with the founding investment treaty which contains the protections to the investors and details of the dispute mechanism, other laws, rules and regulations concurrently apply. The international legal order is not only autonomous; it is composed of a complex framework of treaties and rules which govern its application.

1. Legal Framework for ISDS

a. Relevant Arbitration Rules

456. Arbitrations administered by an institution will follow its given rules for arbitration, such as those from ICSID, LCIA, ICC, or the PCA, to name the most frequently used, and those *ad hoc*, i.e. with no assistance from an institution, will refer to a set of arbitration rules to govern the proceedings, often the UNCITRAL rules.⁵⁰⁰

457. In what can only be described as a self-regulated framework, the development of a body of arbitral rules providing for controls of independence and impartiality of arbitrators has traditionally been the hallmark of arbitration. Concern has increasingly arisen over this system, as well as the lack of consistent rules and approach on a rule-based approach. There however exists a system put in place in practice, mainly through arbitral institutions, to determine and sanction challenges against arbitrators. This system has garnered increased acceptance with a wider transparency with the publication of decisions on challenges to arbitrators, as the LCIA does. The ICC has also agreed to pursue this avenue, although it remains for the time more limited. The weak safeguards provided have repeatedly caused

⁵⁰⁰ David D Caron, Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd Edition) (2013, Oxford).

concern. ICSID, with its mechanism for annulment of decisions and particular procedure to address challenges to arbitrators stands apart. Concerns over the legitimacy of this specific process are, to a large extent, increased within this specific framework. Unfortunately, an important portion of these decisions, no matter the arbitral institution, remains confidential as there exists no undertaking or obligation for their publicity.⁵⁰¹ This undermines the rule of law, and specifically its requirement for procedural transparency.

458. In addition, when examining concerns relating to the independence and impartiality, challenge and removal decisions the applicable law of the place of arbitration will have to be taken into account, with, depending on the issue examined, soft law instruments. The most renown and used instrument in the case of independence and impartiality remain the IBA Guidelines on Conflicts of Interest (2014) (the “IBA Guidelines”).⁵⁰²

b. The IBA Guidelines on Conflicts of Interest

459. The IBA Guidelines were first introduced in 2004 and updated in 2010.⁵⁰³ Initially developed by a group of 15 experts in arbitration, they have become the standard in international arbitration to assess potential conflicts of interest. The IBA Guidelines contain general definitions of concepts of independence and impartiality which must be disclosed and respected by arbitrators on a continuous basis. They are habitually included in the first procedural order guiding the arbitral process in the procedural rules. While it is widely recognized that they have no mandatory force, counsel and arbitrators alike recognize and request their application. Challenges will thereafter be assessed following the guidelines provided.

460. Catherine Rogers explains their role in the self-regulatory system for arbitrators:

The IBA Guidelines work in tandem with standards and procedures in arbitral rules, which were developed and are administered primarily by private arbitral

⁵⁰¹ The LCIA and ICSID websites allow reference to the decisions. New online service providers such as Arbitrator Intelligence or Jus Mundi also boast a wider database and are discussed below.

⁵⁰² IBA Guidelines on Conflicts of Interest (2014) [IBA Guidelines].

⁵⁰³ Margaret L. Moses, “IBA Guidelines on Conflicts of Interests in International Arbitration” in *The Principles and Practice of International Commercial Arbitration*, ed (Cambridge: Cambridge University Press, 2008) 287.

institutions. Institutional rules generally include finality provisions that give arbitral institutions the final say on whether their standards and procedures were complied with, and preclude national courts from second-guessing their decisions.⁵⁰⁴

461. The IBA Guidelines' red, orange and green lists form a crucial part of the self-regulatory system. These Guidelines rank situations in which arbitrators may not continue to act (red list, non-waivable), may not wish to continue acting but can do so with the parties' agreement (red list, waivable), situations which may appear as potentially affecting independence and impartiality (orange list) and those that pose no problem (green list). Throughout the process, the main control mechanism of party appointment is through the disclosure obligation, which is set out in a detailed manner in the IBA Guidelines.⁵⁰⁵

462. The IBA Guidelines have governed issues related to conflicts of interest and independence and impartiality of arbitrators with success. A soft law instrument, it has widely been referred to in a number of arbitration rules and is usually referred to as the instrument to guide such decisions in the conduct of arbitrations. The red, orange and green lists are widely known and adopted by the arbitral community. It is then based on these principles that either arbitration institutions, or tribunals themselves in the case of ad hoc proceedings, take decisions concerning requests for the recusal of arbitrators.

463. Arbitral institutions, and arbitrators in the case of ICSID, LCIA, or ICC proceedings, to name a few, have generally adopted reference to the IBA Guidelines on Conflicts of Interest upon their exercise of the second control mechanism, that of a challenge for removal of an arbitrator.⁵⁰⁶

464. We must therefore refer to the aforementioned instruments in order to complete our analysis of the existing regulatory system on the independence and impartiality of arbitrators. Once the analysis of the ISDS framework is completed, and its relevant rule of law compliance, we may turn to the assessment of the ICS proposal. This will allow us to analyze

⁵⁰⁴ Catherine Rogers, *Ethics International Arbitration* (Oxford: Oxford University Press, 2014).

⁵⁰⁵ Ünüvar & Kreft, "Impossible Ethics?", *supra* note 7.

⁵⁰⁶ Margaret L. Moses, "IBA Guidelines on Conflicts of Interests in International Arbitration" in *The Principles and Practice of International Commercial Arbitration*, ed (Cambridge: Cambridge University Press, 2008) 287.

the additions of the ICS to ISDS, or differences, and assess where they stand in terms of offering a strengthened rule of law.

c. Defining Independence and Impartiality

465. Independence and impartiality are “essential elements of any adjudicatory mechanism that is based on the principle of the rule of law”.⁵⁰⁷ These concepts constitute part of general principles of law pursuant to Article 38(1)(c) of the Statute of the International Court of Justice.⁵⁰⁸ They act as safeguards to preserve the objective and fair nature of proceedings. Their purpose is to ensure that decisions are based solely on the law and are devoid of external influence, whether financial, political, ideological or personal. The volume of research and doctrine focusing on these concepts and the underlying theme of ethics in international adjudication is explained by its crucial nature. Intrinsically linked to the legitimacy of proceedings, independence and impartiality are at the core of the reform efforts of ISDS.⁵⁰⁹ Ensuring that concerns about these key concepts have disappeared will arguably alleviate concerns about the lack of legitimacy in the existing ISDS regime.⁵¹⁰ The question therefore is whether it would not be possible to resolve issues with independence and impartiality without a complete overhaul of an otherwise seemingly highly efficient and praised system.⁵¹¹ The standards proposed by the EU, at first blush, appear to be all but impossible to comply with, or leaving an extremely diminished pool of candidates.⁵¹²

466. The analysis of independence and impartiality can be divided into multiple categories, into which fall the issues of appointment, disclosure, removal, remuneration and conduct of

⁵⁰⁷ Giorgetti et al, *supra* note 645.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.*

⁵¹⁰ Giorgetti et al, *supra* note 5 at 444; Chiara Giorgetti, “Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals” (2014) 49 *George Wash Intl L Rev* 101.

⁵¹¹ Charles N Brower & Charles B Rosenberg, “The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded” (2013) 29:1 *Arbitration International* 7.

⁵¹² Ünüvar & Kreft, “Impossible Ethics?”, *supra* note 7.

adjudicators (ethics and prohibition to act as counsel, witness or expert simultaneously with an appointment as Tribunal member).

467. As an illustration of the ever fragmented nature of international law, as well as the strong influence of domestic law in this case, rarely are the two concepts of independence and impartiality specifically addressed with a single definition. Rather, their contours are sketched in various forms. In doing so, many institutions have indicated wanting to keep a measure of flexibility in their interpretation. Accordingly, there are a number of “definitions” of both independence and impartiality, whether in arbitral rules or in national laws. It is nevertheless possible to provide a general sense of these two principles.

468. The measure to which the evolution of these terms continues to be essential is evident from the important body of jurisprudence surrounding their application. That is, before institutions for the application of challenges to arbitrators, arbitral tribunals within the ICSID system when it befalls upon the two unchallenged arbitrators to determine the challenge against the third arbitrator, or by national courts who are called upon to so rule.

469. Independence and impartiality are defined and distinguished, in their general conception, by Giorgetti et al. as follows:

The notion of independence is generally used to refer to the institutional independence of the judiciary and adjudicators from the other branches of government. In addition, independence is also used to designate the absence of legally relevant relationships between the adjudicator and the parties to a dispute. (our emphasis)

470. The authors then turn to impartiality:

The notion of impartiality, in turn, refers to the absence of pre-judgment of the decision-maker in relation to the case, or to the parties, before her. It encompasses both the actual absence of pre-disposition and conflicts of interest and the perception thereof, because ‘[n]ot only must justice be done; it must also be seen to be done.’ In addition, in international dispute settlement, unlike in the domestic context, diversity of nationality between the parties and the adjudicator is often considered to be a positive representation of independence and impartiality.”⁵¹³ (our emphasis)

⁵¹³ Giorgetti et al, *supra* note 645 at 444–45. See *Opinion 1/17, supra* note **Erreur! Signet non défini.** at paras 189–204 (assessing the compatibility of the ‘investment court system’ provided for in the Comprehensive Economic and Trade Agreement Between Canada and the European Union (EU) the demands for independence and impartiality expressed in art 47 of the Charter of Fundamental Rights of the EU); see also *Mutu and*

471. These standards are present separately in the vast majority of arbitration rules. The main exception is that of the ICSID Rules, where, following interpretation, it has clearly been recognized that impartiality is so included despite not being referred to in the text.⁵¹⁴

472. The scope and definition of the principle of independence and impartiality for adjudicators varies in the different legal instruments. In international arbitration, the principle is usually founded in the national law, and taken together with definitions provided by the applicable arbitration rules (UNCITRAL, ICC, ICSID, LCIA) and that, evidently, of the IBA Guidelines. As the above-referenced set of arbitration rules all find application in investor-state disputes, the analysis below draws from many of these rules in a comparative perspective. ICSID and UNCITRAL Arbitration Rules are examined as they are the principal rules under which investor-state disputes are governed. ICC and LCIA Rules are added to the comparison, as, although they are principally used in commercial disputes, they have been increasingly adopted in investor-state disputes. The modern and diverse approaches of these particular rules, at times bringing into investment disputes an influence of commercial arbitration, are examined below as they each contribute different elements to the assessment of the strength of the rule of law of ISDS for matters related to independence and impartiality.

473. In the current ISDS system, the requirement that arbitrators be and remain independent and impartial is usually inscribed in the text of the treaty in a general obligation. The vast majority of arbitration rules also provide for the disclosure and challenge obligations. While the obligations they provide may vary in specificity, as does their disclosure obligation and the procedure for challenge, the general philosophy is similar overall.

d. Identifying the Conflict of Interest

474. The absence of independence or impartiality may create a conflict of interest. It is that conflict that will be determined as fatal or not to the involvement of the adjudicator

Pechstein v Switzerland, Nos 40575/10 and 67474/10, [2018] ECHR 1 at paras 138–68 (dealing with the notion of independence and impartiality in sports arbitration from the perspective of the European Convention on Human Rights).

⁵¹⁴ Giorgetti et al, *supra* note 645 at 444–45.

involved in the proceedings. A clear definition of conflict of interest continues to be, unfortunately, an elusive goal. H  l  ne Ruiz-Fabri refers to this as “navigating in the fog” through the delicate task to determine when “bonds of interest” transform into conflict and become objectionable. Ruiz-Fabri emphasizes that “it is not always so easy to determine whether a decision-maker is sufficiently independent and impartial. This gray area is the place where bonds of interest can transform into conflicts of interests.”⁵¹⁵

475. The notion of conflict of interest therefore stands at the heart of the analysis. Although it is rarely defined, it is widely understood as that which must be avoided and the result of a lack of independence and impartiality.

476. The purpose of disclosure by an arbitrator, whether at the beginning of the case, or on a continued basis, is meant to avoid such conflicts of interest. Similarly, challenge mechanisms are meant to regulate what is perceived as conflict of interest by the arbitrator, in contravention to the applicable rules.

477. The purpose of the IBA Guidelines, discussed above, is to provide a clear framework against which to assess the impact of the disclosure and whether it risks creating a conflict of interest, or not. Organized around a framework of general principles, and the stop light list system ranking situations according to their impact on the acceptance of an appointment, a disclosure or eventually a challenge or resignation.

478. The Red List is divided into a waivable and non-waivable list of situations which clearly prevent arbitrators from acting in a case due to clear ties or situations affecting their independence and impartiality:

The Red List consists of two parts: ‘a Non-Waivable Red List’ (see General Standards 2(d) and 4(b)); and ‘a Waivable Red List’ (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as

⁵¹⁵ H  l  ne Ruiz Fabri, “Conflicts of interests: Navigating in the fog”, in *Symposium: A focus on ethics in international court tribunals* (2019)113 AJIL Unbound 307-311.

severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).⁵¹⁶

479. Predictably, the category which gives rise to the most difficult decisions for challenges or disqualifications arise from the Orange List:

The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).⁵¹⁷

480. Lastly, the Green List, provides for cases in which there does not exist any appearance or actual conflict of interest:

The Green List is The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List.⁵¹⁸

481. We also recall that although many situations that are revealed by arbitrators can be classified on the orange or red waivable list, only the situations listed in the non-waivable red list cannot be accepted by the parties. In all other situations, parties can expressly indicate that they do not consider that the disclosure prevents an arbitrator from acting in its designated mandate.

2. Selection and Appointment Mechanisms

482. A central feature of arbitration is the power granted to parties to appoint an arbitrator. Under the control of two mechanisms, that of disclosure and challenge, or any elements which may bring question to independence and impartiality and create a conflict of interest, ISDS has developed a self-regulated framework for its arbitrators.

483. The many benefits of party appointment bear recalling. First, it is possible to call upon someone whose experience is notorious in a particular field. Aside from the repeated

⁵¹⁶ IBA Guidelines, p. 17, para 2.

⁵¹⁷ IBA Guidelines, p. 18, para 3.

⁵¹⁸ IBA Guidelines, p. 19, para 7.

criticism that a small and select group of experts are repeatedly called upon to serve as international arbitrators, there exists an ever expanding pool of qualified candidates.⁵¹⁹ The challenges faced by this pool of arbitrators is to allow for an increased diversity in gender and geography, amongst other. This issue is further developed below and continues to be an ongoing concern.⁵²⁰ Nationalities, languages, and technical knowledge of specific fields of law are additional qualifications taken into account in the selection of the arbitrator.⁵²¹ International arbitration, and in particular international investment arbitration, is a field of law that has developed at an exponential pace since the 2000s. With that meteoric rise, the expansion (or lack thereof) of the arbitrator pool has been denounced as an endemic issue to the conscious or unconscious bias that arbitrators who benefit from repeat nominations might bring to a case.⁵²²

484. Appointments of arbitrators may be done by the party itself, by an arbitral institution or by a national court. If party appointment can be considered as one of the features at the heart of international arbitration and ISDS, it also is one of the most criticized.⁵²³ Under the control mechanisms that are set out below for the continuing obligation of disclosure by arbitrators coupled with the possibility for them to withstand a challenge, a party has complete freedom to appoint an arbitrator of his or her choice.

485. The arbitration agreement may contain specifications as to the qualifications necessary for the arbitrator, such as expertise in a particular field, although this is not the standard. Arbitration rules do not contain specific requirements for arbitrators either. Accordingly, it is the practice to select and nominate arbitrators who have prior experience in international arbitration. Depending on the sector, whether commercial or investment international arbitration, or specific sectoral arbitration (e.g. insurance, maritime), different pools of experts are available. An important number of websites, who do not propose to act

⁵¹⁹ Langford, Behn & Lie, “Revolving Door”, *supra* note 361.

⁵²⁰ *Report of the Criss-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*, The ICCA Reports No 8 (ICCA, 2020); UNCITRAL, “Working Group III”, Andrea Bjorklund et al, “The Diversity Deficit in International Arbitration” (2020) *Academic Forum on ISDS Concept Paper 2020/1* [Bjorklund et al, “Diversity Deficit”].

⁵²¹ Bjorklund et al, “Selection and Appointment”, *supra* note 493.

⁵²² Ünüvar & Kreft, “Impossible Ethics?”, *supra* note 7; Catherine Rogers, *Ethics International Arbitration* (Oxford: Oxford University Press, 2014).

⁵²³ Bjorklund et al, “Selection and Appointment”, *supra* note 493.

as administering institutions, provide lists of available arbitrators with their biographies.⁵²⁴ Parties are nonetheless free to select other persons to act as arbitrators.

a. The ICSID Rules

486. The role of arbitral institutions in the selection and appointment of arbitrators is central to the organization of the system. In ISDS, arbitrators are appointed upon parties' nominations, failing which the institutions or authority of nomination can so proceed. These rules provide for a strict framework governing the establishment of the tribunal, from the party nomination of its arbitrator, the signature of a model declaration of independence, to the time provided for the parties to comment thereon.

487. The ICSID Rules, Chapter I, Rules 1-5 govern the establishment of the Tribunal:

Rule 1 General Obligations

(1) ...

(2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators and the method of their appointment.

(3) The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

(4) No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.

⁵²⁴ E.g., Arbitrator Intelligence, a database created by Catherine Rogers and which provides confidential feedback on arbitrators, has also been gaining popularity, with the Government of Canada signing its first agreement with AI to assist in the selection of arbitrators. Designed to increase knowledge and transparency regarding arbitrator's expertise and work, the comments stem from feedback in real cases. While this is a subscription-based instrument, the increased transparency can appear useful to respond to critics against ISDS. The existence of this service could, conversely, be criticized for the same reason. It could be said by detractors to perpetuate and encourage a system which greatly lacks legitimacy.

Rule 2 Method of Constituting the Tribunal in the Absence of Previous Agreement

(1) If the parties, at the time of the registration of the request for arbitration, have not agreed upon the number of arbitrators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:

(a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator or of a specified uneven number of arbitrators and specify the method proposed for their appointment;

(b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:

(i) accept such proposals; or

(ii) make other proposals regarding the number of arbitrators and the method of their appointment;

(c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

(2) The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.

(3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 37(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Tribunal is to be constituted in accordance with that Article.

Rule 3 Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)

(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:

(a) either party shall in a communication to the other party:

(i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and

(ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;

(b) promptly upon receipt of this communication the other party shall, in its reply:

(i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and

(ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

(2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 4 Appointment of Arbitrators by the Chairman of the Administrative Council

(1) If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.

(2) The provision of paragraph (1) shall apply mutatis mutandis in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.

(3) The Secretary-General shall forthwith send a copy of the request to the other party.

(4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Articles 38 and 40(1) of the Convention, he shall consult both parties as far as possible.

(5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5 Acceptance of Appointments

(1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.

(2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of an arbitrator, he shall seek an acceptance from the appointee.

(3) If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

488. The absence of criteria for selection of arbitrators is notable. Rule 1 prescribes only two limits to the appointment. First, it provides that the nationality of nominated arbitrators shall not be the same as that of the party nominated, unless agreed upon by the parties in the case of three member tribunals. It will not be allowed in the case of five member tribunals. Second, it provides that a person having acted as conciliator or arbitrator for the settlement of the dispute shall not be a member of the tribunal. The parties remain the master of the proceedings as it befalls them to determine the method by which they propose to establish the tribunal, which will guide the appointment process for co-arbitrators and president of the tribunal.

489. We also note that time limits provided by Rule 2 are included in order to ensure that the process does not get unduly delayed in this first step of the arbitration. Interestingly, as we later address, one of the criticism of party appointment is the potential delay that this may cause at the start of proceedings, particularly so if there are issues with disclosure, if a party as part of dilatory or “guerilla” tactics refuses repeatedly to agree to the other party’s nominee, or if the party nominated arbitrators are unable to agree a Chair.⁵²⁵ Conversely, proponents of the new ICS which has stricken this step and replaced it with a permanent roster, have put forth the efficiency of such a new mechanism. This potential delay, argue in return defenders of ISDS, may very well be overtaken with the time required for the new appeal level.⁵²⁶

490. In the event that parties are unable to agree on the appointment of one or several arbitrators, Rule 4 provides for the mechanism of appointment by the Chairman after 90 days from the dispatch by the Secretary General of the registration of the arbitration.

491. Rule 5, finally, bookends the procedure to ensure the arbitrator’s acceptance, paramount in the process, as well as a fallback mechanism should the arbitrator fail to do so.

⁵²⁵ Bjorklund et al, “Selection and Appointment”, *supra* note 493.

⁵²⁶ Charles N. Brower and Jawad Ahmad, ‘For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court’ (2018) 41 Fordham Int’l L. J. 791; Alvarez, “The Long View”, *supra* note 55.

In that case, the Secretary General, or if appropriate the Chairman, will invite the parties to proceed to a new appointment in accordance with the agreed method.

492. These Rules must be read in parallel with the provisions governing the independence of arbitrators, coupled with the challenge and removal provisions, set out in the section below. The mechanism governing the required disclosure provides the complete framework for the establishment of the tribunal. Indeed, it is not sufficient to proceed with simply the nomination by the party or the Chairman, and confirmation by the Secretary General, for the Tribunal to be established. There will inevitably be part of the selection process guided by the disclosure made by the parties, crystallized in the acceptance or rejection of the arbitrator proposal referred to in Rule 2(b) and (d) which provides 20 days from the transmission of the name of the arbitrator for the other party to indicate whether she accepts or rejects the proposal for the arbitrator and method of constitution of the tribunal, or whether to make reply proposals, in which case an additional 20 days is granted to inform an acceptance or rejection.

493. As a general rule, the ICSID model reflects very adequately the developed practice for the appointment of arbitrators. This is reproduced in other sets of arbitration rules or followed by rote in *ad hoc* proceedings.⁵²⁷ It is nevertheless worth examining a number of other sets of rules below so as to distinguish between the advantages and efficiencies provided by varying arbitral institutions.

494. In 2016, ICSID initiated a reform process to undergo a full review of its rules. Now at the sixth iteration of these rules, comments from stakeholders, members states, practitioners and arbitral institutions are reflected in the rules. While a commendable, and long awaited, initiative, it has been welcomed with the same general address by the arbitral community than what is reserved for the ISDS reform review conduct by UNCITRAL WGIII. Division reigns supreme – the silver lining in this legitimacy crisis. On the one hand, the reformers have welcomed this new initiative with enthusiasm, while, on the other, critics have vastly denounced it as an oversimplified exercise, accusing ICSID of positioning itself advantageously to serve as Secretariat or Advisory Center to the MIC.⁵²⁸ Rather than

⁵²⁷ Such as UNCITRAL.

⁵²⁸ Alvarez, “The Long View”, *supra* note 55.

reflecting on and attempting to address the fundamental issues with the system, such as the unfairness between states in the Global South and North or the privilege to investors, as Alvarez would have advised, the ICSID rules review only addresses the “low hanging fruit”.⁵²⁹

495. On 12 November 2021, the latest version of the rules was released, providing, in the words of Meg Kinnear, Secretary General of ICSID, “*a set of highly effective and innovative rules that maintain the requisite balance between investors and States.*” It will include the most significant changes in the past 50 years and “reflect a concerted effort to simplify and streamline the rules in order to reduce the time, cost and environmental footprint of cases.”⁵³⁰

The most significant changes include:

Greater transparency in the conduct and outcome of proceedings (for example, through increased publication of awards, decisions and orders)

Required disclosure by parties of third-party funding

The option to fast-track proceedings through the use of expedited arbitration rules

Broader access to ICSID dispute resolution procedures; for example, by permitting Regional Economic Integration Organizations—such as the European Union—to utilize ICSID’s Additional Facility Rules for Arbitration and Conciliation

The introduction of state-of-the-art Mediation Rules that are available to all investors and States based on their consent⁵³¹

496. On 21 March 2022, ICSID Member States approved the comprehensive set of amendments to ICSID rules, and they entered into force on 1 January 2022.

497. Alvarez had predicted the amendments were likely to be adopted, notably as they were based on the latest ISDS chapter in the CPTPP.⁵³² ICSID’s amendments allow for “self-correction even without establishing a single over-arching institution or centralized mechanism for investment disputes”.⁵³³ These changes may only be “the tip of a more

⁵²⁹ *Ibid.*

⁵³⁰ ICSID, News Release, “ICSID Releases Sixth Working Paper on Proposed Amendments to Its Procedural Rules” (12 November 2021), online: ICSID <<https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-sixth-working-paper>>.

⁵³¹ *Ibid.*

⁵³² José E. Alvarez, ‘Is the Trans-Pacific Partnership’s Investment Chapter the new “Gold Standard”?’ (2016) 47 *Victoria Univ. of Wellington L. Rev.* 503 (henceforth *New ‘Gold Standard’*).

⁵³³ Alvarez, “The Long View”, *supra* note 55 at 13.

significant (if subtle) transformation over time in investment arbitration: namely more “balanced” ISDS rulings over the last decade by arbitrators aware of and responsive to the broader sovereign backlash brought on by older ISDS awards”.⁵³⁴

498. ICSID’s position and general lack of enthusiasm with regard to the MIC is also emphasized. As Alvarez writes:

do not expect an institution whose raison d’être is investment arbitration to take the lead in replacing it with a single global investment court. Nor can one expect an organization that provides a procedural venue to venture ahead of its skis to propose substantive changes to states’ IIAs.⁵³⁵

499. With these amendments, ICSID has demonstrated that it stands ready to be the institution at the heart of any reform, which it will support with its Secretariat and revised rules. Alvarez concludes that:

ICSID’s latest effort is a bid by the world’s leading forum for investment arbitration to remain relevant even if more fundamental structural changes to how investment disputes are handled are in the offing. ICSID’s message to ISDS reformers is clear: if you want to establish an international assistance facility or even a formal appeals process as an alternative to ICSID annulment, you do not have to re-invent the wheel. ICSID, an institution with a proven track record and the institution with the greatest experience on investment adjudication, is here and ready to be built upon.

b. The UNCITRAL Rules

500. The UNCITRAL Arbitration Rules (2013) also provide a “comprehensive set of procedural rules” used in commercial, investor-State and State-State disputes in *ad hoc* and administered arbitrations. The three existing versions of the Arbitration Rules are: (i) the 1976 version; (ii) the 2010 revised version; and (iii) the 2013 version incorporating the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration.

501. The UNCITRAL Arbitration Rules, revised in 2010 to reflect the changes of the past 30 years of a developed practice, include provisions on “multiple-party arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A

⁵³⁴ *Ibid*, José E. Alvarez, ‘The Return of the State’ (2012) 20 Minn. J. Int’l L. 223.

⁵³⁵ Alvarez, “The Long View”, *supra* note 55 at 13.

number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, and a review mechanism regarding the costs of arbitration. They also include more detailed provisions on interim measures.”

502. A new Article 1, paragraph 4, was included in 2013 to the Arbitration Rules, following the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency"). They provide as follows, in relevant part, for the selection and appointment of arbitrators:

Appointment of arbitrators (articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has

appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Article 10

1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.⁵³⁶

503. While the procedure provided in the UNCITRAL Rules is similar in a general manner to that provided by ICSID, we note a few distinctions. First, a greater focus on the possibility for the parties to appoint a sole arbitrator should be noted. Bearing in mind that for the majority of cases under the UNCITRAL Rules no administering arbitral institution provide services, references are instead made to an appointing authority. This mechanism is frequently used and can be harnessed so as to designate either the Secretary General of an arbitral institution (often the Permanent Court of Arbitration) which will then designate a renown practitioner to provide the designation service. This, arguably, only contributes to lengthening the delays in the selection and appointment of arbitrators.

504. We now turn to the ICC and LCIA Arbitration Rules to complete our portrait of the existing framework of arbitration rules which govern the selection, appointment and challenge arbitrators. Due to the fragmented nature of this framework for independence and impartiality of the arbitrators, it is only possible to discuss a few of the interlinked frames to present an adequate portrait of the existing system, so that its advantages and flaws may be

⁵³⁶ *UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013): UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (New York: United Nations, 2014), online: UNCITRAL <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>>.

illustrated before turning to the EU’s proposal for the ICS, which was designed to answer all critics of ISDS. Our choice to present the ICC Arbitration Rules is motivated by the forward-looking nature of the institution, its recent review process having taken into account, in part, the increasing reference by states to this body of rules. Unlike ICSID or UNCITRAL who underwent review processes which were lengthy, the ICC has been proactive in the revision of its rules since 2012. For a similar reason, we will examine the provisions of the LCIA, as its rules provide the additional benefit of providing public access to challenge decisions of arbitrators, a rare occurrence in arbitration.

505. The International Chamber of Commerce (ICC) Court of Arbitration is a pioneer in the advancement of the mechanism for appointing arbitrators. To date, the organization has managed over 25 000 cases since its creation in 1923.⁵³⁷ The “ICC Court”, an administrative body, exercises judicial supervision of arbitration proceedings. This includes confirming, appointing and replacing arbitrators, through a network of National Committees in 92 countries, which each have a mechanism to propose arbitrators upon request of the ICC Court, as well as deciding any challenges made against them. The Court also monitors and ensures that the arbitration is performed properly and efficiently. It scrutinizes and approves all arbitral awards, manages the fees related to the arbitration, and oversees emergency proceedings.

506. While most nominations are habitually lawyers or former judges, we see two notable exceptions in sectoral arbitrations. In insurance, maritime and construction arbitrations, there is a strong tendency to include an expert in the field and so require these qualifications in the arbitration agreement. Often drafted following model clauses in specific arbitration rules, it is an accepted standard for industries to include their own specialist. Hence, an engineer will often be called upon to act as arbitrator as he/she will have the greatest understanding of the complex construction contracts such as FIDIC, but will also master the technical intricacies relevant to a dispute. Similarly, and always with the goal to ensure efficient and effective proceedings, we note the selection of insurance experts, intellectual property experts or maritime specialists in these industry arbitrations.

⁵³⁷ International Chamber of Commerce, “ICC Dispute Resolution 2020 Statistics”, online: iccwbo.org/dr-stat and <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf>.

507. Often, reference will be provided in the arbitration clause based on the model agreement provided for in the selected arbitration rules. In commercial arbitrations, we can refer to the ICC model clause, an industry standard, which reads as follows:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.⁵³⁸

508. The ICC Rules govern the appointment process by the institution. Article 13 provides for the Appointment and Confirmation of Arbitrators:

1) In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).

2) The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at one of its next sessions. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.

3) Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of an ICC National Committee or Group that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

4) The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:

- a) one or more of the parties is a state or may be considered to be a state entity;
- b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
- c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.

4) Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and

⁵³⁸ ICC, *Arbitration Rules 2021* (1 January 2021) online: ICC <<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>> [ICC, *Arbitration Rules*].

provided that none of the parties objects within the time limit fixed by the Secretariat, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

5) Whenever the arbitration agreement upon which the arbitration is based arises from a treaty, and unless the parties agree otherwise, no arbitrator shall have the same nationality of any party to the arbitration.

509. In sum, the mechanism provided for the ICC Rules is more prescriptive than the ICSID and UNCITRAL Rules. In particular, in the case of state parties, of interest in this dissertation, we note the power for the Secretary General to proceed by direct appointment (13(4(a))).⁵³⁹ This particular power is meant to ensure efficiency in the appointment and provide the Secretary General with a closer control of arbitrations which include state parties which, due to their specific nature, are inherently recognize as potentially more delicate in problematic. For example, due to the fact that a State is involved, aside from public interest issues, it can be frequent to have longer delays for the nomination of arbitrators, comments on challenges or the payment of the advance on cost, due to the intense administrative structure of a state. Article 13(4) simply allows the SG, in other words, the power to keep an eye on these cases.

510. The ICC practice with respect to confirmation of appointments is set out in Article 13(2). The Secretary General confirms the parties' appointments which pose no potential issues. This is an efficient mechanism which avoids delays in the procedure. In the case of state parties or where issues regarding existing or eventual conflicts of interest, the confirmation of the appointment will be submitted to the Court for a decision. In this case, parties' comments will be required in the disclosure, and a memorandum presenting the situation will be prepared by the Secretariat for decision by the Court. The facts of the case, the parties' comments, and the relevant IBA Guidelines on Conflicts of Interest will be set out. In addition, and specific to ICC Court Practice, members of the secretariat will bring to the attention of the court institutional practice, existing case law from other institutions and similar cases where relevant situations occurred to inform the Court's decisions. The balance here is that of respecting the parties' wishes with respect to the arbitrator, while ensuring that conflicts of interest are avoided.

⁵³⁹ In this body of Rules, similar to the ICSID Rules, parties are granted by the Secretariat a deadline for proposals of arbitrators.

511. Cases which have become particularly known and discussed in this ambit in previous years always focus on gray areas of the Guidelines. For a time, this was embodied by the discussion of the potential conflict with involvement of QCs from the same chambers. These situations are directly addressed in the reform process before WGIII. The issue of multiple roles of arbitrators is particularly contentious in regards of the reform discussions.⁵⁴⁰

512. We also remark the requirement pertaining to the nationality of arbitrators. Article 13(6) provides that, unless otherwise agreed by the parties, arbitrators may not have the same nationalities as the parties to the arbitration. This requirement is a constant throughout the various sets of arbitration rules as it is vastly considered to be a fundamental criterion to ensure a lack of conscious or unconscious bias from the potential arbitrator, the hallmark of this procedure.

513. Finally, the London Court of International Arbitration (LCIA) and the Permanent Court of Arbitration (PCA) are equally renowned for the quality of the services they provide for the appointment of arbitrators. In essence, a myriad of other arbitral institutions also offer selection and appointment services, based on lists, rosters and other mechanisms. The selection by a third party bolsters the independence and impartiality of the arbitrator selected, while adding a dimension of expertise. Indeed, these institutions all rely on various methods to specify the specialties of the experts who may be called upon, the nationalities, previous experience together with institutional knowledge. Conversely, however, the recourse to an appointing authority or even an arbitral institution is more often than not translated to greater delays in the appointment of arbitrators. Efficiency in this domain is recognized as an essential feature to maintaining arbitration a favorite means of dispute resolution in the international realm.

514. The greatest efficiency achieved in the selection and nomination of arbitrators is arguably what has been devised and implemented by various institutions in the creation or overhaul of emergency arbitrator rules. This process is streamlined to a fault in order to ensure that emergency or interim measures are granted to parties while they await the constitution of a tribunal. In order to have an arbitrator in place, the institution proceeds

⁵⁴⁰ Its resolution is crucial to the adoption of the Code of Conduct drafted by ICSID and UNCITRAL and meant to apply to a variety of proceedings, ranging from the MIC to *ad hoc* arbitrations.

directly to the nomination and works in close cooperation with the emergency arbitrator and the parties. It can only be lamented that lessons from this rapid procedure cannot be drawn and adapted for “regular” appointments. This would respond to critics about the delay in the nomination. Unfortunately, to an extent, emergency arbitrator procedures rely on institutions to proceed to the appointment, thus bypassing the will and autonomy of the parties.

515. There exist other avenues for appointment which are mastered skillfully by national institutions. In the case of the Sport Dispute Resolution Center for Canada, an administering institution for arbitrations and mediations at the national level for the sport federations, a procedure has been tailored with extremely tight timelines in order to take into account the often pressing issues of selection to a national team, permission to play in view of an anti-doping control, or obtention of financing to allow the athlete participation in a competition. While the disputes’ focuses are very different than international commercial or investment arbitration, and there are no amounts in play in sports arbitration (or relatively lower than the mammoth ones involved in investor-State arbitrations), the importance of the decision and its life changing aspect for the athletes can often feel closer to heart and with a more direct and immediate impact. ISDS should certainly inspire itself from the simplified mechanisms for nomination and speed with which procedures can be held at the SDRCC, ranging from a few hours in the case of an urgent decision, to a couple of months for a regular non urgent matter. In comparison, two months is often not enough to have a tribunal entirely in place following the arbitration rules set out above or any other *ad hoc* parties’ agreement.

516. We must also mention that recourse to Appointing Authorities is often provided for in arbitral clauses or in the UNCITRAL Arbitration Rules. This way, if a party fails to select an arbitrator, does not participate in the proceedings or if the two co-arbitrators are unable to agree on a chairperson, the responsibility for the appointment of the arbitrator befalls upon the Appointing Authority. The Secretary General of those institutions is often also referred in arbitration rules as a possible appointing authority, be it the Secretary General of the PCA, of ICSID of the ICC or at times of the United Nations.

517. National courts also have the power to appoint an arbitrator in similar situations. But the system has been constructed in order to be a self-functioning framework within which it is possible for the parties to evolve and refer to specialist authorities without having to revert

to national courts. This, as always, is one of the proclaimed benefits of arbitration, in that it purports to provide a strong rule of law system which would not be available to some parties in specific countries.

518. The diversity which the arbitral institutions have sought to strengthen and strive for has been the object of a number of initiatives in recent years. We can refer to the Equal Representation in Arbitration initiative, or Arbitral Women, *inter alia*, which promote a greater diversity within underrepresented groups. Arbitral institutions themselves have recognized and have been pro-active in researching new candidates to widen their pool of arbitrators. All actors of this field recognize the immense progress made in terms of providing a greater pool of candidates from which to choose from for parties and institutions alike.⁵⁴¹ Initiatives for increased diversity of arbitrators, from all regions and different experiences, ranging from seasoned judges and advocates to younger specialists who have developed an expertise in international arbitration, the network continues to expand to encourage, foster and promote talented individuals in their career as arbitrators.

519. The debate on the “diversity deficit” has also been present in the discussions surrounding the ICS, the MIC, and the alternative reform proposals envisaged by the WGIII at UNCITRAL. Proponents argues that a permanent tribunal will contribute to promote a greater diversity while detractors denounce the narrowing in the already limited pool of candidates.⁵⁴²

520. The decision for institutions to resort to quotas or not, marks different approaches. Hailed as an efficient mechanism to promote equal representation, it continues to be a controversial approach. While the use of quotas has become frequent in several domestic systems, for example to mandate that the same number of men and women must be appointed to board of directors of state or state owned enterprises in Quebec. In arbitration, where the issue of the lack of representativity of women is prevalent, the use of quotas nevertheless remains at issue. Indeed, the Equal Representation in Arbitration, whose mandate is to promote the access by women to the profession as arbitrators and otherwise completely

⁵⁴¹ “Fortier on the cola wars”, *supra* note 73; Bjorklund et al, “Diversity Deficit”, *supra* note 520.

⁵⁴² Céline Lévesque, “Canada’s Pro-Ban Stance on Double-Hatting: Playing the Long Game in ISDS Reform?” (2021) 58 Canadian Yearbook of International Law 382 p. 16., Bjorklund, “Diversity Deficit”, *supra* note 520.

recognizes the lacuna in the current system, has deliberately chosen to resort to other means of promotion and refused to promote quotas. Conversely, at the same time, the ICC decided to promote an increase in diversity by setting a quota and actively making direct appointments of women arbitrators by the Court. The increase in numbers could be immediately noted and is reported.

521. Despite these recent efforts, the gap in diversity remains wide. Academics, practitioners and institutions alike are hard at work to find a practical solution. Unfortunately, while some solutions have shown immediate results, such as the imposition of quotas by the ICC, others have been less ambitious in their efforts, to various levels. For many, despite claims of wanting to reform the system and promote a greater diversity in arbitrators, the lack of change in the system or existing rules continue to impede their promotion. We are thinking here of the CAS Arbitration Rules which mandate that arbitrators may not act as counsel.⁵⁴³ Whilst many could commend this advancement in sports arbitration, highly debated at the moment in ISDS reform and the limit on multiple roles for adjudicators, the fact that women may not act as counsel once they are appointed on the CAS list prohibits creates a *de facto* barrier to their entry or increase in the profession as women arbitrators. It confirms that a rule that is too strict for the limitation of appointment of counsel as arbitrators will work against the increase of diversity.⁵⁴⁴

3. Disclosure and Challenges

a. Disclosures

522. Most arbitration rules and institutions have drafted model disclosure or declarations for the arbitrators to complete. Their purpose is to assess the existing or potential conflicts of interest by allowing the arbitrator to declare that her independence and impartiality might not be affected by any past or ongoing situation. The standard against which this disclosure is

⁵⁴³ Louise Reilly, Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, An Symposium, 2012 J. Disp. Resol. (2012), online: <https://scholarship.law.missouri.edu/jdr/vol2012/iss1/5>.

⁵⁴⁴ Céline Lévesque, “Canada’s Pro-Ban Stance on Double-Hatting: Playing the Long Game in ISDS Reform?” (2021) 58 Canadian Yearbook of International Law 382 [Lévesque, “Canada’s Pro-Ban Stance”].

assessed, outside of what the particular arbitration rules provide, continues to be the IBA Guidelines.

523. The ICSID Convention Arbitration Rules provide, in Rule 6, the model declaration and standard for the independence of the arbitrator:

Rule 6 Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

“To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.

“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

“I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

“Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.” (our emphasis)

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

524. The inclusion of the model statement in arbitration rules is a unique situation for the ICSID rules. In addition, we note that this statement must also be signed by the assistant to the President. This practice has recently gained ground and is now also required by the ICC. Indeed, in response to the criticism to the role of the Secretary to the Tribunal, as the “fourth” arbitrator, most institutions have heightened their standards for the involvement of

assistants.⁵⁴⁵ This remains within the privilege of the arbitrators, but controls have been put into place. Hence, the requirement to sign a statement of disclosure including the continuing obligation to divulge information that may call into doubt independence or impartiality. Further, the text of such disclosure often includes the definition of the scope of the mandate of a secretary, as restricted to assistance with the proceedings, research, drafting of procedural or factual briefs and no more. Last, the responsibility in respect of the disclosure obligation of the assistant is put upon the chair.

525. While there exists no sanction in the text directly linked to this reason, we have already seen challenges on this basis (e.g. in the Yukos arbitration, where unfortunately Russia attempted to annul the award on the basis that the secretary to the Tribunal had overstepped his mandate and stepped into the shoes of the tribunal). Although the challenge request was rejected by the tribunal and the secretary and arbitral tribunal were cleared of such allegations, it has certainly demonstrated a lacuna in the framework. This, as we see in the new draft Code of Conduct for Adjudicators, is resolved in the reform proposals.

526. The UNCITRAL Arbitration Rules (2013) provide for the disclosure and challenge of an arbitrator as follows:

Disclosures by and challenge of arbitrators** (articles 11 to 13)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances. (our emphasis)

⁵⁴⁵ Chloe J Carswell & Lucy Winnington-Ingram, “Awards: Challenges Based on Misuse of Tribunal Secretaries”, *Global Arbitration Review* (8 June 2021) online: GAR <<https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-challenges-based-misuse-of-tribunal-secretaries>>. Dmytro Galagan, “The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal’s Mandate?”, *Kluwer Arbitration Blog* (27 February 2015) online: Kluwer <<http://arbitrationblog.kluwerarbitration.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/>>; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (2005), PCA Case no 2005-04/AA227 (UNCITRAL).

527. The formula is the one found also in the IBA Guidelines on Conflicts of Interest and which acts as the standard against which to determine the likeliness that impartiality or independence of the arbitrator may “give rise to justifiable doubts”.

528. Disclosure of arbitrators has been demonstrably different depending on their cultural and legal background. Common law lawyers, and specifically American lawyers and arbitrators, have a tendency to provide a fully detailed and minute disclosure of ties going far beyond the requirements of three years provided throughout the IBA guidelines.

529. Conversely, civil law lawyers have been recognized for a more restrictive approach to disclosure, considering at times that grounds are much more limited than those provided as a baseline by the IBA guidelines. This is the subject of much literature and discussion, and has been recognized as one of the flaws of this soft law framework.

530. In the recently enacted 2021 ICC Arbitration Rules, new provisions have been included to reinforce the independence and impartiality of arbitrators:

Independence and impartiality of arbitrators are further addressed with the inclusion of a provision empowering the arbitral tribunal to take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation (Article 17(2)), and the requirement of party disclosure of third-party funding arrangements (Article 11(7)). In addition, Article 13(6), which applies to investment arbitrations based on a treaty, ensures complete neutrality of the arbitral tribunal by providing that no arbitrator shall have the same nationality of any party to the arbitration.⁵⁴⁶

531. Article 11 provides for the legal obligations related to the independence and impartiality of the arbitrator as follows:

ARTICLE 11

General Provisions

1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.

2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The

⁵⁴⁶ ICC, *Arbitration Rules*, *supra* note 538, Foreword.

Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

3 An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

4 The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final.

5 By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.

6 Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

7 In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration. (our emphasis)

532. First, we note that the model arbitrator statement of acceptance, availability, impartiality and independence does not form part of the ICC Rules of Arbitration, although it is available on its website.⁵⁴⁷ The ICC's test for impartiality and independence requires that a prospective arbitrator disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality".

533. The model statement informs the arbitrator's disclosure with respect to independence and impartiality:

In deciding which box to tick, you should take into account, having regard to Article 11(2) of the Rules, whether there exists any past or present relationship, direct or indirect, whether financial, professional or of any other kind, between you and any of the parties, their lawyers or other representatives, or related entities and individuals. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying inter alia relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information. In deciding which box to tick and as the case may be in preparing your disclosure, you should also consult with care the relevant sections of the Note.

⁵⁴⁷ ICC, "2017 & 2021 Rules – ICC Arbitrator Statement: Acceptance, Availability, Impartiality and Independence", online: ICC <<https://iccwbo.org/content/uploads/sites/3/2016/06/ICC-Arbitrator-Statement-Acceptance-Availability-Impartiality-and-Independence-Arbitration-Rules-ENGLISH.pdf>>.

Nothing to disclose: I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

Acceptance with disclosure: I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

534. This obligation is of an ongoing nature. In 2012, the ICC also included in the statement the requirement for the arbitrator to confirm his or her availability. This was done in part to respond to a concern of efficiency, with respect to arbitrators who accepted a number of appointments superior to their capacity and which had a direct impact on the length of the proceedings. The Court has gone so far as to refuse appointments of arbitrators who indicate that they have an availability which is deemed insufficient (arbitrators are required to indicate the number of ongoing cases they have as chair and co-arbitrators, as well as counsel) and remove arbitrators due to their extreme delay in some cases. It is also not a practice of the ICC Court which is widely known or transparently discussed. The latter practice is however not usual and was only allowed as a last resort to allow parties who had completed the proceedings to have access to an award.

b. Challenges and Removal of Arbitrators

535. The crux of the criticism sustained by the framework regulating arbitrator selection in ISDS materializes in the requests for challenges and subsequent removals, where appropriate. It is also with respect to this aspect of the framework that ISDS defenders argue that the system need not be overhauled as, overall, it provides its control function well. In order to assess the veracity of these two positions, we proceed to the below analysis of the relevant rules and conclude with the rule of law assessment to determine the strength of the rule of law attained.

536. Provisions governing challenges are present in all sets of arbitration rules, which follow similar sets of guidelines. The notable exception to the procedure is found in the

ICSID system, where, contrary to other arbitration rules that mandate a decision on the challenge of an arbitration by an administrative body (for e.g. the ICC or LCIA Court), or by a third party (e.g. the PCA Secretary General), a challenge under the ICSID arbitration rules is determined by the two unchallenged arbitrators of the panel.

537. The ICSID Arbitration Convention Rules govern the disqualification of an arbitrator, as follows:

Rule 9 Disqualification of Arbitrators

(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:

(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and

(b) notify the other party of the proposal.

(3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.

(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.

(6) The proceeding shall be suspended until a decision has been taken on the proposal

538. In ICSID proceedings, it is sometimes possible to have access to decisions on the challenge of an arbitrator, either by the remaining arbitrators or the Chairman when relevant.

539. The difficulty to access these decisions is one of the most nefarious aspect of ISDS which contributes to promoting its reputation as an unfair, private, biased and confidential

system in favor of foreign investors.⁵⁴⁸ While the criticism that the system is biased in favor of foreign investors is both demonstrated and debunked by opposing serious statistics, for example recent statistics by UNCITRAL, there has been an important proactivity by all institutions to confer a greater transparency to proceedings to address these issues.⁵⁴⁹ Particularly with respect to arbitrators, their work and the reasons for which they are faced with a challenge, the public information would be greatly useful to dispel false expectations with the legitimacy of ISDS.

540. A complete and total commitment to transparency to publication of decisions will assist all actors involved, in addition to ICSID itself, arbitrators included, in particular those who are subject to repeat dilatory challenges.⁵⁵⁰ Decisions indicating that vexatious challenges are dismissed or found to lack merit can be useful to arbitrators who suffer from a negative publicity surrounding a proceeding that remains confidential. At the same time, an express undertaking to provide full reasons for all challenge decisions would conversely hold arbitrators to high ethical standards of good conduct and ensure that disclosure obligations are respected. At the moment, under several arbitration rules, it continues to be vastly impossible to make such a determination for members of the public. But the tides are slowly turning.

541. There exist a number of awards which have ruled on disqualification and from which it is possible to assess the threshold required of a “manifest lack” of character, competence or independent judgement.⁵⁵¹

542. The UNCITRAL Arbitration Rules (2013) provide as follows for the challenge of an arbitrator:

⁵⁴⁸ M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) [Sornarajah, *Resistance and Change*]; Alvarez, “The Long View”, *supra* note 55.

⁵⁴⁹ Eg, ICC, LCIA, ICSID Rules, and the Mauritius Convention on Transparency.

⁵⁵⁰ Fortier and the Venezuela challenges, e.g. in Simon Batifort & Chloe Baldwin, “Replacement and Disqualification of Conciliators and Arbitrators” in *The ICSID Convention, Regulations and Rules*, Ed. Julien Fouret, Remy Gerbay & Gloria M. Alvarez, *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Cheltenham (UK) & Northampton (MA): Edward Elgar, 2019) 751.

⁵⁵¹ Riddhi Joshi, “The Threshold for Challenges in ICSID Arbitration: Interpreting the ‘Manifest Lack’ Standard”, *Kluwer Arbitration Blog* (7 May 2020), online: Kluwer <<http://arbitrationblog.kluwerarbitration.com/2020/05/07/the-threshold-for-challenges-in-icsid-arbitration-interpreting-the-manifest-lack-standard/>>.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.
2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.
3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

543. The ICC Rules provide detailed rules and guidelines to explain the process developed by years of practice of the Court. The successive amendments to the rules have increasingly allowed the users to access greater details as to the challenge and removal procedure. The Note on the Conduct of Tribunals updated on 1 January 2021 provides unprecedented access into the Court's guiding principles, with the most notable change being the access to request the decisions for challenges and their availability in the public domain. This important feature is analyzed below in the Rule of Law Assessment for the Challenge of Arbitrators.

544. The 2021 ICC Arbitration Rules provide for challenge and removal of arbitrators:

Article 14: Challenge of Arbitrators

A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

2) For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

3) The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

Article 15: Replacement of Arbitrators

1) An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.

2) An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented de jure or de facto from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.

3) When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

4) When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.

5) Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

545. The ICC Rules of Arbitration provide a detailed procedure which is controlled formally by the administrative body that is the ICC Court. Formalistic controls are also worked into the process in the form of confirmation of arbitrators by the Secretary General, or the approval by the Court when in exceptional situations where the parties protest the nomination or state parties are involved.

546. It is manifest that the standards according to which challenges are assessed differ between each set of rules. Although the approach can be determined through the assessment

of decisions on challenges and disqualification for each of these, the purpose of the rule of law assessment is rather to examine whether safeguard mechanisms are provided within each arbitration rules that allow us to confirm whether the rule of law is strengthened. This is a procedural assessment, and our focus is on the structure provided. We proceed to this analysis below.

547. The PCA and ICSID provide the most data available on successful challenges. As Giorgetti sets out:⁵⁵²

Table 5.1 *Success rates of arbitrator challenges in investor-state arbitration*

Institution	No. challenges	Challenge Outcome
ICSID (as of Sept 2014)¹	84	60 resulted in determination, of which – 56 were rejected – 4 were upheld 21 arbitrators resigned 3 withdrawn/ discontinued
PCA 1976 and 2010 UNCITRAL Rules (as of end 2018)²	34	28 resulted in determination, of which –21 were rejected – 7 were upheld 5 arbitrators resigned 1 withdrawn

¹ Kinnear and Nitschke (n. 11), 34–7.

² Annual Report 2018 (n. 11), p. 16 and Grimmer (n. 11), 80–114.

548. Unfortunately, as many challenges are never resolved and arbitrators instead resign, there is no clear indication of a rate of successful challenges were it not for the resignations.

549. While the standards for assessment of challenge and disqualification requests vary between institutions, there is a noted evolution particularly for ICSID.⁵⁵³

c. The Rule of Law Assessments for Disclosures and Challenges

⁵⁵² Giorgetti, “Arbitrator Challenges”, at 138.

⁵⁵³ Batifort & Baldwin.

1. *The Rule of law*
Assessment for
Disclosure
Obligations

a. Legal certainty

550. Further to our explanation of the technical facets of disclosure and challenges of arbitrators, we now turn to the analysis of this piece of the framework with respect to the rule of law.. We therefore pose the guiding question: Does the disclosure framework in ISDS conform and contribute to the rule of law as defined for ISDS? Does it contribute to strengthening the rule of law and take it from a thin/weak to a thick/robust rule of law framework?

551. We apply the three -prong rule of law matrix as distilled by Professor Castellarin to determine the scope of the (1) legal certainty, (2) procedural fairness and (3) procedural transparency.⁵⁵⁴

552. We look, first, at **legal certainty**. The regulatory framework provided by the rules on disclosure, coupled with the requirement for arbitrators to submit a declaration of independence and impartiality, following an existing pre-determined model confirms, *prima facie*, that there exists legal certainty with respect to disclosure of an arbitrator.

553. However, the legal certainty provided by a disclosure model can easily be subject to critics. First, the scope of what is to be disclosed is often interpreted differently by arbitrators of different cultures.⁵⁵⁵ Second, the continuing obligation to disclose and avoid potential conflicts of interest also gives rise to varying interpretations.⁵⁵⁶ While it can be said that the

⁵⁵⁴ Castellarin, *supra* note 337.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Toby Fisher, “Drymer resigns after Venezuela challenge”, *Global Arbitration Review* (23 September 2021) online: GAR <<https://globalarbitrationreview.com/drymer-resigns-after-venezuela-challenge>>) and the other disqualification was accepted (Cosmo Sanderson, “Drymer disqualified over dual appointments”, *Global*

existence of rules that require disclosure, together with a model declaration that is to be signed, impresses a level of seriousness on arbitrators and can be seen as some guarantee by the parties. Unfortunately, the faulty interpretations of arbitrators who failed to disclose, had a glitch in their conflict check from the office, or did not keep the disclosure are not always made public.

554. A recent illustration are the decisions on the challenge and removal of Stephen Drymer, where in one case he resigned⁵⁵⁷ and in the other disqualification was accepted.⁵⁵⁸ Canadian arbitrator Stephen Drymer has resigned from an ICSID tribunal hearing a US insurer's claim against Venezuela after the state successfully challenged his appointment in a parallel UNCITRAL case.

555. Arbitrator Drymer resigned on 22 September 2021 from the ICSID additional facility case brought by affiliates of Boston-based insurer Liberty Mutual, for undisclosed reasons. This came two months after his disqualification in a parallel arbitration by a Liberty entity against Venezuela on similar issues.

556. Venezuela challenged Drymer in both cases “on the grounds that the dual appointments might lead him to formulate views based on deliberations that his co-arbitrators were not party to”, as the Tribunal was different in these cases. The lack of transparency, even more than the legal certainty, resulting from the failure to disclose, should be lamented in this case.

b. Procedural fairness

557. We turn, second, to **procedural fairness**. The prospective arbitrator will provide the signed declaration with the disclosure which is submitted to the parties. Under several arbitral systems, the parties will be able to consider the disclosures for 30 days, following which they will be considered as accepted if they have not submitted a challenge. At the beginning of

Arbitration Review (15 July 2021) online: GAR <<https://globalarbitrationreview.com/drymer-disqualified-over-dual-appointments>>).

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

the process, parties may ask for further clarifications, or refuse the nomination of the arbitrator based on the disclosure. Arbitral institutions will then assist the parties in proceeding to the nomination of a replacement arbitrator or, failing the nomination by the party or a joint agreement in case of the nomination of the president, the arbitral institution will give access to its services as an appointing authority.

558. The procedural fairness as a criterion can be qualified as strong. The parties are in complete control of the process, remain involved at every step and can ask for clarifications, agree or refuse the nomination of an arbitrator. Finally, in the cases where the arbitral institution will be involved for a party appointment, arbitration rules provide that the parties will also be made aware of the choice and provide time for comments both before and after the nomination, upon the arbitrator's disclosure, to ensure that the parties are given the greatest latitude. This, we submit, guarantees a high level of procedural fairness.

559. The caveat we must underline, however, is that of a party which is querulous and, as a dilatory tactic, opposes arbitrator selection on a continuous basis. This caveat of course ties over to the analysis for challenge and removal, as it is the most recognized case where issues arise. In ISDS in particular, while dilatory tactics are not revealed at the time of the selection of arbitrators because of the lack of transparency, it becomes flagrant upon repeat challenges of arbitrators.⁵⁵⁹ We assess this issue below.

c. Procedural transparency

560. To conclude our assessment, we close, third, with **procedural transparency**. This criterion is much weaker than the two previous ones in the case of the disclosure and declaration signed by the arbitrator. Even in cases where the proceedings might be public, such as those of the government of Canada under NAFTA who follows as its policy full transparency for a number of years, and, as a result makes public the procedural orders and briefs of the parties, disclosures and model declarations of the arbitrators are never made

⁵⁵⁹ Fortier and the Venezuela challenges, e.g. in Simon Batifort & Chloe Baldwin, "Replacement and Disqualification of Conciliators and Arbitrators" in The ICSID Convention, Regulations and Rules, Ed. Julien Fouret, Remy Gerbay & Gloria M. Alvarez, *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Cheltenham (UK) & Northampton (MA): Edward Elgar, 2019) 751.

public. At most, decisions on the challenge of an arbitrator will be available, in some rare cases.

561. Fortunately, an important number of challenge decisions are increasingly available through evolutions of policies of arbitral institutions or their rules. The availability of a number of disqualification decisions in ICSID cases is also helpful. This positive trend for increased transparency for challenged decisions is, at the moment, unlikely to impact the publication of disclosures and model declarations. The ICC policy to publish, upon request, challenge decisions may produce some interesting results with this although we must wait to assess how many of these decisions will be published, the level of detail provided as, de facto, the ICC releases a redacted summary, and, lastly, how many of these decisions will stem from an insufficient disclosure statement and is not based on any of the other possible motives.

562. None of the sets of rules presented above include limits to the mandates that arbitrators may undertake, the otherwise named “double-hatting” prohibition, or mandate that a code of conduct be either developed or followed. This significant development in the ICS and MIC with the drafting of a code of conduct providing for the strictest requirements for multiple roles is a major development from the freedom, autonomy and flexibility traditionally provided by arbitration. We revert to this in the chapter on the ICS analysis below.

563. In sum, our analysis reveals a weak rule of law for disclosure. The controls are not guaranteed and situations that will lead to challenges by the parties often are fortuitous.

564. A pertinent illustration is the case of the challenge of Sigvard Jarvin, renowned Swedish arbitrator, which occupied the French courts for several years. Sigvard Jarvin was president of an ICC Tribunal in an arbitration opposing J&P Avax to Tecnimont.⁵⁶⁰ In this saga, an 8 year legal battle by J&P Avax attempted to set aside a partial award, which upheld its liability in a dispute with Tecnimont, an Italian construction company, based on doubts

⁵⁶⁰ CA Paris, 12 April 2016, *Tecnimont SPA v J&P Avax* (2016) RG, No 14/14884 [ICC Case No 12273]. See also Douglas Thomson, “Jarvin award upheld in Paris”, *Global Arbitration Review* (13 April 2016) online: GAR <<https://globalarbitrationreview.com/jarvin-award-upheld-in-paris>>.

about Mr. Jarvin's impartiality. On 12 April 2016, the Paris Court of Appeal rejected the Greek construction company's latest attempt. Although set aside twice, in 2009 by the Paris Court of Appeal and 2011 by the Reims Court of Appeal, twice also the French Cour de Cassation reversed this decision on grounds that Avax had failed to timely raise its doubts. In 2002, when Mr. Jarvin was appointed as Chair of the Tribunal, he disclosed that his firm's Milan and Washington offices, Jones Day, had advised Tecnimont's parent company. In 2007, Mr. Jarvin gave a lecture at a conference with a representative from another party, who was represented by his firm. While he was not aware of this link, a member of one of the parties to the arbitration was in the audience and brought a subsequent challenge against Mr. Jarvin for failure to disclose his conflict of interest.

565. The ICC rejected this challenge, which was taken up before the French Courts. Mr. Jarvin argued that this conflict had arisen after his appointment as President of the Tribunal, and that the conflict check from his firm had not picked it up. The issue was strongly argued by the parties and was heard by all levels of the French courts. This saga is but an example of delay and derailment that can be caused by a querulous and dissatisfied party. At the same time, the challenge was sufficiently probative that it occupied (twice) the circuit before the French Courts. Whether such challenges are valid is not the question here – rather, this illustration serves to emphasize that the situation occurred despite the requirement for disclosure as well as situations that should now be avoided thanks to the reform.

2. The Rule of Law Assessment for Challenges

566. The possibility to challenge and seek removal of arbitrators are the fundamental safeguard mechanisms to the entire regulatory system put in place to govern arbitrator ethics in ISDS.⁵⁶¹

567. The application of the Castellarin rule of law matrix to control this process will allow us to understand whether the concern expressed with respect to this system are based on real

⁵⁶¹ Castellarin, *supra* note 337.

or perceived flaws and legitimacy issues.⁵⁶² To refer to the classification developed, whether the rule of law is thick or thin in respect of challenge and removal of arbitrators, this assessment is prone to vary depending on the set of rules examined, whether they have been recently revised and the extent to which institutions have mechanisms in place to determine challenges and, crucially, publish these decisions.

a. Legal certainty

568. The evaluation of the first prong of the test, **legal certainty**, can be done, to a certain extent, through the comparison of existing arbitral rules and soft law instruments. This includes the IBA Guidelines and the various codes of conducts developed in international investment agreements. While the rules in their technical intricacies continue to provide differently, they are based on similar principles guiding the mechanism.

569. Unfortunately, to a large extent, the inner workings of challenges and removals of arbitrators remain cloaked in opacity. They are the province of arbitral institutions who have developed a wealth of institutional knowledge on the process. Acknowledging the debate and in an attempt to respond to the debates about the lack of or alleged lack of legitimacy, arbitral institutions have recently been proactive in providing greater transparency and informing on the process for the challenge and removal of arbitrators. The newly adopted ICSID rules, for example, seek to provide greater transparency. Despite these advances, there remains a level of opacity, and it may be difficult to ascertain the level of legal certainty that is reached.

570. The IBA Guidelines provide a commentary, and shared experience by the LCIA or ICC courts can be useful as to their application. At times, it is possible to consult domestic case law to assess the approach under national laws. Domestic law approaches from arbitration friendly jurisdictions will be particularly relevant in assessing progress in this field.

571. The legal certainty is provided by the very existence of several detailed sets of rules and the existence of administrative bodies and structure controlling their implementation.

⁵⁶² Castellarin, *supra* note 337.

Whether this concerns the ICC or LCIA Court, domestic tribunals or even in the case of ICSID, the two co-arbitrators, the Secretary General or Chairman, the fact that a control mechanism exists allows us to confirm that a certain degree of legal certainty is present for the rule of law analysis.

b. Procedural fairness

572. The second prong of the test, **procedural fairness**, varies, with greater fairness ensured by administrative bodies, such as the LCIA and ICC courts, and seemingly lesser when the designation process is conducted by one individual, such as the Secretary General of the PCA. Coupled with the first criteria of legal certainty, the procedural fairness is ensured by the existence and implementation of control mechanisms to follow the parties' challenge requests. While these procedures are set out in detailed manner in the arbitration rules, there remains a vastly unknown part which consists in the inner workings of the administration themselves. In the case of the ICC, by way of example, institutional knowledge resides with the Secretariat which ensures through the assistance of memoranda (or "agenda" in the language of the ICC) it is communicated to the members of the Court who are required to take a decision on a specific situation. These "agendas" are not available to the public and only provided in redacted form to the parties, upon request, in the form of a decision on removal.

573. The ICSID system stands apart. Under this system, as established above, the two arbitrators who are not challenged will be called to decide on the fate of their challenged colleague. Very limited, both in perception and in reality, under the ICSID system – other than a code of honor, it may be particularly problematic for arbitrators to detach from their role as adjudicators on the panel and have to make a determination as to their colleague's independence and impartiality. It can be imagined that arbitrators might be tempted to discard the challenge so as to continue sitting on the same tribunal, or conversely, to accept a challenge which has no legs based simply on personal reasons or even delay tactics (although that is contrary to the *esprit de l'arbitrage* itself). While there is no place for such conduct from the part of arbitrators, we refer here to the more subtle notions of unconscious bias.

574. There exists a body of arbitral awards which refer to disqualification requests and the threshold to be attained. It is the disqualification decisions themselves which are more difficult to obtain. The institution itself has published statistics and analysis of challenges submitted.⁵⁶³ In 2014, ICSID counted 84 disqualification proposals in 57 cases. Approximately half were commenced in cases in which respondents were from South America, with the highest number being from Argentina and Venezuela. 56 of these challenges were directed to a single arbitrator whereas the remaining 28 concerned the totality of the tribunal.⁵⁶⁴ Kinnear and Nitschke recall that:

In the eighty-three resolved challenges, twenty-one arbitrators resigned from the case, three proposals were withdrawn or discontinued prior to a decision being rendered, and fifty-nine decisions were issued. Four of the fifty-nine decisions upheld the challenge and fifty-five declined the challenge. While only four decisions have disqualified an arbitrator, the composition of the tribunal changed in 30% of the cases where a disqualification application was brought. This reflects the fact that many arbitrators who are challenged elect to resign before a decision is issued, regardless of the merits of the disqualification proposal.⁵⁶⁵

575. A recent revolutionary tool in the field comes from legal tech Jus Mundi, a Paris based firm which has undertaken to revolutionize research and publication of information in international arbitration and claims to be the world's most comprehensive international law and arbitration database with an AI based technology. Although challenge decisions are available when they are public on each of these institutions' website, Jus Mundi prides itself in making available decisions that might not have been published.

576. This, while it advantages users of arbitration, also contravenes to one of its fundamental principles of confidentiality. If greater transparency is advisable and desirable in ISDS, it is not to the extent that users should count on relying on "leaked" confidential decisions. This would pose a moral conundrum to a counsel wishing to rely on a precedent which has been illegally obtained or published. At the same time, as *stare decisis* does not exist in international arbitration, that same counsel could well rely on its information without

⁵⁶³ Meg Kinnear & Frauke Nitschke, "Disqualification of Arbitrators under the ICSID Convention and Rules" in Chiara Giorgetti, ed, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Leiden: Brill Nijhoff, 2015) 34.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid* at 59.

disclosing the source. Unfortunately, this detracts from the rule of law and provides a thinner perspective of it.

c. Procedural transparency

577. Last, we turn to the third prong for our assessment of the strength of the rule of law provided by the existing ISDS regulatory framework for challenges, **procedural transparency**. As stated above, this is truly the level of the rule of law which reveals a faulty system on many levels, with varying degrees of transparency under LCIA, ICC, and ICSID Rules, to follow the arbitration rules we examine.⁵⁶⁶ It is on transparency that hinges our assessment of this thickness of the rule of law for the challenges of arbitrators. Without access to all or even the majority of the decisions on challenges to arbitrators, this remains a primary concern. Publicity of decisions is a fundamental element in any judicial system following the rule of law. The public element of international investment law with the involvement of a state also requires a higher degree of publicity than that which can be expected in private commercial proceedings.⁵⁶⁷

578. The LCIA, with its policy of publication of challenge decisions to arbitrators, both records the greatest transparency by ensuring access to these decisions, and ensures that there is a dissuasive effect on parties who might wish challenge procedures as delay tactics. The challenge decision database provides all decisions from 2010 with respect to accepted and rejected challenges. It indicates the result of the decisions and provides access to what the LCIA refers to as “digests” of the decisions. In practice, the digests are redacted summaries of the decision, which provide the factual matrix and legal reasoning behind the rejection or acceptance of the challenge. The names of parties, counsel, arbitrators, and LCIA court members are redacted. Once more the situation falls in a middle ground between an attempt at transparency coupled with the former practice following which such decisions were not released. While the initiative is commendable, it must be pushed further towards transparency so as to provide the decision and not merely a digest, even if redactions remain.

⁵⁶⁶ Langford, Behn & Lie, “Revolving Door”, *supra* note 361.

⁵⁶⁷ Alvarez, “The Long View”, *supra* note 55; Castellarin, *supra* note 337.

579. The ICC, while continuing to maintain a mostly confidential process, enacted a major change to its practice when it introduced, on 8 October 2015, the possibility for publication of challenge decisions, upon request. This change was enacted in the ICC’s ‘Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules’, dated 1 October 2015. The note indicates that reasons for a decision must be requested in advance of the ICC Court’s decision. The communication of such reasons may also result in an increase of the ICC administrative expenses, not in excess of USD 5,000.⁵⁶⁸

580. To take matters a step further for the publication of awards, the ICC has entered into a partnership with Jus Mundi. On 1st April 2021, the new partnership was announced for all awards and “related documents” since 1 January 2019. No details are provided to help us elucidate what the “related documents” evoked may relate to. We can hope that this proviso also hints to an increased publication of challenge decisions.⁵⁶⁹ As Jus Mundi already provides access to a wealth of challenge decisions, in all likelihood the ICC will follow in the footsteps of other institutions.

581. The latest version of the Note provides as follows:

IV – Transparency

A - Communication of Reasons for the Court’s Decisions

46. Pursuant to Article 5 of Appendix II, upon request of any party, the Court will communicate the reasons for a decision on (i) prima facie jurisdiction (Article 6(4)); (ii) consolidation (Article 10); (iii) Article 12(8); (iv) Article 12(9); (v) the challenge of an arbitrator pursuant to Article 14; (vi) whether to replace an arbitrator pursuant to Article 15(2).

47. In exceptional circumstances, however, the Court may decide not to communicate the reasons for any of these decisions.

⁵⁶⁸ ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2021) at 9, online: ICC <<https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf>>. See also “ICC International Court of Arbitration decides to communicate reasons, increasing institutional transparency”, *Allen & Overy* (27 October 2015) online: Allen & Overy <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/icc-international-court-of-arbitration-decides-to-communicate-reasons-increasing-institutional-trans>>.

⁵⁶⁹ “ICC and Jus Mundi launch partnership to publish ICC arbitral awards”, *International Chamber of Commerce* (1 April 2021) online: ICC <<https://iccwbo.org/media-wall/news-speeches/icc-and-jus-mundi-launch-partnership-to-publish-icc-arbitral-awards/>>.

48. For arbitrations conducted under the Rules in effect prior to the entry into force of the 2017 Rules, a request for communication of reasons must be made by all parties.

49. Any request for the communication of reasons must be made in advance of the decision in respect of which reasons are sought. Such request may be made when the Secretariat invites parties to comment ahead of the Court's decision.

582. It should be recalled that one of the fundamental principles introduced into the latest version of the 2021 ICC Arbitration Rules is the standard of transparency. An import from ISDS, the debate has now bled into international commercial arbitration. The cross-fertilization or cross-pollination between international investment and commercial arbitration has been repeatedly hailed as a mutually beneficial relationship. While the essential need for a transparent approach is understandable in a system which deals with public interest, as does ISDS, the approach can be more nuanced with respect to commercial arbitration, which remains a private procedure in the hands of the parties. The complete autonomy that parties benefit from in contractual commercial arbitration therefore affects their privilege to determine whether a matter should be heard under the seal of confidentiality, a fundamental reason which often attracts the parties to arbitration, or whether it should be balanced by transparency. While this topic can be the object of a large debate than that addressed by this thesis, we consider that an increase of transparency will only contribute to a greater legitimacy of arbitration writ large, whether commercial or investor-State.

583. Finally, we turn to the transparency in the ICSID system. Due to the previously described particular nature of the system, it is rare that decisions on challenges of an arbitrator are made public. First, in certain cases, parties refuse to divulge any of the relevant documents. Second, even in cases where some documents are made available to the public with the parties' consent, this mostly includes the Notice of Intent, the Notice of Arbitration, Answer and subsequent Memorials, some salient procedural orders, as well as the award(s). It is much rarer to find that decisions on challenges or removals, as well as procedural orders, are rendered public. While it is of the greatest utility to have access to these documents, be it only for practitioners in the field who can assess the evolution and application of the IBA guidelines on conflicts of interest, it still remains rare.

584. An eventual adoption of the Code of Conduct of Adjudicators, as proposed in the joint UNCITRAL ICSID draft, might aid in obtaining greater transparency for these decisions.

585. It is undeniable that the lack of procedural transparency for the vast majority of challenge decisions, whether or not they lead to the removal of an arbitrator, has contributed to fuel the controversy on the legitimacy of ISDS.⁵⁷⁰ Not only, as we have seen earlier, is there a risk of unconscious bias through the appointment process or the decision making of the arbitrator in favor of the nominating party, but the control mechanisms designed to ensure the continued independence and impartiality of arbitrators is faulty. It is mostly impossible to know the basis and reasoning under which arbitrators have been challenged, and subsequently removed upon the decision of an opaque institution or, worst even, the challenged arbitrator's colleagues on the tribunal in the case of ICSID, and this contributes to the mistrust of the system and its reputation as an elite club.⁵⁷¹

4. Remuneration and National Courts Interventions

a. Remuneration

586. Although the question of arbitrator remuneration is examined last, it is not the least of our concerns for the assessment of the strength of the rule of law with respect to the selection and appointment of arbitrators. In fact, one of the contributing factors discrediting to arbitrators in the public's eyes is the very issue of remuneration. To an extent, the reason that arbitration can boast such success, flexibility, celerity, and expert resolution is founded on the fact that this private mechanism is funded by the parties. Just like a judicial proceeding, parties will pay legal fees for their counsel. But unlike public judicial procedures, they also fund the tribunal.

⁵⁷⁰ Alvarez, "The Long View", *supra* note 55; Charles N. Brower and Jawad Ahmad, 'For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court' (2018) 41 Fordham Int'l L. J. 791.

⁵⁷¹ Langford, Behn & Lie, "Revolving Door", *supra* note 361.

587. Arbitrator remuneration is addressed differently in *ad hoc* or administered proceedings. We first address *ad hoc* proceedings, as they are rapidly dealt with. Remuneration is agreed upon by the parties in *ad hoc* proceedings, with no outside controls. This is therefore habitually where the arbitrator rates will be the highest. There are no or rare public records to the level of remuneration. At times, arbitration awards which have been made public may include the remuneration of the tribunal, or they can at least be deduced from the costs section of the award.

588. While *ad hoc* proceedings will not habitually have any sort of capping to remuneration or governing system, in many cases parties can ask an arbitral institution to act as depositary. This will aid greatly the tribunal in its management of the funds. An institution appointed to act as escrow, will ask the parties for advances and keep the funds, to be released upon the tribunal's request after significant steps of the proceedings, as is the custom. These amounts ranging frequently in the six number range, if not more, for major arbitrations, tribunals are often interested in obtaining such services, against a fee, from arbitral institutions, such as the PCA.

589. Administered arbitrations are quite another story. They provide important and essential services with respect to the management of funds from the parties, and exercise a level of control on the arbitrators' remuneration. Practice, and level of remuneration, varies greatly depending on the set of rules agreed upon by the parties.⁵⁷²

590. The rule of law assessment is necessarily impacted by the enormous gap in transparency, control by institutions and sheer amounts parties are willing to put forward for their dispute to be resolved by renowned specialists. To an extent, parties can both be willing participants when choosing to resort to and pay for arbitration, but become its hostages in cases where delays derail the proceedings, a querulent party or the tribunal delays in rendering it(s) award(s). While there exists instruments for the tribunal to punish a querulent party with an order on cost, it continues to be rarely used. Modern versions of rules, as well as the new proposed ICS, contain provisions to summarily dismiss claims which have *prima facie* no legal grounds. However, there exists no mechanism for a party to hold its tribunal to

⁵⁷² In ICSID proceedings, an hourly rate of USD 375 per arbitrator is the norm.

deadlines and ensure that related costs do not become uncontrollable. The assistance of an administering institution will aid in calling the tribunal to respect delays. Finally, we recall that the majority of costs in arbitration continues to be that of counsel.

591. Overall, the question of remuneration is certainly one of the instances where, without doubt, we find a “thin” or “weak” rule of law.

b. The Halliburton decision: a missed opportunity to restore legitimacy

592. Domestic case law is rife with illustrations of national courts tackling issues with regard to the independence and impartiality of arbitrators. Although our aim is not to assess the impact of national jurisdictions’ case law on the development of arbitral reform, which is a separate but related matter, we close this section on a comment from a recent landmark case from the United Kingdom. There exists an important body of case law from domestic jurisdictions that are known to be arbitration friendly. We could refer to precedent and interpretations from French, Swiss or US Courts to discuss this issue. The choice to single out the *Halliburton* case can be explained by the importance of the questions evaluated by the court, the extraordinary length of the proceedings, and the findings of the court, that, as we argue, spectacularly missed a golden opportunity to strengthen the rule of law, not only in the United Kingdom, but also for ISDS and international arbitration in general.⁵⁷³

593. The extent of the obligation of disclosure involved in the principle of independence and impartiality continues to be the subject of debate. In this recent decision, issued on 27 November 2020, the United Kingdom Supreme Court had the occasion to rule on the existence of such obligation under UK law, and set the limits to be respected by an arbitrator

⁵⁷³ Joe Rich, “U.K. Supreme Court Rules on Arbitrator Bias in Halliburton v. Chubb”, *Kluwer Arbitration Blog* (1 December 2020) online: Kluwer <<http://arbitrationblog.kluwerarbitration.com/2020/12/01/u-k-supreme-court-rules-on-arbitrator-bias-in-halliburton-v-chubb/>>; Ruth Keating & Samar Abbas Kazmi, “The axiom of impartiality: Halliburton v Chubb”, *International Bar Association* (10 March 2021) online: IBA <<https://www.ibanet.org/article/C93FC2F7-D71F-490E-AC6E-A295E0A706B1>>; Stuart Isaacs, “Halliburton – was it worth the wait?”, *Wilberforce Chambers* (16 December 2020) online: Wilberforce <<https://www.wilberforce.co.uk/halliburton-was-it-worth-the-wait/>>.

to comply dutifully.⁵⁷⁴ We discuss below in detail the decision, its impact, and the missed opportunity for the Court to restore some legitimacy to the existing system. The recognition of London as a place of arbitration and the UK as an arbitration friendly *lex loci* plays no small role in the disappointment felt by the arbitral community upon the issuance of this decision by the Supreme Court.⁵⁷⁵

594. The decision defined the meaning of independence and impartiality under UK law as well as their place in international arbitration. Yet, many have criticized the decision as being too complacent with an arbitrator who simply failed to complete a declaration and admitted to it.

595. While an error is excusable, one wonders why the arbitrator did not simply follow the practice of resigning upon high contestation in the case. Especially in this case, with two tribunals hearing cases with the same parties based on the same agreement, but composed differently, i.e. with the one member in common being the challenged arbitrator, it is evident that the arbitrator might be privy to information in one case that could give him bias in the other.

596. It is certainly to be lamented that, aside from failing to resign, the arbitrator insisted and the saga continued for over 10 years. It was a unique opportunity for the UK Supreme Court to demonstrate that the United Kingdom continued to be a prime location for arbitration, due to its national laws and arbitration friendly approach as place of arbitration. Unfortunately, and despite the strong interventions from the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC), both of which are overly active in the process of challenges and removal of arbitrators, no blame was placed on the arbitrator. It was, quite clearly, a missed opportunity.

597. To restore legitimacy to ISDS, in order to continue to work within the regime as it exists, the national courts when faced with the explicit situation that give credence to

⁵⁷⁴ *Halliburton v Chubb* [2020] UKSC 48, online: Supreme Court <<https://www.supremecourt.uk/cases/docs/uksc-2018-0100-judgment.pdf>>.

⁵⁷⁵ Rory Mac Neice, “Why is London a Global Capital for International Arbitration?”, *Ashfords* (20 March 2015) online: Ashfords <<https://www.ashfords.co.uk/news-and-media/general/why-is-london-a-global-capital-for-international-arbitration>>.

detractors of investor-state dispute settlement, specifically those in jurisdictions reputed as arbitration friendly, must reflect in systemic terms and rise above the particular nature of the case.

5. Conclusion: ISDS - A Functional but Faulty Regulatory System for Arbitrators

a. A Weak Rule of Law for Independence and Impartiality of Arbitrators

598. To conclude the assessment of the existing regulatory framework of ISDS with regard to independence and impartiality, we find that the three rule of law criteria as defined by Castellarin are lacking, to varying degrees. Having assessed the totality of the evidence with respect to the nomination, appointment, disclosure, challenge and removal processes, we find significant insufficiencies.

599. The nomination and appointment of arbitrators raises concerns principally for the repeat appointments of arbitrators who are often viewed as biased towards investors or states generally. Similarly, the practice of double hatting, a regular feature for arbitration practitioners who, with a great measure of success, act as counsel and arbitrator, contributes to the concern of an alleged bias and perception of conflict of interest. These issues are addressed to an extent by the existing safeguards of the challenge mechanism and the eventual replacement of arbitrators. Unfortunately, in most of the existing institutional arbitration systems the publication of challenge decisions remains rare. The lack of transparency is glaring and affects the rule of law in ISDS.

600. In a system where legal certainty can be doubtful, due to the absence of the *stare decisis* principle, the two other elements of rule of law must, at least, be bonified to compensate for this weakness. Unfortunately, procedural fairness is affected by the limits stemming from the nomination and appointment of arbitrators. And while they are corrected, in part, by the existence of a mechanism for parties to complain of a failure of lack of independence and impartiality on behalf of arbitrators through a challenge, the fact that the decisions are mostly unpublished further affects the legal certainty of the system. In sum, the

existing system with regard to the preservation of independence and impartiality of arbitrators is fraught with failings.

601. To be clear, we do not submit, as other authors have, that arbitrators nominated in ISDS are implicitly biased and cannot provide fair and effective dispute resolution of disputes between foreign investors and States.⁵⁷⁶ Rather, we contend that the existing mechanisms can be strengthened to attain a thicker rule of law.

602. Solutions must be found to strengthen, and restore, the rule of law, to ultimately redress legitimacy or at least the appearance thereof. A *status quo* is untenable. This was the EU's conclusion in 2014, as it was the UNCITRAL Working Group III's conclusion in 2018, *i.e.* that ISDS was in want of reform.⁵⁷⁷ The necessity of the reform itself is not controversial. Rather, it is the scope of such reform that is debated by specialists of the field. Both the EU and the WGIII have proposed vastly different avenues of reform.

**b. Improved Investment Arbitration to Strengthen
the Rule of Law**

603. One of the reform paths envisaged lies simply in a strengthened ISDS. This is what Giorgetti refers to as “Investment Arbitration Improved”⁵⁷⁸ or to some extent what Alvarez classifies as “ISDS Reformed”.⁵⁷⁹ This pathway is by far the less stringent structurally due to its flexible nature. It also provides the most immediate results. The question, after examining these proposed improvements, will become whether they are sufficient to strengthen the rule of law to a sufficiently robust level to provide legitimacy to ISDS.

604. This tact consists in reforming the existing rules and instruments governing ISDS by addressing the recognized weaknesses and providing for corrective measures that are either already designed in recent agreements, such as the CPTPP – the most recent example of a

⁵⁷⁶ Catherine Rogers, *Ethics International Arbitration* (Oxford: Oxford University Press, 2014).

⁵⁷⁷ UNCITRAL, “Working Group III”.

⁵⁷⁸ Giorgetti, C., Ratner, S., Dunoff, J., Hamamoto, S., Nottage, L., Schill, S. W., & Waibel, M. (2020). Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options, *The Journal of World Investment & Trade*, 21(2-3), 467.

⁵⁷⁹ Alvarez, “The Long View”, *supra* note 55 at 24.

fine-tuned ISDS reformed mechanism, or through thorough rule amendments that have only just been enacted, such as the new ICSID rules.⁵⁸⁰ Alvarez notes that

[the] prospect that reformed ISDS will dominate in the short to medium term needs to be tempered by some basic facts. While IIAs with reformed ISDS are the most popular model of today – 16 IIAs in UNCTAD’s database contain what most would be characterized as sufficiently reformed ISDS between 2018 and 2020 – that model has not completely dominated. During the same period, 9 IIAs with traditional ISDS were concluded.

For this reason, the best hope for convergence around ISDS reformed lies in ICSID’s rules amendment and its emulation by other arbitration venues and not the individual negotiation or renegotiation of IIAs (as envisioned by UNCTAD) – which would take considerable time and political will.

605. Giorgetti, along similar lines, argues that

An incremental approach focused on targeted measures without major structural reforms could address many concerns with independence and impartiality in investment arbitration. The option to ‘improve’ ISDS holds the promise of concrete and immediate change and several proposals have been already raised in the UNCITRAL Working Group III process. That said, their success would depend significantly on the precise content of those reforms and their broader acceptance.⁵⁸¹

606. A number of improvements could be envisaged, she submits, including “more onerous and specific disclosure requirements” which would address both “general concerns related to arbitrators’ independence and impartiality and party appointment as well as specific problems of *ex parte* contacts, repeat appointments, and issue conflicts.⁵⁸² It is mainly through the introduction of a Code of Conduct that she proposes to introduce these specific changes meant to address identified issues. She proposes including limits on the number of appointments (both in terms of number and time since the last appointment), revising procedures for arbitrator challenges, “separating the pool of individuals serving as ICSID arbitrators from those serving on annulment committees” to address double hatting concerns, introducing rules with respect to the role of tribunal assistants, to dispel concerns on “improper influence of staff and secretariats.” Finally, she suggests tackling “by requesting comprehensive disclosure of an arbitrator’s publications and case list, or by imposing strict prohibitions of sitting in cases that may touch on the same treaty or facts.”

⁵⁸⁰ *Ibid.*, at 25.

⁵⁸¹ Giorgetti et al, *supra* note 64 at 467.

⁵⁸² *Ibid.*

607. The above proposed improvement to investment arbitration might have been considered sufficient by the legal community and the civil society alike before the EU proposed an overhaul of the ISDS with the introduction of a permanent two-tiered tribunal. While they are examined to an extent by the Working Group III at UNCITRAL, the group's remit continues to focus for the most part on structural, and not individual or specific, reforms. Nevertheless, we submit that these proposals contain great merit and could, on a rule of law scale for the assessment of their impact on the independence and impartiality of arbitrators, provide a more robust, yet functional, reform.

608. It is these paths that we explore in the following section. After our assessment of the ISDS system, we can now turn to the EU proposal for the ICS in order to establish whether it resolves and strengthens the issues in the rule of law where we have found weaknesses in the ISDS system.

***B. The new Regulatory System of the European Union:
Assessing the Rule of Law in the ICS for Members***

609. The object of this dissertation is to determine the impact of the new EU ICS on strengthening the rule of law. The point of comparison is the existing system under ISDS, which was reviewed in the previous section. Accordingly, in this section, we apply the rule of law matrix to the ICS, keeping, to the extent possible, to the same categories examined under ISDS. A perfectly mirrored analysis is not quite possible, as the new ICS will automatically abolish certain categories due to the nature of the reform proposed, for example the selection process in ISDS is abolished under the ICS with the permanent tribunal. Naturally, the introduction of a standing tribunal to replace a mechanism renowned for its inherent flexibility for the parties will bring many such changes. But, for the purposes of our analysis, we can match the different criteria analysed, so that we assess, in turn, as we did for ISDS, the selection and appointment, disclosure, challenge and removal, and limits on multiple roles. Lastly, the point on remuneration stands by itself but will also be addressed as it is a concern inherent to any evaluation on independence and impartiality of adjudicators.

610. It is useful to recall the three limbs under which the rule of law is defined as a value - (1) legal certainty, (2) procedural fairness and (3) procedural transparency, as set out above,⁵⁸³ which are recognized in a synthesized manner as the elements of the rule of law in ISDS. We are therefore able to compare them with the new system proposed in the ICS.

611. What the ICS proposes by introducing a standing tribunal with permanent members is a systemic reform with respect to independence and impartiality of arbitrators. At the moment, these issues are dealt with on an individual basis in investor-State dispute settlement through the mechanisms of disclosure and challenge. As Giorgetti et al. write:

Concerns regarding independence and impartiality in ISDS are addressed currently at the level of individual disputes through disclosure requirements and challenges procedures. The systemic aspects, by contrast, are often more elusive and difficult to address. What is more, while the one-off nature of arbitration to settle private-public disputes may not be an obstacle to independent and impartial dispute settlement as such, the widespread mixing of roles of those active in present-day investment arbitration – as arbitrators and counsel, academics, and experts – and the financial, professional, and personal entanglements resulting from such mixing of roles, are central to the systemic debate over independence and impartiality, both in ISDS as it stands now, and in respect of future reforms.⁵⁸⁴

612. It is plain that the ICS model brings the most fundamental changes to the independence and impartiality of the adjudicators. By introducing new obligations for tribunal members with respect to the appointment, challenges, removal, remuneration and conduct, the European Union has proposed an in-depth reform of the existing practice in ISDS. With the ICS, the EU has proposed a permanent tribunal based on the WTO model.⁵⁸⁵ While providing a judicial system which responds to critics against ISDS, the EU unfortunately also loses some of the most important benefits of arbitration. This is examined in the relevant section above. Indeed, the most highly acclaimed advantages of submitting a dispute to arbitration, being the autonomy of the parties to tailor and design their procedure to the greatest possible extent, now appears to have been discarded.

613. Advocate General Bot, in its Opinion of 29 January 2019 in anticipation of *Opinion I/17*, wrote that the “hybrid nature” of the ICS still contained original features from

⁵⁸³ See above, Introduction, Chapter 2, Section 2, B. The Rule of Law in International Investment Law.

⁵⁸⁴ Giorgetti et al, *supra* note 64 at 446.

⁵⁸⁵ The Inspiration – the WTO DSU AB system – similarities and differences, also include the rule of law in the WTO article. See Annex I.

arbitration⁵⁸⁶ and that the new ICS model merely introduced “improvements”.⁵⁸⁷ As we shall see, the EU reform is not merely a proposal with key improvements. It proposes an entirely new judicial system, setting, we argue, impossible standards.⁵⁸⁸

1. The Legal Framework for the Investment Court System

a. The Investment Court System: an Introduction

614. To date, the Investment Court System has been accepted into the CETA, EU-Vietnam (“EU VIPA”) and the EU-Singapore (“EUSIPA”) and EU-(Mexico (EUMEX)). For the purposes of this thesis however, the focus was set on the CETA. First, it is the most comprehensive agreement to be entered into by Canada at the time, and for this reason alone makes it worthy of in-depth study.⁵⁸⁹ It is also the subject of much controversy surrounding its implementation and eventual application. We recall that until all Member States have signed the agreement it will not come into force. At the moment, Chapter 8 Investment “therefore continues to be excluded from the agreement’s provisional application.”⁵⁹⁰

615. Before delving into the analysis of the ICS, we examine the recently adopted Code of Conduct for Members of the Tribunal. Finalized on 29 January 2021, it was adopted by the EU and Canada in line with their previous commitment in this regard. The Code details the obligations of Members with respect to their conduct and ethics.

b. Code of Conduct for Members of the Investment Court System

616. Chapter 8 of the CETA provides that the Committee on Services and Investment will draft a code of conduct for members of the Tribunal:

⁵⁸⁶ *Opinion 1/17*, *supra* note **Erreur! Signet non défini.** at para 242.

⁵⁸⁷ *Ibid* at para 245.

⁵⁸⁸ Ünüvar & Kreft, “Impossible Ethics?”, *supra* note 7.

⁵⁸⁹ Marc Bungenberg & August Reinisch, eds, *CETA Investment Law: Article-by-Article Commentary* (London: Bloomsbury Publishing, 2022); Kriton Dionysiou, *CETA's Investment Chapter: A Rule of Law Perspective* (Cham, Switzerland: Springer, 2021) [Dionysiou, *CETA's Investment Chapter*].

⁵⁹⁰ Finally, this dissertation being conducted under the guidance of Canadian and Italian universities, funded by the EU Marie Skłodowska Curie fellowship, the choice of CETA was self-evident.

Article 8.44 – Committee on Services and Investment

[...]

2. The Committee on Services and Investment shall, on agreement of the Parties, and after completion of their respective internal requirements and procedures, adopt a code of conduct for the Members of the Tribunal to be applied in disputes arising out of this Chapter, which may replace or supplement the rules in application, and may address topics including:

- a. disclosure obligations;
- b. the independence and impartiality of the Members of the Tribunal; and
- c. confidentiality.

The Parties shall make best efforts to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement, as the case may be, and in any event no later than two years after such date. (our emphasis)

617. While Member States denounced before the CJEU that such important provisions should not be left out of the treaty and for future committees, which would then escape the formal ratification mechanism of the treaty in the EU, it was nevertheless ultimately accepted in *Opinion 1/17*.⁵⁹¹ Such a provision is in practice often found within treaties.

618. The EU treaties including the ICS model, i.e. CETA EU VIPA, EUSIPA and EUMEX, require their members to follow a Code of Conduct.⁵⁹² The latest approved draft of such a code can be found in the Code of Conduct and Rules of Procedure of the Agreement between the EU and Viet Nam, which is the latest bilateral trade agreement to have been approved by the Council and the European Parliament.⁵⁹³

619. In the case of CETA, our guiding model for this investigation, the Code of conduct for Members was presented by the Commission on 11 October 2019.⁵⁹⁴ It was adopted

⁵⁹¹ *Opinion 1/17*, *supra* note **Erreur! Signet non défini.**

⁵⁹² Below Annex V.

⁵⁹³ Some treaties now provide for a code of conduct of arbitrators and mediators, that they have to comply with. These instruments typically include additional detailed obligations. Recent treaties include some form of code of conduct, such as CETA, CPTPP, EUVIPA, EUSIPA, EUMEX. We can also draw alternative examples from a different model accepted under NAFTA (chapters 19 and 20) and USMCA (Annex xx ISDS between the US and Mexico). See Annex B Codes of Conduct to the Draft Code of Adjudicators jointly produced by the UNCITRAL/ICSID Secretariat, 8 May 2020.

⁵⁹⁴ In what was adopted formally on 28 January 2021, “The European Commission today presented to the Council four proposals for specific rules putting in place the Investment Court System (ICS) provisions in the EU-Canada Comprehensive Economic and Trade Agreement (CETA). These will now be discussed in the

formally through the Decision No 001/2021 of the Committee on Services and Investment of 29 January 2021, adopting a Code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators, reproduced in relevant part below:⁵⁹⁵

The Committee on Services and Investment,

Having regard to Article 26.2.1(b) of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (“the Agreement”),

Whereas Article 8.44.2 of the Agreement provides that the Committee on Services and Investment is to adopt a code of conduct to be applied in disputes arising out of Chapter Eight (Investment) of the Agreement, which may replace or supplement the rules in application,

Has adopted this decision:

Article 1

Definitions

For the purposes of this Decision, the following definitions apply:

Council and approved by the Council and Member States. After their approval they can be formally agreed with Canada in the relevant CETA committees. They will enter into force when the ratification of CETA is completed by Member State parliaments.

The fundamentals of the Investment Court System are already established in CETA. While they are not yet applied pending ratification of the agreement by all EU Member States (13 have ratified it so far), the Joint Interpretative Instrument on CETA agreed by the EU and Canada in October 2016 includes a commitment to make the system operational as soon as the agreement enters into force.

Today’s proposals are necessary to deliver on this commitment by the European Union, Member States and Canada. These rules complete the putting in place in CETA of the reformed approach to investment dispute settlement and continue the ground-breaking path already established by the EU’s reforms of investment dispute policy.

In particular, they will ensure an effective appeal function, the first such appeal function to become operational in international investment agreements. They will further bolster the assurances of the highest ethics standards already contained in the agreement. They put in place rules on mediation for investment disputes, an area which traditional investment agreements have largely overlooked. Finally, they flesh out a framework for the adoption of binding interpretations (already foreseen in the agreement), facilitating the Parties maintenance of control of the interpretation of the agreement.

The four proposals concern:

- Rules setting out the functioning of the Appellate Tribunal
- a code of conduct for members of the ICS;
- rules for mediation and;
- rules for binding interpretations to be adopted by the CETA Joint Committee

The Commission has already discussed the drafts with EU Member States and has also kept the European Parliament fully informed.”

⁵⁹⁵ Global Affairs Canada, “Decision No 001/2021 of the Committee on Services and Investment of January 29, 2021 adopting a code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators”, online: Government of Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/code-conduct-conduite.aspx?lang=eng>>.

- (a) the definitions in Article 1.1 (Definitions of general application) of Chapter One (General definitions and initial provisions) of the Agreement;
- (b) the definitions in Article 8.1 (Definitions) of Chapter Eight (Investment) of the Agreement;
- (c) “Appellate Tribunal” means the appellate tribunal established under Article 8.28 (Appellate Tribunal) of Chapter Eight (Investment) of the Agreement;
- (d) “assistant” means a natural person, other than a person employed by the ICSID Secretariat, who, under the terms of appointment of a Member, conducts research for or provides assistance to the Member;
- (e) “candidate” means a natural person who has submitted an application or is otherwise aware that he or she is under consideration for selection as a Member;
- (f) “mediator” means a natural person who conducts mediation in accordance with Article 8.20 (Mediation) of the Agreement; and
- (g) “Member” means a Member of the Tribunal or of the Appellate Tribunal established pursuant to Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement.

Article 2

Responsibilities to the Process

Candidates, Members and former Members shall avoid impropriety and the appearance of impropriety, and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved.

Article 3

Disclosure Obligations

Candidates shall disclose to the Parties any past and present interest, relationship or matter that is likely to affect, or that could reasonably be seen as likely to affect, their independence or impartiality, that creates or could reasonably be seen as creating a direct or indirect conflict of interest, or that creates or might reasonably be seen as creating an appearance of impropriety or bias. To this end, candidates shall make all reasonable efforts to become aware of any such interests, relationships or matters. The disclosure of past interests, relationships or matters shall cover at least the last five years prior to a candidate submitting an application or otherwise becoming aware that he or she is under consideration for selection as a Member.

Members shall communicate matters concerning actual or potential violations of this code of conduct, in writing, to the Parties and, when relevant to a dispute, to the disputing parties.

Members shall at all times continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article. Members shall at all times disclose such interests, relationships or matters throughout the performance of their duties by informing the Parties and, where relevant, the disputing parties.

In order to ensure that relevant information is provided by candidates and Members, disclosures shall be made through a standardised form with the possibility to add or enclose any document, and in accordance with any other procedures established by the Parties.

Article 4

Independence, Impartiality and Other Obligations of Members

In addition to the obligations established in Article 2 of this Decision, Members shall be and shall appear to be independent and impartial, and shall avoid direct and indirect conflicts of interest.

Members shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party, disputing party or any other person involved or participating in the proceeding, fear of criticism or financial, business, professional, family or social relationships or responsibilities.

Members shall not, directly or indirectly, incur any obligation, accept any benefit, enter into any relationship, or acquire any financial interest that is likely to affect or appear to affect their independence or impartiality.

Members shall not engage in *ex parte* contacts concerning the proceeding.

Members shall perform their duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence.

Members shall consider only those issues raised in the proceeding and which are necessary for a decision or award and shall not delegate this duty to any other person.

Members shall take all appropriate steps to ensure that their assistants are aware of, and comply with, Articles 2 (Responsibilities to the Process), 3(2) and (3) (Disclosure Obligations), 4(1) to (5) (Independence and Impartiality and Other Obligations of Members), 5(1) and (3) (Obligations of Former Members) and 6 (Confidentiality) of this Decision *mutatis mutandis*.

Members shall take appropriate account of other dispute settlement activities under the Agreement and, in particular, of decisions or awards rendered by the Appellate Tribunal.

Article 5

Obligations of Former Members

Former Members shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the Tribunal or the Appellate Tribunal.

Members shall undertake that for a period of three years after the end of their term, they shall not act as representatives of any of the disputing parties in investment disputes before the Tribunal or the Appellate Tribunal.

Without prejudice to the possibility to continue to serve on a division until the closure of the proceedings of that division, Members shall undertake that after the end of their term, they shall not become involved:

(a) in any manner whatsoever in investment disputes which were pending before the Tribunal or the Appellate Tribunal before the end of their term;

(b) in any manner whatsoever in investment disputes directly and clearly connected with disputes, including concluded disputes, which they have dealt with as Members of the Tribunal or the Appellate Tribunal.

If the President of the Tribunal or of the Appellate Tribunal is informed or otherwise becomes aware that a former Member is alleged to have acted inconsistently with the obligations set out in paragraphs 1, 2 and 3, or any other part of this Decision while a Member, he or she shall examine the matter, provide an opportunity to the former Member to be heard, and, after verification, inform thereof:

(a) the professional body or other such institution with which that former Member is affiliated;

(b) the Parties;

(c) if it involves a specific dispute, the disputing parties; and

(d) the President of any other relevant international court or tribunal in view of the initiation of appropriate measures.

The President of the Tribunal or of the Appellate Tribunal shall make public his or her decision to take the actions referred to in subparagraphs (a) to (d) above, together with the reasons therefor.

Article 6

Confidentiality

Members and former Members shall not at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of the proceeding, and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.

Members shall not disclose an order, decision, award or parts thereof prior to its publication in accordance with the transparency provisions of Article 8.36 (Transparency of proceedings) of the Agreement.

Members or former Members shall not disclose any deliberation of the Tribunal or Appellate Tribunal, or any Member's views, except in an order, decision or award.

Article 7

Expenses

Each Member shall keep a record and render a final account of their time devoted to the procedure and of their expenses incurred, as well as the time and expenses of their assistant.

Article 8

Sanctions

For greater certainty, the provisions of this code of conduct shall be applied together with the obligations set out in Article 8.30.1 of the Agreement and the procedures provided for in Articles 8.30.2, 8.30.3 and 8.30.4 of the Agreement shall apply to violations of this code of conduct.

For greater certainty, the CETA Joint Committee shall provide a Member the opportunity to be heard prior to the issuance of any decision pursuant to Article 8.30.4 of the Agreement.

620. It is plain that the model for the Members is that of judges in the domestic system, or the Members of the WTO system.

c. Defining Independence and Impartiality

621. Article 8.30 of CETA governs ethics. It addresses independence and impartiality of the members, the requirements for disclosure and conflict of interest, and provides for a challenge procedure, as follows:

Article 8.30 – Ethics

1. The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

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

3. If, within 15 days from the date of the notice of challenge, the challenged Member of the Tribunal has elected not to resign from the division, the President of the International Court of Justice may, after receiving submissions from the disputing parties and after providing the Member of the Tribunal an opportunity to submit any observations, issue a decision on the challenge. The President of the International Court of Justice shall endeavour to issue the decision and to notify the disputing parties and the other Members of the division within 45 days of

receipt of the notice of challenge. A vacancy resulting from the disqualification or resignation of a Member of the Tribunal shall be filled promptly.

4. Upon a reasoned recommendation from the President of the Tribunal, or on their joint initiative, the Parties, by decision of the CETA Joint Committee, may remove a Member from the Tribunal where his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued membership of the Tribunal.

2. Selection and Appointment Mechanisms

a. From Arbitrator to Member: Terminology for the Adjudicator

622. The first notable aspect of the ICS reform is the essence of the mandate of the adjudicator. All aspects intrinsically linked to the nature of the arbitrator under the ISDS are removed by the ICS. The term itself to designate the adjudicator is changed from “arbitrator” to “member”. In this choice of term, the EU mirrors the WTO system in which Members are appointed to the first instance, the DSU, and the Appeal Board, the AB.⁵⁹⁶ It is suitable, however, that the term of arbitrator is replaced, as one of the most important modification of the Investment Court System resides in the introduction of safeguards to protect and promotes further independence and impartiality. Of course, while these procedural matters have important consequences, it is important to recall that the substance of the mandate of the adjudicator, whether an arbitrator or a member, will remain the same.

623. Here, too, a question of appearance seems to strike at first glance. The draft of TTIP, which contained the EU’s first proposal for a standing court, referred to “judges”. It was rapidly one of the most salient issues remarked by critics and proponents alike of this new system. Since that version, no other draft has included a reference to judges. It seems that the EU here recognizes that it is walking the fine line between arbitration and litigation, and hopes to retain advantages of the ISDS system whilst correcting some aspects in appearance.

624. Chapter 8, Section F of the CETA provides for the modalities governing the constitution and functioning, in part, of the Tribunal in its article 8.27, as follows:

⁵⁹⁶ Below Annex I.

1. The Tribunal established under this Section shall decide claims submitted pursuant to Article 8.23.
2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.
3. The CETA Joint Committee may decide to increase or to decrease the number of the Members of the Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.
4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.
5. The Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once. However, the terms of seven of the 15 persons appointed immediately after the entry into force of this Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a Member of the Tribunal whose term of office has not expired shall hold office for the remainder of the predecessor's term. In principle, a Member of the Tribunal serving on a division of the Tribunal when his or her term expires may continue to serve on the division until a final award is issued.
6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.
7. Within 90 days of the submission of a claim pursuant to Article 8.23, the President of the Tribunal shall appoint the Members of the Tribunal composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve.
8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and shall be appointed for a two-year term and shall be drawn by lot from among the Members of the Tribunal who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the CETA Joint Committee. The Vice-President shall replace the President when the President is unavailable.
9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic consideration to a request from the claimant to have the case heard by a sole Member of the Tribunal, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made before the constitution of the division of the Tribunal.
10. The Tribunal may draw up its own working procedures.

11. The Members of the Tribunal shall ensure that they are available and able to perform the functions set out under this Section.

12. In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee.

13. The fees referred to in paragraph 12 shall be paid equally by both Parties into an account managed by the ICSID Secretariat. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears by a Party shall remain payable, with appropriate interest.

14. Unless the CETA Joint Committee adopts a decision pursuant to paragraph 15, the amount of the fees and expenses of the Members of the Tribunal on a division constituted to hear a claim, other than the fees referred to in paragraph 12, shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 8.39.5.

15. The CETA Joint Committee may, by decision, transform the retainer fee and other fees and expenses into a regular salary, and decide applicable modalities and conditions.

16. The ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support.

17. If the CETA Joint Committee has not made the appointments pursuant to paragraph 2 within 90 days from the date that a claim is submitted for dispute settlement, the Secretary General of ICSID shall, at the request of either disputing party appoint a division consisting of three Members of the Tribunal, unless the disputing parties have agreed that the case is to be heard by a sole Member of the Tribunal. The Secretary General of ICSID shall make the appointment by random selection from the existing nominations. The Secretary-General of ICSID may not appoint as chair a national of either Canada or a Member State of the European Union unless the disputing parties agree otherwise.

625. The qualifications and standing of Members under the ICS are close to that of judges under domestic systems but retains a clear inspiration from ISDS. The one characteristic which distinguishes the two is the level of professionalization or specialization attached to the position of Members, in view of their required qualifications specific to international law.⁵⁹⁷

626. The WTO system is mirrored and a judicialized system put in place.⁵⁹⁸ It is widely recognized that the origin of the appeal level for ISDS is modeled on the WTO. As previously set out, it remains puzzling to many practitioners and academics that the EU has formally adopted a policy stance which requires the implementation of a system which is itself in deep

⁵⁹⁷ *CETA*, *supra* note 220, art 8.27.

⁵⁹⁸ Below Annex I.

crisis. Indeed, the US has now successfully demolished the AB in the WTO system and other than admitting that negotiators are profoundly stuck, few resolutions appear to create a consensus. The systematic blocking of nomination to the empty seats of the AB by the US commenced in 2017 under President Obama, were pursued under President Trump and continue to hold firm with President Biden.

627. The paradox of the EU attempting to propose a fundamental reform by introducing a system touted for its appeal level, which has now been demolished, with an irony which is lost on no one. Unfortunately, and although the situation with the AB could be expected from the opposition of the US, at the time the EU introduced its ICS, in 2014, things had not yet turned sour at the WTO. The WTO system at that date was considered a success in the world of international trade law for an efficient, consistent and specialized tribunal.

628. The United States' main preoccupation with the AB is that it considers the appeal level and its members to go beyond its assigned mandate. By creating and determining the law, the US considers that this is not within the scope of the AB. Most importantly, the US profoundly disagrees with a number of decisions rendered by the AB which only reinforces its systematic blocking.

629. A number of proposals have been put forward to resolve the crisis of the AB. At the moment, and for a number of states, it has been replaced by the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), an arbitral mechanism.⁵⁹⁹ Spearheaded by the EU, this temporary solution has been gaining popularity. It was officially created on 30 April 2020, when a group of 47 WTO members notified the organization of its creation.⁶⁰⁰ At the time of writing, it has not yet released any report although 7 cases have been notified under Article 25 MPIA, one is listed as a potential as both WTO members also are MPIA members (DS607: European Union — Measures Concerning the Importation of Certain Poultry Meat

⁵⁹⁹ WTO Plurilaterals, “Multi-Party Interim Appeal Arbitration Arrangement (MPIA)”, online: WTO Plurilaterals <https://wtoplurilaterals.info/plural_initiative/the-mpia/> [WTO Plurilaterals, “MPIA Cases”].

⁶⁰⁰ World Trade Organization, Communication, JOB/DSB/1/Add.12, “Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of the WTO Disputes” (30 April 2020) online: WTO <https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf>. The following WTO members are party to the plurilateral agreement: Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; European Union; Guatemala; Hong Kong, China; Iceland; Macao, China; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Peru; Singapore; Switzerland; Ukraine and Uruguay.

Preparations from Brazil) and a consultation is ongoing ([Consultations Stage] China – Alleged Chinese restrictions on the import and export of goods, and the supply of services, to and from Lithuania, Request for consultation received on 25 January 2022).⁶⁰¹

630. Discussions surrounding the possibility to allow for a permanent mechanism have been ongoing. Of course, the issue with the WTO system is the near impossibility to change its mechanism. The EU has also proposed that the AB be replaced and nominated *en bloc* for a period of 8 years, following which it would be entirely changed. Cases could even be relitigated. Little or no appetite has been demonstrated for this proposal characterized as impractical. We would add that the possibility to relitigate cases also goes against a fundamental principle of the rule of law, the *res judicata*. A rule-based legal system would have no legitimacy if one of its tenets in the finality of the last level of judgment, could simply be reversed through reform. The only interesting aspect to this proposal, aside for providing a consistency of decision for 8 years, is the minimal change that would be necessary to enable its implementation in the DSU.

631. For this very reason, the DSU review has been ongoing for the past 20 years. One of the reasons set forth as justifying the lack of progress is that most states considered that the *status quo*, i.e. preserving the well-functioning system until 2017, was a more apt solution than proceeding to a review. This option was only taken off the table in 2020 when the number of members in the AB and the lack of re-election rendered it ineffective.

632. The EU's "obsession with consistency" has led to a strict positioning in its policy. While it was able to save the ICS from an internal debacle with a very convoluted and much decried decision of the Court (*Opinion 1/17*) which essentially found a way to rubber-stamp a situation which had been *de facto* put in place as the ICS was put in CETA in 2016 and Belgium, after the fact, sought a political confirmation through an Opinion of the Court, there are no guarantees that the EU will be able to pull such a tour de force in its negotiations at WGIII before UNCITRAL. Neither the US nor China will hear of the MIC, and aside from showing its leadership as a global actor in being instrumental in the initiation of these discussion, the EU's leverage is much lessened on the international plane. It has restricted its

⁶⁰¹ WTO Plurilaterals, "MPIA Cases", *supra* note 599.

options with proactively spearheading a solution that has the merit of providing a strict judicialization with the guarantees that it brings. While Members of the MIC will be highly professionalized if, certainly, their selection criteria attain those provided in the CETA (e.g. 8.27 of CETA which requires Members to be specialists in public international law, trade, investment law) and exceed by far the competencies of many of the WTO Members, it is our position that the constraints of the MIC far exceed its advantages.⁶⁰²

633. In discussions that are led under the seal of pragmatism and efficacy, the only solution that has a viable future is the enactment of an *à la carte* buffet of reforms for a selection mechanism for arbitrators and an *ad hoc* appeal panel that parties will be able to refer to upon request.

634. The fragmentation of international investment law will not be aided by the introduction of a MIC in any case, which would only contribute to adding a layer of complexity to an infinity of arbitral tribunals which are already allowed under existing IIAs. Whether the parties are presented with alternatives to opt in to appeal or selection mechanism will in no way alter the bigger picture fragmentation. It is an illusion to continue to wish to provide uniformity and strict consistency.

635. In sum, the complete chaos that the EU is attempting to avoid before the WTO, is only reflected in the one that it creates before UNCITRAL.

b. Appointment of Members

636. Party appointment is widely considered as the “historical keystone of international arbitration”.⁶⁰³ It has been acknowledged as the main reason pursuant to which parties choose arbitration, so that they maintain a level of control upon the appointment process. The justifications are numerous – arbitration is a process by which parties retain the most flexibility, control and governance.⁶⁰⁴ In the system as it is currently designed, through the

⁶⁰² Below, Part II, Chapter 2, B. The Multilateral Investment Court.

⁶⁰³ Van Vechten Veeder, “The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva” (2013) 107 Proceedings of the ASIL Annual Meeting 378.

⁶⁰⁴ Alvarez, “The Long View”, *supra* note 55.

framework provided by arbitration rules and international conventions, international arbitration continues to be in the hands of the parties. The limit to this freedom rests in the rule of law standard which must be respected.⁶⁰⁵

637. Accordingly, the introduction of the requirement of a standing court coupled with a code of conduct for its members consists in a fundamental overhaul, far beyond a major systemic reform effort. The judicialized process loses nearly entirely this main advantage of arbitration. The reason that arbitration has continued to have such success, and arguably become increasingly more attractive for states and investors, is the flexibility and level of expertise provided. The EU's proposed reform is so drastic that we must query the reasons for which it decided to act so rapidly only to respond to perceived legitimacy issues.

638. The ensuing slew of decisions from the CJEU with respect to the arbitrability of EU law and the protection of its autonomy continues to highlight the tension between the strong desire of the EU to frame a step by step consistent investment policy⁶⁰⁶ and the reality of its positioning to continue to allow arbitration in certain instances (with third parties) while forbidding it in others (EU Members).⁶⁰⁷ The puzzle of the EU's stance is summarized in a paradox set out by Prof. Cordero-Moss: "What seems to be arbitration friendly, restricts the scope of arbitration; What seems to be arbitration-unfriendly, supports arbitration".

639. Fundamental changes to the ISDS regime are enacted by the abolishment of party appointment. The introduction of a standing court and appointed members responds to concerns regarding the exclusive club of arbitrators who benefit from repeat appointments, at times from the same party.⁶⁰⁸

640. Indeed, the ICS judicializes the process and removes the parties' autonomy in this respect. By establishing a permanent roster of fifteen members, nominated by governments for a five year once renewal term, the EU responds to one of the recurring criticism against the private nature of "chosen" arbitrators, who might be biased towards the party that

⁶⁰⁵ Dionysiou, *CETA's Investment Chapter*, *supra* note 589.

⁶⁰⁶ *Opinion I/17*, *supra* note **Erreur! Signet non défini.**

⁶⁰⁷ Giuditta Cordero-Moss, "Towards the end of arbitrability, About Achmea, Komstroy, PL Holdings, et al." (John EC Brierley Memorial Lecture, Faculty of Law, McGill University, 19 January 2022).

⁶⁰⁸ Langford, Behn & Lie, *supra* note 361. Ünüvar & Kreft, "Impossible Ethics?", *supra* note 7.

nominated them.⁶⁰⁹ There is strong concern in this regard in ISDS, and, in fact, arbitrators have been systematically challenged for repeat nominations by the same party, or even, at times, for an opinion expressed previously, referred to as issue conflict.

641. There have also been numerous critics lamenting the loss of autonomy of the parties in the selection of their arbitrators. Not only has this feature been hailed as fundamental to the very nature of arbitration, but it has always been considered as a tool to provide access to highly specialized experts in the subject matter of the arbitration.⁶¹⁰ Arbitral institutions have been active in this regard, providing highly skilled tools, lists and in-house knowledge within their secretariat to assist parties in appointing arbitrators that are most skilled for the matter being arbitrated.⁶¹¹ This often requires knowledge of nationality, language, residence of arbitrator, specialized fields of law, level of experience, amongst other skills.

642. The new permanent roster established by the ICS eliminates the “à la carte” nature of finding the perfect arbitrator for each case.⁶¹² Of course, the provision detailing the selection of the members of the ICS has attempted to redress the balance and requires that any nominated member “possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements” (art 8.27(4)).

⁶⁰⁹ Catherine Rogers, *Ethics in International Arbitration* (Oxford: Oxford University Press, 2014).

⁶¹⁰ *Ibid.*

⁶¹¹ ICC, ICSID and the PCA rely on various methods and internal tools to maintain acceptable databases containing information on arbitrations that provide them with an edge, and efficient and reliable approach to proposing arbitrators. These institutions also rely heavily on institutional knowledge and networks, bearing in mind that a number of information cannot even be compiled due to data compliance laws in Europe. New online tools such as Arbitrator Intelligence and Jus Mundi are clearly competing for a slice of the appointment business. A telltale sign that the market for parties to nominate arbitrators is not affected by the reigning “legitimacy crisis” is the recent additions to legal techs and their important developments, together with the continued growth of existing institutions and creation of new ones. The “arbitrators’ market” certainly has not been caught by the discontent expressed by detractors of arbitration. Quite the contrary. This illustrates once more the widening gap between practice and reality in arbitration and that of the theoretical abyss academics tend to create and fall into.

⁶¹² Alvarez, “The Long View”, *supra* note 55.

643. This requirement provides a safeguard meant to ensure that only experts are appointed to the roster. This, conversely, brings up the excessive restraint imposed regarding the qualifications, as well as the indirect impact on the increase of diversity to the panels.

644. On 18 December 2020, the EU Commission, in conjunction with its Member States, issued a call for candidates for dispute settlement activities in EU trade and investment agreements. The Commission explains that it: “maintains a pool of candidates from which it will draw qualified individuals for specific agreements. Individuals will be proposed by the Commission to the Council, which will decide on their appointments. The lists are subsequently agreed with the third country concerned, typically by a decision of a joint committee.”⁶¹³

645. This call is aimed at candidates for “the pool of arbitrators or the separate pool of trade and sustainable development experts”. A call for candidates for the Investment Court Systems will take place at a later stage, “when the agreements with such systems will enter into force”.⁶¹⁴ A panel of experts composed by international judges and academics is appointed, inspired by the committee for appointments to the Court of Justice of the European Union (Art 255 TFEU).

646. The Commission, in line with its adherence to the Equal Representation in Arbitration Pledge, will “seek to ensure gender balance in its list of proposals.”

647. The selection criteria for the rosters follow in all aspects the new provisions included by the EU which we examine in detail. Candidates must therefore have “expertise in law, international trade, sustainable development and/or other matters covered by EU trade agreements. They should have the ability to conduct arbitration and/or expert panel proceedings, and to draft an arbitration award or a recommendation in one or more of the most likely working languages of such proceedings (i.e. English, French or Spanish).”

⁶¹³ European Commission, News Release, “Candidates for dispute settlement activities under EU trade and investment agreements” (18 December 2020) online: European Commission <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2224>>.

⁶¹⁴ *Ibid.*

648. With respect to the ethics, independence and impartiality, the Commission states that candidates must “be independent and impartial from any organisation or government” and only candidates who do not hold the nationality of a EU member may chair panels.⁶¹⁵ The Code of Conduct and Rules of Procedure of the Agreement between the EU and Viet Nam, the latest bilateral trade agreement approved by the Council and the European Parliament, is set out as an example of the ethical standards appointed candidates will be expected to follow.

c. The “Double Hatting” Prohibition

649. One of the founding safeguards to the new system designed by the EU is the limit posed on the multiple roles that members may exercise, also referred to as “double hatting”.⁶¹⁶ The ICS has now included a prohibition on the concurrent roles that an arbitrator may exercise, thus requiring the Tribunal members to agree to forego any mandates as counsel, expert or witness.

650. First, we recall that as members may not cumulate multiple roles, the pool of available candidates will be strongly impacted by professionals who will simply determine that they do not wish to limit their practice for such a nomination, when there are at the moment no guarantees of the amount of work that will derive from the ICS.

651. Article 8.30(1) of CETA provides for the “double-hatting” prohibition *in fine*:

In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

652. This provision is complemented by the Code of Conduct for CETA Members, article 5(2), which “provides additional disciplines applicable to former tribunal members, including time limitations on their ability to act as representatives of disputing parties before the CETA

⁶¹⁵ European Commission, “The European Commission launches selection of candidates for the position of arbitrators and trade and sustainable development experts in bilateral disputes under the EU trade agreements” (18 December 2020) online: European Commission <https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159204.pdf>.

⁶¹⁶ See below for the analysis of the new Code of Conduct for Adjudicators which addresses this issue.

tribunals” and acts “as a sort of extension of the double-hatting ban post-term”.⁶¹⁷ The three year time limit further limits the roles to be undertaken by the adjudicator under CETA.

653. At the moment, the Investment Section of the CETA is still exempted from provisional application. This prohibition serves nonetheless as founding for Canada’s position⁶¹⁸ with respect to limit on multiple roles as well as a model for the UNCITRAL discussions.⁶¹⁹

654. Possessing the required qualifications provided for in art. 8.27(4) will tailor the roster to select candidates. The provision envisions senior jurists or judges, which “possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence.” These individuals must also have “demonstrated expertise” in public international law, international investment law and international trade law and the resolution of disputes under international investment or international trade agreements. The list, once more, is further shortened. In fact, it makes us think of the “infamous” private elite club of the revolving door of arbitration.⁶²⁰ Perhaps the door is open to a number of highly qualified individuals who would otherwise not benefit from appointment. Evidence points here to senior government official (although they may not have access to the roster due to their main functions in government, due to the limits on multiple roles) and academics.

655. Diversity and the necessary access to arbitration roles to professionals from a wider horizon is recognized.⁶²¹ Unfortunately, it is not likely that a quota for half of the adjudicators be women be enacted. In fact, the CETA parties agreed in January 2021 that the ICS’s appellate tribunal would be composed of six members who would be “appointed by the CETA Joint Committee with a view to the principles of diversity and gender equality”⁶²², the

⁶¹⁷ Céline Lévesque, “Canada’s Pro-Ban Stance on Double-Hatting: Playing the Long Game in ISDS Reform?” (2021) 58 *Canadian Yearbook of International Law* 382 [Lévesque, “Canada’s Pro-Ban Stance”]. p. 16.

⁶¹⁸ Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 618.

⁶¹⁹ ICSID, “Code of Conduct – Background Papers: Double-Hatting”, online: ICSID <[https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_\(final\)_2021.02.25.pdf](https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf)> [ICSID, “Background Papers: Double-Hatting”].

⁶²⁰ Langford, Behn & Lie, “Revolving Door”, *supra* note 361.

⁶²¹ Bjorklund et al, “Diversity Deficit”, *supra* note 520; Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 617.

⁶²² CETA 2021 Decision, *supra* note 70, art 2(1). Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 617 at 24. Katherine Simpson and Anthony Marcum, CETA – Where Are the Women? Diffusing the Thought-Terminating Clichés That Impeded Diversity (March 6, 2022).

indirect impact to an increase of diversity still divides.⁶²³ Interestingly, all camps of ISDS reform claim that proposed measures for ISDS reform and in particular the ban on double-hatting both favor and negatively impact the diversity deficit.⁶²⁴ Detractors of the new proposal submit that if women are appointed in equal ratios to the ICS, they will be barred from acting as arbitrator in other cases due to the limit on multiple roles. As women in the professions are in smaller numbers under the cloak of a push for greater diversity the ICS roster will in fact hamper the development and increase of women in the profession. To the contrary, proponents of the new regime simply submit that the opportunity for more women to sit on the ICS would further broaden the pool of arbitrators.⁶²⁵ This discussion is applicable to arbitrators from underrepresented countries or regions as well, and participates to the critics that the ICS system is too strict, impossible to respect, and, under cover of a perfect theoretical system, might in reality prove harmful to the development of the profession. There can be no strengthening of the rule of law if the system cannot be implemented.

656. The so-called “double hatting” has been strongly denounced as a conduct which may lead to bias on the part of arbitrators. Indeed, in practice, many counsel may appear before arbitrators with whom they will sit on an arbitral tribunal in another case. While the IBA Guidelines provide for an obligation to disclose such ties, it does not forbid that the same lawyer from having a practice both as counsel and arbitrator. While some challenges have been initiated, and successful, in this respect, many others have failed.⁶²⁶ There are no clear provisions forbidding arbitrators to take on multiple roles at the moment, and challenges in this respect have failed. To the contrary, the possibility for an arbitrator to practice in many capacities is one that is hailed by a group of arbitrators in favor of maintaining the current ISDS regime (the “incrementalists” as designated by Prof. Anthea Roberts), as one of the positive aspects of arbitration. It is only by practicing as counsel that one may become an arbitrator. This is the common law approach to the magistrature, wherein after a number of years excelling as counsel one may be appointed to the magistrature, opposed to the civil law approach of a strict divide between professions and the existence of schools for magistrates. The training counsel obtain as future arbitrators and the necessity to allow for the lawyers to

⁶²³ “Fortier on the cola wars”, *supra* note 73.

⁶²⁴ Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 617 at 393.

⁶²⁵ Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 617.

⁶²⁶ Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 617.

take on multiple roles concurrently may also be explained by the very practical nature of the sector. The available work as arbitrator may be limited to the vast majority of counsel.⁶²⁷ As Professor Lévesque writes with respect to the new CCA which contains a similar provision, with respect to the impact of this ban on diversity:

Since the majority of ISDS arbitrators only act in that capacity in one or two cases in their careers, most counsel could not afford to leave their practice behind in the hope of getting more appointments in the future. As such, a prohibition to also act as counsel would hinder new entrants and, as a result, the diversity of arbitrators (in terms of gender, geography, and so on).⁶²⁸

657. It is certainly true that a number of boutique firms or arbitrators have famously continued their practice solely as adjudicators. Yet, these outfits remain limited due to the nature of the work. Most practitioners, even at very experienced stages of their careers, will continue to take on mandates in different capacities, be it as expert witnesses, counsel, mediators or arbitrators.

658. The ICS' rules for the prohibition of concurring mandates of members of the Tribunal also state that: "They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest." The inclusion of this exclusivity of the mandate of members resembles that of judges or adjudicators of institutionalised judicial systems. Indeed, in such systems, judges are forbidden from also acting as counsel to maintain the utmost barrier and appearance of independence and impartiality. Here, the signal that the EU promotes with the introduction of this controversial measure, is its intolerance towards arbitration as a mechanism. In past years, the possibility for arbitrators to continue acting as counsel has repeatedly raised criticism. It was considered that, as long as ties were disclosed, and the parties so accepted them, such "double hatting" continued to be standard practice. Arbitrators regularly argue that this is even part of the training for the next generation.

659. While the totality of these provisions will ensure that members of the Tribunal are limited to their mandate as members of the Tribunal, it may also severely reduce the pool of

⁶²⁷ Lévesque, "Canada's Pro-Ban Stance", *supra* note 617.

⁶²⁸ *Ibid* at 394, n 37.

experts willing to accept such a mandate. Indeed, the roster basis of the Tribunal provided for the moment could be considered as insufficient for experts who are used to cumulating revenue sources from different cases. In addition to the benefit of a wider remuneration sources, the lack of availability to accept diverse and interesting cases may also deter otherwise excellent candidates from accepting to serve on the EU-Canada ICS, or other similar tribunals. One of the very few positions that seems open to a multitude of appointments is the cumulation with academic functions.

660. The pool of potential candidates is restricted to such an extent that, aside from academics, and full time arbitrators having set up their own boutique firm, few may be in a position to surmount the myriad of obstacles, or controls as referred to by the EU, to becoming a Member of a Tribunal. While this approach may prohibit regular members of the “elite club”⁶²⁹ to submit their candidature for the position, we can only lament the much reduced pool of candidates that will be left available. Unfortunately, this also speaks detrimentally to efforts for diversity (which, the EU has repeatedly addressed and confirmed through signing the Equal Representation for Arbitration pledge, eg) in gender and nationality.

3. Disclosure and Challenges: An Impossibly Perfect Standard?

661. Ethics and the conduct of arbitrators have long been at the heart of the debate regarding the legitimacy of arbitration.⁶³⁰ The new provisions in the ICS regime and proposals from the EU for a Code of Conduct of arbitrators are a monumental step away from the autonomy provided for in arbitration with respect to independence and impartiality of the arbitrators, scope of their mandate, etc. A critical approach of these new rules and regulations makes one wonder whether the EU has simply conjured impossible standards to comply with.⁶³¹ To an extent, as we argue below, rules of conduct currently proposed for adjudicators

⁶²⁹ Ünüvar & Kreft, “Impossible Ethics?”, *supra* note 9.

⁶³⁰ Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 617, Catherine Rogers, *Ethics International Arbitration* (Oxford: Oxford University Press, 2014), e.g.

⁶³¹ *Ibid.*

under the EU proposal, in conjunction with the draft Code of conduct for adjudicators, sets standards that are stricter even than for some judicial bodies.

662. In addition to the arbitration rules governing the proceedings, as well as the applicable national law, the conduct of arbitrators is in practice governed by the initial procedural order of the arbitration, providing for all the modalities in the proceedings. It is habitually in this procedural order that the reference is made for the arbitral tribunal and the parties to refer to the IBA Guidelines on Conflicts of Interest, when it is the case. More frequently, mention of the IBA Guidelines on the Taking of Evidence is generally provided for in the first procedural order which provides the procedural rules for the arbitration. Reference to the IBA Guidelines on Conflicts of Interest remains rarer: it is mostly used by arbitral institutions and arbitrators under ICSID rules when determining challenges.

663. First, we note that the current reference to the IBA Guidelines will be replaced by the supplemental rules adopted under article 8.44.2, i.e. the Code of Conduct for CETA Members.

664. Article 8.30(1) requires members to be and remain independent. No reference, however, is made to impartiality. The ties of the members are strictly governed. In addition, from being prohibited to “take instructions from any organisation or government” related to the dispute. Upon appointment, members also must refrain “from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.” Members are also expected to avoid participation in disputes “that would create a direct or indirect conflict of interest.”

665. While the challenge of Members is governed by articles 8.30(2) to (4), no mention is made of disclosure, other than the Members must be “independent”. We must read the CETA Code of Conduct to find the detailed applicable rules to the situation. This is a departure from provisions governing independence and impartiality in IIAs.

a. Disclosure

666. The CETA Code reflects more closely traditional provisions with sizeable additions. First, we note the strictness of the requirements set out in Article 3 which governs disclosure.

In most aspects, it mandates broader and more restrictive obligations than the IBA Guidelines on Conflicts of Interest.

667. Second, we note that the test for independence and impartiality concerns both real and perceived “interest, relationship or matter” that is “likely to affect or reasonably be seen as likely to affect” the Member’s independence and impartiality, or “that creates or could reasonably be seen as creating a direct or indirect conflict of interest, or that creates or might reasonably be seen as creating an appearance of impropriety or bias”.

668. The wide ranging terminology can be seen as cumbersome or as part of the trend of overly and explicitly drafting into the text any situation likely to arise. This is certainly in line with the inflationist trend with respect to drafting IIAs, as can be seen from the exponential size of the treaties, from a few pages in 1958 to thousands of pages now, with multiple annexes.

669. Third, the scope of the disclosure covers “past interests, relationships or matter” which does not stray from the recognized criteria already assessed under the existing ISDS regulatory framework.

670. Fourth, the requirement for disclosure of events dating back to “at least” five years prior extends the existing three-year period provided for in the IBA Guidelines:” The obligation is one that arises at the proposal for appointment and remains throughout the proceedings.

671. We also emphasize the new mandatory obligation in the Code for the Members to take appropriate steps to ensure that their assistants are aware of and comply with” articles of the Code which concern responsibilities in the process, disclosure, independence and impartiality, former members and confidentiality, which shall apply to the assistants *mutatis mutandis*. This new measure provides for both a legal obligation (“shall”, “comply”) for the assistants and the Members. Of course, the absence of a sanction here is notable, as the assistants are one step removed from the tribunal. The imaginable sanction would be that of

a challenge with respect to the arbitrator due to the assistant's conduct.⁶³² The responsibility of the arbitrator is broader than simply ensuring disclosure by the assistant. Members "shall take all appropriate steps to ensure that their assistants are aware of, and comply with," in addition to the disclosure obligation, Articles 2 (Responsibilities to the Process), 4(1)-(5) (Independence and Impartiality and Other Obligations of Members), 5(1) and (3) (Former Members) and 6 (Confidentiality). This paragraph must be read in conjunction with the previous paragraph, which provides that the Member may not delegate his power to decide and render the award: Members shall consider only those issues raised in the proceeding and which are necessary for a decision or award and shall not delegate this duty to any other person.

672. This article appears to be in line with the requirement in practice by arbitral institutions to have assistants sign declarations of independence and impartiality with respect to their functions when they are appointed to a case.

b. Challenges

673. Challenges are to be submitted to the President of the International Court of Justice, who must request the comments of Parties and "endeavour" to issue a decision in 45 days. The vacancy created by disqualification or resignation by a member must be filled promptly.

674. Importantly, pursuant to Article 8.30(2), (3) and (4), a Member can be removed where "his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued membership of the Tribunal". A reasoned recommendation by the President of the ICJ or a joint request from the Parties may lead to a decision of the CETA Joint Committee to remove a Member. The requirements in the provision bring to mind the strictest of measures to be found and a double verification to be made prior to the removal of a Member.

⁶³² This situation has already occurred in the much publicized challenge of the Assistant to the President of the Yukos Tribunal. Chloe J Carswell & Lucy Winnington-Ingram, "Awards: Challenges Based on Misuse of Tribunal Secretaries", *Global Arbitration Review* (8 June 2021) online: GAR <<https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-challenges-based-misuse-of-tribunal-secretaries>>.

675. Evidently, because of the judicial structure of the ICS, the safeguards on the independence and impartiality are brought to the front end of the process – with the rules governing appointment, assistants and mostly the limits to multiple roles, it should be expected that the number of challenges is significantly reduced.

c. The Limitation of Roles for Members of the International Court of Justice: A Sign of the Changing Times

676. Until recently, even judges from the International Court of Justice were allowed to keep taking mandates, not as counsel but as arbitrators while sitting as permanent members of the ICJ. This practice was only formally ceased in 2018.⁶³³ This practice officially came to an end after a study released in November 2017 revealed that 10% of ICJ judges had concurrently acted as arbitrators during their tenure with the International Court of Justice. Officially, however, ICJ judges have continued this “moonlighting” practice. The ICJ’s policy against moonlighting was first announced by Judge Abdulqawi Yusuf, then president of the ICJ, to the UN General Assembly on 25 October 2018. In a further speech to the General Assembly on 2 November 2020, Judge Yusuf had confirmed that the court had approved guidelines on precisely what non-judicial activities could be carried out by judges, without releasing said guidelines.

677. Nevertheless, the practice continued and at least one ICJ judge accepted new mandates as arbitrator.⁶³⁴ Recently, however, in light of his third renewal for a term at the ICJ, Judge Tomka resigned from the arbitration for which he had been criticized for accepting mandates outside his remit as ICJ Judge. Although he gave no reasons for the resignation, it coincided with the renewal of his term as ICJ Judge on 6 February 2021.⁶³⁵

⁶³³ Marie Davoise, “Can’t Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes”, *EJIL:Talk!* (5 November 2018) online: EJIL:Talk! <<https://www.ejiltalk.org/cant-fight-the-moonlight-actually-you-can-icj-judges-to-stop-acting-as-arbitrators-in-investor-state-disputes/>>.

⁶³⁴ Alison Ross, “ICJ moonlighting controversy resumes”, *Global Arbitration Review* (25 November 2020) online: GAR <<https://globalarbitrationreview.com/icj-moonlighting-controversy-resumes>>.

⁶³⁵ Alison Ross, “Tomka resigns from China case as third ICJ term starts”, *Global Arbitration Review* (16 February 2021) online: GAR <<https://globalarbitrationreview.com/tomka-resigns-china-case-third-icj-term-starts>>.

678. The ICJ guidelines in this respect continued to be unavailable to the public until their release in December 2020. At first glance, these synthetic (3 pages) guidelines are broad and non-prescriptive. This entitled “Compilation of decisions adopted by the Court concerning the external activities of its members” governs three areas of external activities, (1) arbitration, (2) activities “other than arbitration” and (3) “invitations from State entities to Members of the Court”.

679. Thus, the main section of the guidelines provides as follows:

A. Arbitration activities of Members of the Court

1. Members of the Court may only participate in inter-State arbitration cases.
2. Members of the Court may accept an appointment by a State party in inter-State arbitration, including the State of which the judge is a national.
3. Members of the Court must however decline to be appointed as arbitrators by a State that is a party in a case pending before the Court, even if there is no substantial interference between that case and the case submitted to arbitration.
4. Members of the Court may participate in inter-State arbitration without necessarily having to be appointed President of the arbitral tribunal in question.
5. Members of the Court may only participate in one inter-State arbitration procedure at a time.
6. Prior authorization must have been granted to a Member of the Court wishing to participate in an arbitration by a panel made up of the President, the Vice-President and the Chairman of the Rules Committee. If the Member of the Court requesting the authorization is a member of the group, the decision shall be taken by the other two judges. The panel will inform the Court once a year on the authorizations given during the course of that year, and at any time as necessary.
7. Any participation of Members of the Court in inter-State arbitrations is subject to the strict condition that their judicial activities must take absolute precedence.

680. First, we note that all participation of members in ISDS cases is now prohibited, as, *a contrario*, the first article provides that members may only participate in inter-state arbitrations, including the state of which the member is a national (art. 2). They may only act in one inter-State arbitration at a time, whether as co-arbitrator or President, and must decline if the nomination comes from a state party to a proceeding before the ICJ. Importantly, such participation must now be authorized by a special committee of the court (art. 6). The scope of arbitration activities for Members has been restricted to the greatest degree compared to the previous unregulated situation wherein it was regular practice for ICJ Judges to sit in

parallel as arbitrators in investor-State and State-State arbitrations. This, in itself, marks a significant turn towards a strict ethical approach limiting multiple roles to a maximum.

681. The difference stands, as we will see with the analysis of the Code of Conduct for CETA Members and the Code of Conduct for Adjudicators, in the nature of the document. First, the three page “Compilation of decisions” is not referred to as a Code of conduct or even as Guideline. Second, we remark on the judicial economy of the succinct provisions that nevertheless achieve a remarkable limitation to the scope of activities ICJ members may undertake. Again, in comparison with the two above referenced codes, this document directly addresses the scope of external activities that members may undertake and does not address the members’ obligations with respect to independence and impartiality. We recall that this is already accomplished in the existing Code. Accordingly, one could envisage this document as an amendment to the Code with the view to circumscribe only what is addressed in the other referred instruments as the limits on multiple roles.

682. Second, we remark the newly imposed limits on multiple roles defined by Section B of this Compilation of Decisions:

B. External activities of Members of the Court other than arbitration (a) General guidelines

1. Members of the Court are required to give absolute priority to the exercise of their judicial functions over their external activities. An external activity may be undertaken only if it does not affect the exercise of the Members’ judicial functions.
2. When undertaking an external activity, Members of the Court shall ensure that it does not impinge on their independence or place their impartiality at risk.
3. Members of the Court shall preserve the confidentiality of the Court’s deliberations.

(b) Teaching activities and academic discussions

4. A Member of the Court shall refrain from engaging in regular teaching. He or she may give the occasional lecture and take part as an external examiner in a jury for a doctoral thesis. He or she may participate in discussions of an academic character in conferences, seminars, workshops or meetings of learned societies.

(c) Publications

5. A Member of the Court may publish writings of a literary, academic or scientific character.

(d) Professional contacts

6. A Member of the Court may maintain professional contacts established prior to the assumption of his or her duties and acquire new ones, provided that he or she avoids interactions that might be seen as undermining his or her independence or impartiality in pending or future cases.

(e) Positions in external entities

7. A Member of the Court may be a member of a learned society and may hold a position in its governing or scientific board, including presidency.

8. A Member of the Court shall not hold a position in a non-governmental organization if his or her engagement might call into question or appear to call into question his or her impartiality or independence.

9. A Member of the Court shall not hold a position in a law firm or on the board of directors of a commercial company.

(f) Implementation

10. Members of the Court are invited to inform the President periodically of their commitments relating to the different external activities covered in the present guidelines and of other external activities that may also be relevant.

683. In the external activities outside of arbitration, we note the severe restrictions imposed on members of the ICJ. Prohibitions which may have existed in practice are now inscribed in the document and to a large extent can appear reasonable, such as the prohibition for a judge to be a member of a law firm or to hold a position as director in a commercial company. Again, these are meant to avoid any situation which may call into question the independence and impartiality of the member. It is certainly more difficult to understand the prohibition against a standing teaching appointment and the allowance only for lectures – if only perhaps to protect the time and potential statements that would betray judicial secret by the judges.

684. Last, the third section of the “Compilation of Decision” governs the “Invitations from State entities to Members of the Court”. This section is particularly interesting as it addresses an area which is not envisaged in the other codes with which we compare the text. Indeed, section C provides:

1. Invitations to visit from States that have cases pending before the Court may not be accepted by Members of the Court, including when the Member concerned is not sitting in a particular case under Article 24 of the Statute.

2. All other invitations by State entities may be accepted if the Member of the Court concerned considers them useful and in line with the independence and moral integrity expected from Members of the Court.

3. For the sake of transparency and orderly record-keeping, it would be desirable for Members of the Court who receive invitations from State entities to provide,

through the President, a short account of these invitations and visits, if any, for the archives. Such an account would be useful for building up a record of the practice of the Court in this area.

4. This text does not apply to invitations from universities and other institutions exercising activities of an academic character.

5. The Registrar of the Court shall also draw guidance from the above when deciding whether to accept invitations from State entities.

685. This section resembles more closely provisions on ethics standard to governments with respect to guidelines for certain visits or accepting gifts. Nonetheless, the first provision of the section which prohibits members from accepting invitations to state members who are involved in proceedings before the ICJ can appear particularly prohibitive.

686. This instrument is not a formal legal instrument. It can only be referred as a soft law guideline. It is unclear where it falls in the internal structure and regulation of the ICJ. Further, its adoption can be contrasted to that of the two Codes of conducts discussed in the thesis. There was no transparent and open process or discussion. There appears to have been no consultation of members and no documents or meetings publicly available. In stark contrast to WGIII or even the EU who has to some extent published working documents in advance of their discussion and adoption, as it did with the CETA Code of Conduct, the ICJ went from an entirely unregulated situation decried in the media, to a sudden issuance of extremely restrictive guidelines who appear to be mandatory for the ICJ members. Certainly, if we refer to the illustration by Judge Tomka's resignation on the renewal of his mandate, there appears to be a strong political will from the ICJ to avoid all manner of appearance of improprieties that may call into question independence or impartiality of its members. We can only wonder as to the engagement of the ICJ members themselves in the newly adopted Compilation of Decisions. Although we are certain that judicial reserve prevents them from commenting publicly these new guidelines, there can only be a measure of disappointment for the members who engaged previously in the practice without concern that they acted outside of their mandate or gave an appearance of lack of independence and impartiality.

4. *A Rule of law Assessment of the ICS and CETA Code of Conduct*

687. Whereas in the preceding section presenting the ISDS regulatory system for independence and impartiality of arbitrators we conducted an assessment of the rule of law following the presentation of each of the individual parts of the analysis, ie definition, appointment, disclosure, challenge, in this section, and due to the judicialized nature of the ICS and its accompanying CETA Code of Conduct, we are able to complete the rule of law analysis in a single final evaluation.

688. At the outset, we remark that the new system proposes a judicialization of the existing arbitral system. Fundamental advantages of arbitration are therefore absent from this proposal. Autonomy of the parties, flexibility and finality of the award have been replaced by a standing body of members, detailed fixed rules and access to an appeal. Yet, the system retains many of the markers of ISDS. For one, the entire inspiration for the new governing rules on independence and impartiality are inspired by an aggregation of the IBA Guidelines on Conflicts of Interest, coupled with existing Codes of Conduct taken from IIAs.⁶³⁶

689. Castellarin's three prong assessment of the rule of law in ISDS is, in some ways, overtaken by the quasi-judicial nature of the ICS. We may wonder how, or even why, a test designed to determine whether ISDS functions attain the rule of law is applicable in this judicial context. For one, its application allows us to compare with the results of our analysis of the rule of law in ISDS to determine whether the EU has achieved its objective of restoring the rule of law features lacking in ISDS in its attempt to resolve the legitimacy crisis.

690. At first glance, as a concluding interpretation of the new regulatory system which governs independence and impartiality of the members, an easy answer might be that all identified issues with ISDS are resolved by the ICS. This is at least the EU's position.

691. In applying the Castellarin three prong matrix for the rule of law, it is at once evident that the rule of law is as thick as can be conceivable on our scale, and that all three elements to our yardstick are more than satisfied. The resulting question will be, however, whether it is viable and can be successfully implemented.

⁶³⁶ See Annex V.

a. Legal certainty

692. The first criterion, **legal certainty**, appears to be fulfilled due to a permanent framework (over)organizing every minute aspect of the dispute resolution model. The extremely detailed rules, the Code of conduct for CETA members, the additional instruments for interpretation, coupled with the relevant case law from the CJEU (*Opinions 2/15 and 1/17*), all testify to a specific framework designed to provide legal certainty. The nature of the standing tribunal contributes to legal certainty, as it provides for a single body in charge of resolving disputes, replacing an arbitral tribunal created on a case by case basis.

693. The direct result of this quasi-judicial body is, hopefully, the creation of a consistent body of case law. The fact that *stare decisis* does not exist in ISDS may continue to pose issues. However, as was seen with the WTO example, a standing tribunal with a permanent roster is able to develop a consistent body of case law. Two remarks should be made at this stage. First, it may be wise to be wary of an organization promoting its mission to provide case law or jurisprudence in international economic law – this is the very aspect which irked the United States with the WTO who saw this aspect as an example of the unlimited power of the organization which went beyond its original mandate. Second, we should recall that actors of ISDS, despite recognizing the absence of *stare decisis* in the framework, have also promoted their effort to follow previous awards and issue consistent awards. One could say that the entire system is built on the flexibility provided to arbitrators to attempt, wherever possible, to follow precedent, whilst not being formally held to it and having the necessary freedom to rule as they see fit for each case.

694. The creation of an appeal tribunal is an additional safeguard provided towards legal certainty. The criteria for review being open for legal and factual errors breaks open the possibility for an appeal. Here, too, we stand far apart from the ISDS system which only allows a limited annulment proceedings under most domestic laws and the New York Convention.

b. Procedural fairness

695. The second criterion, **procedural fairness**, is here also fulfilled with the EU proposal for the ICS. In general terms, the existence of a detailed framework set out in a treaty, taken together with two instruments of interpretation and the Code of conduct for CETA members provides the users with an explicit and excruciatingly detailed system. Conversely, the risk posed by this new design stands in the possibility that this body will be overly rigid and impossible to enforce. Already, the strong opposition of the unconvinced EU member states who have hotly debated the legality and value of the ICS, amongst which France and the Netherlands, bodes ill.

c. Procedural transparency

696. Finally, the third criterion, **procedural transparency**, stands in stark contrast to the conclusion we obtained for ISDS. The ICS provides complete, or at the very least, heightened transparency. Where, in ISDS, the selection and appointment process for arbitrators, their disclosure, challenge and removal, and lastly the publication of their awards, are all, to varying degrees, cloaked in confidentiality, the ICS provides full transparency. First, the roster of Members is selected further to a government process. This, perhaps, can be contested. Although the relevant provisions are clear for the expertise necessary for a member to occupy this position, and the publication of the Canadian government and EU process advertisements, there remains a part of mystery on the internal workings for the selection of members from each party to the CETA. Otherwise, upon publication of the roster names, a complete transparency on members who might adjudicate disputes will be total.⁶³⁷

697. However, a slew of new issues have been created by the EU's unilateral attempt to reform ISDS. The first level of these stands at the EU level. A few have already been addressed by the CJEU, with a resolution provided for issues with the division of competences for investment (*Opinion 2/15*) or with the compatibility of the ICS with EU law including fundamental rights (*Opinion 1/17*). The second level of potential issues arising with the ICS concerns its implementation and its coexistence with ISDS. It is widely recognized that the two systems, when the ICS effectively comes into force, will cohabit. This is already

⁶³⁷ Compared to our analysis of legal certainty in ISDS, the gap is wide and the theoretical results from the change in design evident.

the case in international investment law of the complex network of treaties that are interrelated and coexist as an ecosystem.⁶³⁸

698. The very nature of international law is one of fragmentation, and the creation of the ICS, born out of a uniformization will on the part of the EU will necessarily contribute to an increase of the fragmentation in IIL. The interconnectedness of the treaties is likely to continue as it does today – with a great fuss from academics and a practical living situation of a modern blended family. Although it is in the air of the times to denounce the overcomplication of treaties, their proliferation, the lack of a common framework, and, to go into the specifics of ISDS, the lack of consistency of awards, amongst many other things, at the end, the EU’s extreme effort to propose a consistent and uniform solution reforming ISDS will only appease these tensions if it is uniformly accepted – by the entire arbitration community. Even in all its goodwill, it is unimaginable to think that this would be the Commission’s true intent. Rather, the ICS/MIC package and the unification of the EU investment policy present the great advantage of aligning values and actions with a paper perfect system.

5. Conclusion: Impossible Ethics – A quasi-judicial arbitration compromise through the ICS

699. The EU’s ICS proposal not only reforms ISDS, it replaces it with a new adjudicatory system. A hybrid approach between courts and arbitration, the judicialization of ISDS is complete with the adoption of a strict Code of Conduct for Members, inspired by tribunals.

700. The ICS model answers strictly to many of the denounced issues with ISDS. By providing a fixed roster and a standing tribunal, the ICS model resolves issues of real or perceived bias. In introducing a fixed salary, and limits to the roles that may be conducted, these further safeguards provide increased conformity to a heightened rule of law standard. Finally, the introduction of an appeal mechanism will console parties and civil society who lament the lack of a consistent body of jurisprudence.

⁶³⁸ Meunier & Morin, *supra* note 291.

701. However, it is evident that the new ICS is also fraught with issues. First, we note that the complete loss of autonomy of the parties over the process in order to reinforce the rule of law standard annihilates the fundamental advantage of arbitration. We must also highlight the potential of losing the advantage of efficient time and costs, another one of the fundamental reasons cited by parties as the reason for choosing arbitration.⁶³⁹ Indeed, the introduction of an appeal mechanism comports the risk of greatly increasing the time spent in proceedings. The potential lack of strict limitations for grounds of appeal, should appeals be allowed on fact and law, may also give rise to a relitigating of an issue, a core reason governing the choice of arbitration. Last, issues of internal EU law, although seemingly resolved at the moment after a particularly overactive approach of the CJEU in recent years with *Opinions 1/15* and *1/17*, does not give confidence to eventual issues having arisen.⁶⁴⁰ We must here recall that, at any rate, the CETA has still not been ratified and that accordingly the provisions on Investment, which include the ICS, are not in force.

702. The strict ethics provided for in the ICS and the mandatory Code of Conduct seem to be a prelude to an avalanche of impossibility. By attempting to resolve, on its own, without consultation with other state parties or at the international level, a systemic issue that affects all treaties. The overzealous approach of the EU, attempting to establish itself as a leader, may yet backfire. Having set up a dispute resolution system that is theoretically perfect, the practical issues have not ceased abounding since its introduction. An even greater omen when we consider that the provisions are not yet in force.

703. Despite touting the new ICS as a full reform, when we examine the system in its entirety, including the provisions regarding the Members, it retains several arbitration related aspects. The EU could have abrogated arbitration altogether if it wanted “ISDS dead” rather

⁶³⁹ Kun Fan, “Why Do Parties Choose Arbitration? To Each Their Own”, *Commercial Arbitration in Europe* (23 March 2022) online: Commercial Arbitration in Europe <<https://commercialarbitrationineurope.wordpress.com/2022/03/23/why-do-parties-choose-arbitration-to-each-their-own/>>.

⁶⁴⁰ Such as the 2018 CJEU judgement in *Slovak Republic v. Achmea B.V.* (Case C-284/16) or the more recent *Green Power v. Spain* arbitration, first arbitration to have dismissed a case based on the “Achmea” objection that a case between two EU states members of the ECT could not be heard by an arbitral tribunal. All arbitrations had rejected this argument before that point. See “Green Power v Spain: the first decision to ever uphold the intra-EU objection. Is this a turning point for ECT arbitrations?” available online: <https://riskandcompliance.freshfields.com/post/102hrqe/green-power-v-spain-the-first-decision-to-ever-uphold-the-intra-eu-objection-is>. This was also before the announced mass exit from the ECT in the fall of 2022 and the halt of the ECT’s reform.

than a hybrid model – but why would the EU let go of a power it had managed to acquire by the inclusion of Art 207 and investment, no matter how fragile or divided? We must also take into account that, ISDS aside, international commercial arbitration, which at times includes state parties, continues to flourish. It would have been an herculean task for the EU to attempt to reform commercial arbitration, upon which it does not have competence, in a similar manner. As a result, by wanting to both reform and retain the main aspects of arbitration, the EU lost an opportunity for presenting itself as a determined actor in its investment policy.

704. It seems all too likely that strong economic partners will refuse to enter into agreements containing the ICS. In fact, Japan has not included the mechanism, the first major exception to the new model touted by the EU. Nor has the United Kingdom. Should the negotiations reopen with the United States, despite the fact that all indicia lead to think that the new administration will favor a stronger protectionism, the ICS will face its real test.

CHAPTER 2 ASSESSING THE CONFORMITY OF THE REFORMS PROPOSALS OF WORKING GROUP III WITH THE RULE OF LAW

705. This chapter assesses the conformity to the rule of law of the EU proposal for the MIC, as well as the two main alternatives for ISDS reforms proposed, the selection mechanism for arbitrators and the stand alone appeal level, with respect to the independence and impartiality of adjudicators. As set out previously, the core tenet of this research centers on a strengthening of the rule of law system with respect to ethics of the arbitrators. It has been recognized repeatedly has a central issue to the contestation of legitimacy of ISDS.⁶⁴¹

706. As the comparative analysis below is one based on ongoing reform discussions at UNCITRAL Working Group III, the extent of the analysis is somewhat limited. In particular, following the session held from 7 to 15 February 2021, the impetus of the Working Group is now geared towards inscribing in text the reform options discussed.⁶⁴² Now at the expected last revision of the draft Code of conduct for adjudicators, it is expected to be adopted in its final form before the end of 2022. In three years only, the Working Group discussions have

⁶⁴¹ Giorgetti et al, *supra* note 5.

⁶⁴² Anthea Roberts & Taylor St John, “UNCITRAL and ISDS Reform (Online): Crossing the Chasm”, *EJIL:Talk!* (17 February 2021) online: *EJIL:Talk!* <<https://www.ejiltalk.org/uncitral-and-isds-reform-online-crossing-the-chasm/>>.

advanced at heightened speed. Of course, an analysis comparing the text of the ICS, to that of the Multilateral Investment Court and the stand alone appeal mechanism would present a greater appeal for a thorough comparative analysis. Unfortunately, and as a research based on future developments is bound to find, the measure of uncertainty for the time necessary to develop and agree to text is as yet uncertain. Prof. Giorgetti, on 19 February 2021, estimated that the Working Group's effort were scheduled to run until 2025.⁶⁴³ Predictions have only increased since for the finishing time with the Working Group, now estimated to 2026. Unlike in the case where highly political issues or emergencies of an international level arise, such as the pandemic or climate change, there currently exists no such impetus which could lead us to think that the reform efforts would be concluded before the set date. The alleged legitimacy crisis of ISDS may be raging – but it has been so for over ten years with diminutive side effects.⁶⁴⁴ As with reform efforts or drafting of international conventions meant to cover inexistent or emerging situations, in the present case, as noted by Prof. Giorgetti, the investor-State dispute settlement mechanisms continue to work, arbitrations continue to be initiated every day, and are even gaining interest in Asia and the Middle East.⁶⁴⁵ All arguments, in sum, that do not make for a likely rapid resolution of the Working Group III's task to reform ISDS.

707. For the purposes of this dissertation, however, the consideration of the reform efforts at the time of writing this manuscript remain noteworthy. The alternative reform proposals have been sufficiently developed, having essentially been discussed for now close to twenty years, in various attempts to transpose the WTO appeal mechanism to ISDS, with regard to which literature exists, and from which we can draw conclusions.⁶⁴⁶ The topic of ISDS reform, and its alleged crisis, has been sufficiently discussed for close to twenty years to ensure that the alternatives proposed before Working Group III are all based on previously debated discussions.

⁶⁴³ Giorgetti (Keynote), *supra* note 34.

⁶⁴⁴ Franck, *supra* note 20.

⁶⁴⁵ "Fortier on the cola wars", *supra* note 73.

⁶⁴⁶ In addition to the existing literature on the opportunity of developing an appeal level for ISDS (eg Steger), the ISDS Academic Group for WGIII has catalogued and built upon the foundations since the opening of discussions of WGIII.

708. Last, we note that the opportunity for a doctoral dissertation is unique. Not only is the comparative approach between two autonomous legal orders to assess the contribution and conformity to rule of law the EU ICS model makes to the existing ISDS framework, but the singular chance to assess the impact of the EU's reform efforts to unilaterally resolve the crisis on the universe of international investment agreements (IIA) render this scientific investigation truly original by its contribution.

709. UNCITRAL Working Group III, the work of which we examine in depth in this second part, recognized the central role played by independence and impartiality of adjudicators in its November 2018 Report:

Independence and impartiality were described as key elements of any system of justice, including arbitration. The concerns relating to the possible lack of independence and impartiality of decision makers, or of the perception thereof, were said to be particularly acute in the field of ISDS, as ISDS cases usually involved public policy issues and involved a State. It was reaffirmed that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of decision makers, but also the appearance thereof. Therefore, it was said that any reform in that respect should aim at addressing both actual and perceived lack of independence and impartiality.⁶⁴⁷

710. In Chapter 1 of Part II, we analyzed the scope of the rule of law in the EU and the extent to which strengthens the rule of law, with respect to the role of arbitrators (ISDS) and members of the tribunal (ICS). In this second chapter, we conduct a critical assessment of the EU's reform proposal for the introduction of a permanent international investment court, the Multilateral Investment Court, with respect to the members of the MIC and adjudicators who may be appointed under alternative models for reform, and the extent to which these proposals strengthen the rule of law system within which they are contained. There is, however, a difference in the rule of law as defined by the EU for the ICS, and the existing standards of the rule of law in ISDS. As a value in EU and international law, the rule of law has a similar basis with a different scope. If all elements must be respected, it is the strength of the rule of law that can vary.

711. Aside from the MIC proposal, which, as it mirrors the EU proposal, sets a highly strengthened, if not impossible, rule of law model to follow, a number of other proposals are being debated by WGIII, and in particular the selection mechanism for adjudicators and the

⁶⁴⁷ UNCITRAL, para 67 (footnotes omitted); Giorgetti et al, *supra* note 64 at 443.

stand-alone appeal level.⁶⁴⁸ While the debate is currently ongoing, and it will not be possible to focus on its ultimate resolution, this dissertation seeks to examine each proposal alongside the EU rule of law standard and the ISDS rule of law standard, to determine their validity, conformity and compatibility.

712. The question that is advanced here is the one that guides this dissertation: to what extent must the rule of law be strengthened to provide a dispute resolution mechanism for investors and States that will restore legitimacy (real and perceived)? With the EU's MIC proposal at the extreme end of the spectrum, might it not be sufficient to settle on a model providing a strengthened ISDS without losing its many proven benefits? The option for parties to opt-in or request referral for a selection mechanism or a stand-alone appeal mechanism might just provide the sufficient guarantees for a strengthened rule of law that is also practical, thereby overcoming the "impossible ethics" proposed by the EU.⁶⁴⁹

713. A specific study related to independence and impartiality is therefore conducted below, with the object of determining the system which will prove to be the most efficient solution to provide an accessible, legitimate and effective system for the resolution of disputes between investors and states. As the EU ICS model was compared to the ISDS model in Chapter 1 of Part II, we will now compare the MIC and other reform proposals before UNCITRAL Working Group III to determine where they stand on the rule of law scale between the ISDS existing standards to the impossible ones set by the EU. Our analysis seeks to determine the most apt reform for ISDS, and, ultimately, is written with the aim "of assisting both policy makers and other stakeholders identifying the best preferred possible solutions" that such academic work be helpful to policy makers and practitioners alike.⁶⁵⁰

714. The first focal point of the analysis revolves around the comparative analysis of the UNCITRAL/ICSID joint drafts for a Code of Conduct for Adjudicators. The additional benefits, as well as the expected drawbacks, of this new Code are examined and compared with (1) ISDS and (2) the EU model for Codes of Conduct in the ICS (CETA). We find that

⁶⁴⁸ UNCITRAL, "Working Group III: Investor-State Dispute Settlement Reform", online: UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>.

⁶⁴⁹ Ünüvar & Kreft, "Impossible Ethics?", *supra* note 7.

⁶⁵⁰ Giorgetti et al, *supra* note 645 at 443.

the new draft Code of Conduct for Adjudicators falls somewhere between ISDS and the ICS models on the rule of law scale. More restrictive than ISDS, this draft Code of Conduct for Adjudicators appears to be a “lighter” and reframed version from the CETA Code of Conduct. In hindsight, it may provide the right amount of safeguards to provide for a stronger version of the rule of law which will help restore legitimacy concerns with ISDS whilst ensuring that the entire system is not brought down by unattainable requirements.

Section 1. UNCITRAL Working Group III and the Multilateral Investment Court

A. Categorizing Reform Avenues for ISDS

715. The EU’s own reform with the introduction of the ICS in 2015 was crucial in initiating the examination of the ISDS reform process before UNCITRAL. As set out above in detail, although the crisis of legitimacy had been long brewing for well-over the last decade, the EU’s own introduction of a reform of such a scope was instrumental in initiating the unprecedented review process.

716. On 20 March 2018, the EU Council adopted the negotiating directives authorizing the Commission to negotiate, on behalf of the EU, a convention for creating the Multilateral Investment Court.⁶⁵¹ In line with its recently enhanced transparency policy, the Council also made the negotiating mandate public.⁶⁵² It may seem that the EU came in strongly with a readymade proposal developed and already integrated into its own trade agreements. But we must remember that at the time the new ICS proposal was still hotly contested, by Member States and NGOs alike. Many were menacing to refuse ratification, and all anxiously awaited the ruling of the CJEU in *Opinion 1/17*. If the situation is now partly rectified internally, in the sense that the Court has granted its imprimatur to the ICS model by finding it was

⁶⁵¹ European Council, Press Release, “Multilateral investment court: Council gives mandate to the Commission to open negotiations” (20 March 2018) online: European Council <<https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/>>.

⁶⁵² Council of Europe, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, Doc 12981/17 ADD 1 DCL 1 (2018), online: EU <<https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>>.

compatible with EU law, including fundamental rights, several Member States continue to debate its validity. Remaining issues with respect to the investment policy of the EU are still in suspense, such as the ECT's compatibility with the decision by the EU to terminate all intra-EU BIT.

717. By proposing a mirror version of the ICS adapted into a Multilateral Investment Court, the EU proposed an important alternative to ISDS in the CETA:

Article 8.29 – Establishment of a multilateral investment tribunal and appellate mechanism

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

718. The judicialization of the arbitral process had long been envisaged, whether as a totality, to follow in the WTO's footsteps, or in part, with alternatives and add-ons available "à la carte" to parties who sought to design their own dispute resolution process. The theories behind treaty and institutional design for ISDS make an important contribution to evaluate the feasibility of such an exercise by allowing us to understand and frame the challenges present with the proposal of the EU and attempts at ISDS reform.

719. The process before UNCITRAL Working Group III for the reform of ISDS, officially launched in October 2017, has proceeded at high pace with never before seen levels of participation. Although the mandate for WGIII provides that this is a government led initiative, the flexible scope of the description, and indication that it must be a fact-based process due to the strong negative impressions regarding the legitimacy of ISDS, allowed numerous actors to actively participate in the process, from academics, to NGOs and other intervenors.⁶⁵³

720. The scope of ISDS reform in its totality as examined before UNCITRAL WGIII is not the object of this dissertation. Our analysis focuses on one of the reforms envisaged by the Working Group, the Multilateral Investment Court, the EU reform proposal. In order to

⁶⁵³ Langford et al, *supra* note 32.

do so, we must also assess the other alternatives proposed, specifically the selection mechanism for arbitrators and the stand alone appeal level.⁶⁵⁴ The MIC responds to many of the identified concerns by the Working Group, although not to all. Accordingly, we proceed to first identify the concerns addressed by the WGIII, and the categorisation proposed for the reform avenues (A). Then, we turn to identifying the ways in which the MIC addressed the concerns, and those in which it fails to (B). Afterwards, we examine the viable solutions which would address the most important aspects of ISDS reform concerns. Last, we complete our analysis to examine whether the EU proposal for the MIC responds to a heightened respect of the rule of law as defined by the EU courts and in international treaties, as well as to the rule of law as defined in ISDS (C). We can finally determine if the EU's reform proposals are necessary and useful.

721. The ongoing reform process is focusing only on procedural reforms, and have thus excluded a substantive reform. This agreement was made early on in the process, notably to ensure that strong critics of ISDS reforms would be prepared to take part in the process.⁶⁵⁵

⁶⁵⁴ Kaufmann-Kohler & Potestà, 2016, *supra* note 226; David Gaukrodger & Kathryn Gordon, “Investor-state dispute settlement: A scoping paper for the investment policy community” (2012) OECD Working Papers on International Investment 2012/03; Karl P Sauvart, “The Evolving International Investment Law and Policy Regime: Ways Forward” (2016) Policy Options Paper (E15 Initiative, International Centre for Trade and Sustainable Development and World Economic Forum); Jean E Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill, 2015); Karl P Sauvart, ed, *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008); Albert Jan van den Berg, “Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions” (2019) 34:1 ICSID Reviews 156 [presented at Conference on Mapping the Way Forward for the Reform of the Investor-State Dispute Settlement System (Hong Kong, 13 February 2019), online: ISDS Reform Conference 2019: <<https://isdsreform2019.aail.org/wp-content/uploads/2019/02/AM-Interaction-with-ICSID-and-NYC-AJB-Draft-06-02-2019.pdf>>]; Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Berlin: Springer, 2020) [Bungenberg & Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts*]; Marc Bungenberg & August Reinisch, “Standalone Appeal Mechanism: ‘Multilateral Investment Appeals Mechanism’ (MIAM)” (2019) European Yearbook of International Economic Law (Special Issue); see also bibliographic references published by the Academic Forum, available under “Additional Resources” at UNCITRAL, “Submissions and additional research material”, online: UNCITRAL <https://uncitral.un.org/en/library/online_resources/investor-state_dispute> and University of Oslo, “Bibliography relating to ISDS reform”, online: UiO <<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/bibliography/>>.

⁶⁵⁵ Anthea Roberts & Taylor St John, “UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting”, *EJIL:Talk!* (20 September 2019) online: EJIL:Talk! <<https://www.ejiltalk.org/uncitral-and-isds-reforms-agenda-widening-and-paradigm-shifting/>> referring to UNCITRAL WGIII, 37th session (1–5 April 2019), Possible reform of Investor-State dispute settlement (ISDS) Comments by the Government of Indonesia (9 November 2018), UN Doc A/CN.9/WG.III/WP.156, 1–2; UNCITRAL WGIII, 51st session (25 June–13 July 2018), Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) Part I*, UN Doc A/CN.9/930/Rev.1, 20.

This then allowed both the United States and Russia to participate actively to the process. While some of the procedural reforms identified might impact the rights and obligations of investors, scope of provisions and general economy of ISDS on the substance, it is not its first focus.

722. The key concerns identified by WGIII all aim to address the “real and perceived legitimacy of the investment regime”.⁶⁵⁶ Ultimately, a successful resolution “will require both an optimal palette of reforms and an artful management of internal and external politics”.⁶⁵⁷

723. UNCITRAL WG III was tasked with a reform process to tackle six specific concerns undermining the legitimacy of the investment regime: “excessive costs and lengthy proceeding, inconsistent and incorrect decisions, and a lack of diversity and independence”.⁶⁵⁸ To these six concerns, additional issues pertaining to third-party funding, prevention of investment disputes and calculation of damages emerged from the process.

724. The reform options envisaged range from the “lighter” to the more “robust” proposals. Different ways to frame the reform proposals have been put forward. We ultimately opt to follow the categorization of reform options according to the types of reforms envisaged as the most pragmatic approach for this thesis, as set out by Langford et al in their Introduction to the Special Issue on the topic of ISDS reform.⁶⁵⁹

725. We first contemplate three other types of categorizations which have been offered. Prof. Anthea Roberts, the Australian Representative before WGIII and participant in the ISDS Academic Forum, classified the “actors” of reform into three categories. First, the “incrementalists” favor maintaining ISDS and address specific concerns through *ad hoc* reforms. Generally, these are arbitration practitioners who are convinced of the validity of the existing system. Second, the “systemic reformers” are in favor of a structural reform of ISDS, while maintaining the fundamental rights of investors to seek redress of breaches to

⁶⁵⁶ Langford et al, *supra* note 32.

⁶⁵⁷ *Ibid* at 187.

⁶⁵⁸ *Ibid* at 167.

⁶⁵⁹ *Ibid*

their rights before a specifically tailored dispute mechanism.⁶⁶⁰ This is where the EU stands with its proposal for the ICS and the MIC. Third, the “paradigm shifters” seek the end of ISDS, and its replacement with other means of justice, ranging from recourse to domestic courts, conciliation, mediation, ombudsmen or state to state arbitration.⁶⁶¹ Typically, these are states who have withdrawn from existing BITs (Ecuador, although the country has recently ratified the ICSID Convention anew⁶⁶²) or that have already gone another route (Brazil, South Africa, e.g.).⁶⁶³

726. A second proposed classification of the reform proposals is through their design, *i.e.* whether it is a structural or non-structural reform. A structural reform consists in an overhaul of the entire design, creating new institutions and bodies, which would here consist in a new tribunal, with an appellate level and advisory center. A non-structural reform can be achieved by soft and hard law instruments, limited in the present case to a multilateral opt-in convention for the multilateral investment court, paired with a number of soft law instruments, such as the Code of Conduct for Adjudicators.

727. The third classification, set out by Langford et al., proposes following the agenda for discussions set out by WGIII.⁶⁶⁴ While this might appear as a pragmatic solution, it is characterized as a “somewhat untidy combination of distinct concerns or reform proposals” or a “bricolage timetable”.⁶⁶⁵ This stems from the very nature of the ongoing negotiations which started out as a streamlined process going from identifying concerns, agreeing that a reform was necessary, and assessing in parallel discussions in same or different sessions, reform solutions.

728. We adopt the fourth classification proposed by Lanford et al., which presents four categories of reform options: (1) improvement of the existing investor-state arbitration system (IA improved); (2) addition of appellate mechanism to current ISDS regime (IA + appeal); (3) multilateral investment court, with or without an appeal level (MIC) and (4)

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid* at 175.

⁶⁶² ICSID, News Release, “Ecuador Ratifies the ICSID Convention” (4 August 2021) online: ICSID <<https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention>>.

⁶⁶³ Alvarez, “The Long View”, *supra* note 55.

⁶⁶⁴ Langford et al, *supra* note 21.

⁶⁶⁵ *Ibid.*

rejection of ISDS (no ISDS).⁶⁶⁶ This helps guide our analysis of a proposed resolution and evaluation of the strength of the rule of law proposed for each reform and its impact on the independence and impartiality of arbitrators.

729. This matrix is of the greatest utility to tease out the concerns to which the MIC responds and those that it does not resolve. Overall, this will bring us back to our analysis in the first chapter of this second part of this dissertation, which assessed the extent to which the EU's ICS proposal provided additional strength to the rule of law than ISDS previously did. While the MIC is a mirror proposal to the ICS, and merely repeats its structure and distinct features with an adaptation to the multilateral aspect of the court, an analysis of a wider scope is warranted to determine whether the MIC will indeed bring a greater conformity to the rule of law. And, finally, whether this solution is indeed the one providing the most safeguards for preserving the rule of law rather than the host of alternatives examined as reform options.

730. Accordingly, after having assessed the advantages and flaws of the MIC, we turn to the draft Code of Conduct for Adjudicators (Section 2), before assessing the “à la carte” reform alternatives, the selection mechanism for arbitrators and the stand alone appeal level. We do not assess the options to bypass entirely ISDS, as they clearly fall outside the scope of our research question.⁶⁶⁷ We also do not attach our analysis to alternative mechanisms to arbitrators or courts to resolve disputes, such as the fourth option from the Langford categorization, the Alternative Dispute Resolution mechanisms already in force and favored by part of the representatives at the WGIII, such as mediation, the resort to Ombudsman or State to State arbitrations.⁶⁶⁸ Our research interest being the comparative value of similar systems of extrajudicial nature to different extents, i.e. standing courts and arbitrations, and the extent to which they contribute and conform to the rule of law, there would be little sense in evaluating ADR mechanisms. This does not detract from the value of these mechanisms, but evidences that they are not of a similar nature and are thus not apt to a comparative

⁶⁶⁶ *Ibid* at 176.

⁶⁶⁷ Alvarez, “The Long View”, *supra* note 55.

⁶⁶⁸ *Ibid*.

evaluation. Last, we address pending issues with regard to potential threats to implementation of alternatives evoked above.

B. The Multilateral Investment Court

*“La justice est trop lente, trop coûteuse, inexperte, et admet une trop grande publicité; les parties peuvent avoir recours à l'arbitrage simplement pour éliminer ces défauts. L'on aurait cependant une vue fautive de l'arbitrage, croyons-nous, si l'on ne voyait l'arbitrage que sous cet aspect. On ne recourt pas seulement à l'arbitrage pour obvier à des défauts ou à des règles trop strictes de l'organisation ou de la procédure des tribunaux. L'arbitrage, en nombre de cas, s'explique d'une autre façon: les parties veulent, en y recourant, obtenir une justice autre que celle qui résulte de l'application du droit national.”*⁶⁶⁹

1. The Advantages of the Judicialization of Arbitration with the Multilateral Investment Court

731. In July 2014, then European Commission President Juncker pledged the replacement of the “outdated” investor-state dispute settlement system that had governed the majority of international investment agreements to date. Following a public consultation and impact assessment conducted by the European Commission in 2014-2015, the Council mandated the latter in March 2018 to negotiate a convention establishing a Multilateral Investment Court on behalf of the European Union and its Member States.

732. The Multilateral Investment Court is meant to act as a permanent tribunal, “a mechanism with full-time adjudicators – no longer party-appointed arbitrators – and two levels of adjudication”. The first instance tribunal would review facts and apply the relevant laws. The appellate tribunal would have “the power to reverse legal findings or serious errors in the weighing of facts, but not review facts.”⁶⁷⁰ Inspired by the WTO DSU, the paradox of the inverse treatment by states of judicialization between the trade and investment worlds has

⁶⁶⁹ René David, p. 10.

⁶⁷⁰ Issam Hallak, “Multilateral Investment Court: Overview of the reform proposals and prospects” (2020) Briefing PE 646.147 (European Parliamentary Research Service) online: European Parliament <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI\(2020\)646147_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf)>.

been repeatedly recognized since 2019.⁶⁷¹ This “odd juxtaposition” is emphasized by Andrea Bjorklund when she writes:

[this] rather oddly divergent situation we currently see in the international governance of international economic law—on the one hand, the World Trade Organization’s (WTO’s) ‘crown jewel’—the dispute settlement body with its appellate body at the apex—is in crisis. The appellate body lost its ability to function at the end of 2019. In its place, 20 Member States have established a multi-party interim appeal arbitration mechanism. Thus, at the WTO, arbitration is the appellate body alternative adopted to respond to a crisis sparked in part by dissatisfaction with the appellate body and its alleged overreach. On the other hand, investment treaty arbitration is currently under attack. The most likely alternative and the one touted strongly by the European Commission is a multilateral investment court (MIC), with an appellate body to serve as its ‘crown jewel’. What explains this odd juxtaposition? Why is multilateral, judicialized dispute settlement in disfavour at the WTO yet sought—at least by some—in the investment context? It is clear that the European Union’s proposal for a MIC is drawn in part from what had been viewed until lately as the success of the WTO dispute settlement mechanism.⁶⁷²

733. The objective of the European Commission in establishing the MIC is to “address the concerns of stakeholders and restore confidence in international investment agreements”. These concerns, on which this entire dissertation is based, are related to the lack of consistency of decisions, the lack of predictability, time, costs, and, not least, independence and impartiality of the arbitrators.

734. Even though Canada, Singapore, Vietnam and Mexico have already signed investment agreements with the EU that include the bilateral International Court System (ICS), a number of the EU's major trading partners, including the USA and Japan, express little support for the creation of a MIC. This support has dwindled as the discussions at Working Group III have advanced.

735. The EU proposes a two-tiered multilateral investment court, with a first instance and appeal levels composed of full-time judges serving 6 to 9 year terms. Presented as the one size fit all solution to all ailments of ISDS, from inconsistent caselaw, to multiple proceedings, insufficient transparency, high cost and length of arbitrations, as well as the lack of independence and diversity of arbitrators, of an appeal level, the MIC has often been

⁶⁷¹ Andrea K Bjorklund, “Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court (2021) 37:2 *Arbitration International* 433.

⁶⁷² *Ibid* at 434.

derided as an illusory policy reform.⁶⁷³ The selection of judges would allow harmonization, just as the appeal level would provide possibility for correction, while eliminating issues on bias of arbitrators. Enforceability of the decisions, on first instance and appeal, would be ensured under the New York Convention.⁶⁷⁴

736. Proposed under the design of a multilateral opt-in treaty similar to the Mauritius Convention, states would be able to agree to send arbitrations under their IIAs.⁶⁷⁵

737. The judicialization of ISDS proposed through the MIC has convinced EU constitutionalists, among others, who concur that independence of judges will be guaranteed by the selection of high-ranking jurists of member states, meeting similar constitutionalist requirements for European or domestic courts.⁶⁷⁶

738. Detractors of the MIC have persistently condemned its overwhelming structure and judicialization.⁶⁷⁷ The EU's proposal, both for the ICS and the MIC, is overtly inspired by the WTO's Dispute Settlement Body (DSB) and Appellate Body (AB) and unfortunately, its astonishing demise bears no promise for success of a multilateral investment court.⁶⁷⁸ The MIC offers a solution to many of the concerns raised with respect to the legitimacy of ISDS, but not to all.

2. Flaws and Pitfalls of the Multilateral Investment Court

⁶⁷³ Alvarez, "The Long View", *supra* note 55, at 27, Possible reform of investor-State dispute settlement, Submission from the European Union and its Member States, A/CN.9/WG.III/Wp.159, Add.1 (24 January 2019), para 39.

⁶⁷⁴ Possible reform of investor-State dispute settlement, Submission from the European Union and its Member States, A/CN.9/WG.III/Wp.159, Add.1 (24 January 2019), paras 30-32.

⁶⁷⁵ Gabrielle Kaufmann-Kohler & Michele Potestà, Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap, Geneva Center for International Dispute Settlement (CIDS), June 2016, <https://www.iisd.org/itn/en/2016/08/10/can-the-mauritius-convention-serve-as-a-model-for-the-reform-of-investor-state-arbitration-in-connection-with-the-introduction-of-a-permanent-investment-tribunal-or-an-appeal-mechanism-analys/>.

⁶⁷⁶ Mattias Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege' (25 May 2015) 4 ESIL Reflections, Issue 3 at 8 <https://esil-sedi.eu/wp-content/uploads/2015/05/ESIL-Reflection-KUMM-final.pdf>.

⁶⁷⁷ Alvarez, "The Long View", *supra* note 55.

⁶⁷⁸ Below, Annex I.

739. The challenges and novel features of the MIC have been detailed in part in Part I setting out the new Investment Court System, and in the section above. The EU has been very active in promoting the MIC, and indicating that it would mirror the ICS to the extent possible, and be adapted where necessary to its multilateral nature. This presents a plethora of potential issues with the MIC.

740. Detractors of the MIC have persistently condemned its overwhelming structure and judicialization.⁶⁷⁹ The EU's proposal, both for the ICS and the MIC, is overtly inspired by the WTO's Dispute Settlement Body (DSB) and Appellate Body (AB) and unfortunately, its astonishing demise bears no promise for success of a multilateral investment court.⁶⁸⁰

741. Concerns regarding time (additional time taken by the proceedings) and costs (increased costs due to the payments to the institution and the permanent salaries to members) have also been the subject of debate. The costs associated with the Tribunal could potentially be reduced for parties, for example with assistance mechanisms or the discussion around an Advisory Center modeled on the one for the WTO, and through strong case management approaches by the Tribunal. However, delays could be incurred due to the judicial form which could suffer from a lack of mechanisms to deal with particular claims (whether dilatory or small claims). While consistency may be enhanced with a smaller number of members or adjudicators, and a strong secretariat, the correctness of decisions, however, would not automatically be enhanced and generally, proves extremely difficult to control.⁶⁸¹

⁶⁷⁹ Alvarez, "The Long View", *supra* note 55.

⁶⁸⁰ Below, Annex I.

⁶⁸¹ See also, updated as at 18 December 2020, European Parliament, Resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, 2015/2105(INI); European Commission, Staff Working Document Impact Assessment on Multilateral reform of investment dispute resolution, SWD(2017) 303; Council, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17; Court of Justice of the EU, Opinion of the Court 1/17, 30 April 2019; United Nations Commission on International Trade Law (UNCITRAL) Working Group III: Investor-State Dispute Settlement Reform, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), A/CN.9/970, July 2019, United Nations Commission on International Trade Law (UNCITRAL) Working Group III: Investor-State Dispute Settlement Reform, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.166, July 2019, UNCITRAL Secretariat, Code of conduct for Adjudicators in Investor-State Dispute Settlement (with annotations) and Annexes. May 2020, European Parliament, EPRS, Multilateral International Court: Overview of the reform proposals, Briefing, January 2020.

742. The same critics have also denounced the fact that new members may be potentially less skilled than arbitrators. Others respond, however, based on domestic or specialized courts, that such expertise can be quickly mastered.⁶⁸²

743. The first main condemnation of the permanent multilateral investment court is the elimination of one of the first causes of contestation of arbitration: party autonomy in the selection of arbitrators.⁶⁸³

744. Further disadvantages to the proposed tribunal are numerous. First, the narrowing on the pool of arbitrators, directly affecting their diversity, can be noted. Second, allegations of bias could also be attached to judges who, nominated by states, might thereby see their independence affected “tilt[ing] the balance in favor of respondent states”.⁶⁸⁴

745. Detractors have also denounced the novelty of the court as one of the shortcomings of the EU proposal. As Alvarez recalls, aside from the “incipient Arab Investment Court under the Arab League as a precursor, no comparable international judicial body exists”.⁶⁸⁵ If the Working Group is conducting its work on a different premise, if one considers the recent study on “Pertinent elements of selected permanent international courts tribunals”, an in-depth study meant to guide the discussions related to a new permanent tribunal⁶⁸⁶, opponents to the new tribunal hold diverging opinions. In particular, Alvarez submits that none of the existing international tribunals have jurisdiction to grant damages to individuals and not states.⁶⁸⁷ He also discards the oft cited examples of semi-permanent tribunals, such as the U.S.-Mexican Claims Commission and the Iran-U.S. Claims Tribunal, on the grounds that these bodies were specifically established on the basis of known claims. Finally, Alvarez disregards regional human rights courts such as the ECHR and the WTO DSU’s on the basis

⁶⁸² *Ibid* at 186.

⁶⁸³ Alvarez, “The Long View”, *supra* note 55, at 27. Investor-State Dispute Settlement Reform, Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III (18 December 2019) (henceforth ‘CCIAG Submission’), paras 13, 17.

⁶⁸⁴ Alvarez, “The Long View”, *supra* note 55, at 28. CCIAG Submission, paras 21-26.

⁶⁸⁵ Alvarez, “The Long View”, *supra* note 55, at 29. Walid Ben Hamida, ‘The First Arab Investment Court Decision’ (1 January 2006) *J. of World Inv. & Trade*, 7(5), 699-721.

⁶⁸⁶ Initial draft for comments until 30 June 2022.

⁶⁸⁷ Alvarez, “The Long View”, *supra* note 55, 30.

that they “operate more like systems of correction to secure states’ continuing compliance with their treaty obligations.”⁶⁸⁸

746. A particular concern is the implicit influence of states/governments in the process. Just as the WTO has been accused of legislating from the bench⁶⁸⁹, the Multilateral Investment Court could err in similar ways due to its very design. Tempted to attain consistency and promote the desired harmonization while interpreting a number of different IIAs, the MIC could eventually be accused of similar wrongdoings.⁶⁹⁰ Harmonization hopes, such as the suggestion by Schill and Vidigal that the MIC “be empowered to generate harmonious investment law by giving it the power to issue preliminary rulings to other bodies or advisory opinions”⁶⁹¹ are bound to be dashed when one examines the potentiality that a bench of judges manage to provide consistent interpretations of a widely varying body of IIAs. While perhaps recent EU agreements could contain similar provisions and protections for investors, older models of IIAs would just as likely be susceptible to be interpreted as, under the opt-in model for the multilateral treaty, any state member could join.⁶⁹²

747. The independence and impartiality, as well as the competence, of judges is not, despite appearances, guaranteed by the new proposal. While the Working Group is attempting to determine the most efficient manner of selection, such as by reproducing the election mechanism for ICJ judges, research reveals that this is, in fact, no guarantee of the neutrality of the appointee.⁶⁹³ Doubts have also been expressed with respect to the scope of the work of the secretariat that would be established to the tribunal.⁶⁹⁴

⁶⁸⁸ *Ibid.*

⁶⁸⁹ U.S. Statement Delivered by Amb. Dennis Shea at the WTO General Council Meeting (Geneva, 7 May 2019).

⁶⁹⁰ Jaemin Lee, ‘Mending the Wound or Pulling It Apart? New proposals for International Investment Courts and the Fragmentation of International Investment Law’ (2018) 39 *Nw. J. Int’l Law & Bus.* 1.

⁶⁹¹ Alvarez, “The Long View”, *supra* note 55, at p. 33. Stephan W. Schill and Geraldo Vidigal, ‘Designing Investment Dispute à la Carte: Insights from Comparative Institutional Design Analysis’ (2019) 18.

⁶⁹² Alvarez, “The Long View”, *supra* note 55, at 32.

⁶⁹³ Eric A. Posner & John C. Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 *Cal. L. Rev.* 1. Gleider Hernandez, *International Legal Theory*, Syllabus (Université Paris Nanterre, May 2020).

⁶⁹⁴ Alvarez, “The Long View”, *supra* note 55 at 31. Joost Pauwelyn, ‘The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists are from Venus’ (2015) 109 *Am. J. Int’l L.* 761. 92 See generally, Charles N. Brower and Jawad Ahmad, ‘For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court’ (2018) 41 *Fordham Int’l L. J.* 791.

748. Alvarez doubts that judges could “come to share a common hermeneutics of treaty interpretation” noting that “hopes that a single group of judges can reconcile such differences elevate hope over experience”.⁶⁹⁵

749. While the MIC has been presented as being able to provide better reasoned decisions than ISDS awards, the argument is countered by the scrutiny given to ISDS awards as well as the lack of investment experience required of MIC judges. As Alvarez contends, “It also seems naïve for all but the most starry-eyed judicial romantics to presume that a MIC’s rulings will be, on average, better reasoned than the ones issued under ISDS.”⁶⁹⁶ Indeed, the EU’s proposal provides for appointment of public international lawyers for renewable terms. The potential for states to refuse their reappointment, in the eventual face of a displeasing decision, as has been done by the ICJ and WTO, would also counter the benefits of appointment.⁶⁹⁷

750. Alvarez makes a compelling case in favor of improved ISDS with the example of the recently negotiated chapter of the CPTPP. Just like the MIC, Alvarez argues, this modern ISDS chapter responds to each of the criticism affecting ISDS:

That treaty conspicuously narrows investor rights as compared to earlier incarnations of the standards of protection (from FET to expropriation to national treatment and MFN), expands considerably on respondent states’ rights to regulate, and subjects arbitral discretion to binding inter-state party interpretations. Its reformed ISDS makes progress on virtually every ground that the EU cites to justify establishment of a MIC: it enables greater transparency, participation, reason-giving, and correction and review. It anticipates, as does the EU’s Court, a Code of Conduct for arbitrators; authorizes amicus and public hearings; provides access to the minutes and transcripts of hearings to ample transparency provisions; provides the parties with a first look at the proposed award to permit comment and arbitral reconsideration; clarifies that the burden of proof of claims rests with the claimant; provides a procedure for the expeditious handling of frivolous claims and even the awarding of costs for those who file them; requires arbitrators to refer some issues to the Party’s Commission which can issue binding rulings in response prior to any arbitral decision; and even anticipates establishment of an appellate body should the parties want one.

⁶⁹⁵ Alvarez, “The Long View”, *supra* note 55 at 33.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ Gregory Shaffer, “Will the US Undermine the World Trade Organization?”, *Huffington Post* (24 May 2016) http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html. Gleider Hernandez, *International Legal Theory*, Syllabus (Université Paris Nanterre, May 2020).

751. This leads to an assumption that in having to choose between “reformed ISDS under a tested institution and resort to a wholly untested international investment court, (...) many if not most states will opt for the first”.

752. The features of the MIC resemble those of the ICS. The multilateral body presents novel features to address legitimacy concerns with ISDS. The Code of Conduct for Adjudicators being drafted by the UNCITRAL and ICSID Secretariat would also apply to the MIC.

753. Provided that this Code is adopted in its current form, which is still far from likely in view of the controversial restrictive measures to the role of adjudicators, members of the MIC would be restrained in their function. Remarks and critics examined above with respect to the impossible ethics sought by the EU apply to the MIC, *mutatis mutandis*.

754. There also is an enormous gap in terms of perceptions. The EU has actively promoted its new court as the most efficient solution to ISDS concerns, starting from the inclusion of a provision calling for the formation of a multilateral court in the ICS (see art. 8.29 CETA). The EU then proceeded to actively promote this new design prior even to the formation of Working Group III tasked with the reform efforts of ISDS. Several efforts were also made contemporaneously by academics to support this work and set out the structure of such a new body.⁶⁹⁸

755. A few years later, we stand at a point where the MIC has just begun being examined in full by the WG. The EU presented in its working paper the details envisaged, with a text for the Court and measures for implementation now being discussed. There appears to have been a lack of the expected enthusiasm by the EU for the MIC. The QMUL CCIAG has in fact revealed much skepticism from the users for the proposals as has the clear opposition or lack of support of important States for the EU to be successful in its proposal.

⁶⁹⁸ Kaufmann-Kohler & Potestà, 2016, *supra* note 226; Gabrielle Kaufmann-Kohler & Michele Potestà, “Challenges on the road toward a multilateral investment court” (2017) Columbia FDI Perspectives (Columbia Center on Sustainable Investment) no 201, online: CCSI <<http://ccsi.columbia.edu/files/2016/10/No-201-Kaufmann-Kohler-and-Potesta-FINAL.pdf>>.

756. In addition, the mechanism proposed for the design of this multilateral convention appears, *prima facie*, to be a functional solution. Kaufmann Kohler and Potestà have proposed an opt-in convention model be used, based on the Mauritius Convention Model.⁶⁹⁹ This would allow States to opt-in without making fundamental changes to the treaties that they are part of. Indeed, an opt-in model for a multilateral convention merely requires the ratification of the convention which will then override treaty provisions governed by the convention.

757. While the EU has successfully promoted the MIC and presented a convincing proposal, there continues to be great skepticism, both from other State Parties involved in WGIII reform discussions and from the users.

758. What Tom ra addressed as the main flaws of the MIC bear recalling the risk of tilting the balance in favor or the state, loss of autonomy proper to arbitration, increase in time and costs and the uncertainty for enforcement continue to be the subject of much debate on the proposed solution by the EU, and tilt the balance in favor of alternative solutions proposed for an ad hoc selection mechanism and a stand-alone appeal process.

C. Assessing the Conformity of the MIC to the Rule of Law

“This proposal does not contend that the current system is not working or should be replaced; it merely demonstrates that *it is possible to have a new one.*”

Marc Bungenberg & August Reinisch,
*Draft Statute for a Multilateral Investment Court*⁷⁰⁰

759. In order to compare the assessment of ISDS and that of the ICS with the rule of law matrix, we superimpose this framework to the analysis of the anticipated Multilateral Investment Court. Evidently, this process is much more prospective as the text of the MIC

⁶⁹⁹ Kaufmann-Kohler & Potestà, 2016, *supra* note 226.

⁷⁰⁰ Marc Bungenberg & August Reinisch, “Draft Statute of the Multilateral Investment Court” (November 2020) online: UNCITRAL <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/bungenberg_reinisch_draft_statute_of_the_mic.pdf> [Bungenberg & Reinisch, “Draft Statute of the Multilateral Investment Court”]. This proposal is based the 2018 study “From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court”, first published in German: Marc Bungenberg & August Reinisch, *Von bilateralen Schieds- und Investitionsgerichten zum multilateralen Investitionsgerichtshof: Optionen für die Institutionalisierung der Investor-Staat-Streitbeilegung* (Baden-Baden: Nomos, 2018). A second, English edition, is now also available as an open access book: Bungenberg & Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts*, *supra* note 654.

has not been formally written at the time of this dissertation. However, a draft Statute which has been formally proposed for discussion at UNCITRAL, and upon which we can apply our rule of law matrix.

760. The next step decided at the 40th session of February 2021 is the drafting of the text of the various reforms proposed. This decision addresses the menu of options proposed from an *ad hoc* mechanism for appointment, to a standing court, and an appeal mechanism. Of all the options envisaged, the writing of the text of the MIC should be the most efficiently completed if the European Union follows the ICS. On that basis, a prospective analysis can be completed for a rule of law analysis of the MIC if we presume the text will resemble that of the ICS. We can apply, *mutatis mutandis*, the analysis set forth above for the ICS.

761. The models for a permanent international court are many. The Secretariat of the Working Group examines for comparative purposes international courts established under treaties as well as those which examine claims brought forth under multiple treaties:

762. We arrive at a similar conclusion for the necessity and the viability of the MIC on the multilateral level than we did for the ICS on the EU level. The only difference is that the EU does not have the power to impose the MIC reform. It seems that the EU reform had the welcome result of giving impetus to the creation of WGIII. However, ever since, the EU has appeared to lose steam as its proposal has grown increasingly unpopular. The impossible standards set by the MIC, coupled with concern expressed for increased time and costs, are now added to envisaged enforcement issues.

763. The Queen Mary - CCIAG-Survey of 2020 has shown that ISDS users were highly skeptical of the MIC and would likely refuse to use such a mechanism, emphasizing the risks set out above. A greater surprise uncovered by the survey was the level of enthusiasm from users for a mandatory appeal mechanism. As Professor Bjorklund recalls, the establishment of such a mechanism has also been discussed for over 20 years, with the US putting placeholders in its Treaties and ICSID envisaging formally the possibility of an appeal level from 2004.⁷⁰¹

⁷⁰¹ Bjorklund, *Arbitration, WTO and MIC*, p. 435.

764. The issue remains that of legitimacy of the MIC. Whether real or perceived, the legitimacy of ISDS continues to guide the reform efforts and solutions proposed.⁷⁰² Perceptions are key and continue to guide the process for reform decisions. Bias, conscious or unconscious, is now universally agreed as a risk. Accordingly, real and perceived legitimacy continue to reign as the guiding standard to return ISDS to a more favorable position in the users' mind. The appetite for ISDS style proceedings is palpable, with investors and states amenable to modifications that would provide greater guarantees. The "real politik" evoked by Lucy Reed remain very much at the heart of the matter.⁷⁰³ WGIII's stance will be crucial in determining the issue of an acceptable reform solution for users, investors and states that provides continued engagement and resolves the legitimacy crisis of ISDS. It may not be a matter of revolution, but rather of redress, reform and, perhaps, resolution.

765. The text of a convention developed by Bungenberg and Reinisch of a Draft Statute of the Multilateral Investment Court⁷⁰⁴ an international organization based on a treaty, open to States as well as international organizations, reads, in relevant part, as follows:

The Statute prescribes the MIC's jurisdiction over investor-State as well as State-State disputes. By joining the MIC, Members recognize its international and domestic legal personality, accord it with the privileges and immunities required for its independent functioning, and contribute to its budget.

The draft also provides for a bench of judges (sitting as a Court of First Instance and an Appellate Court), a Secretariat, a Plenary Body, and an Advisory Centre. The Statute envisages that judges will be appointed for a longer period of time, be independent as well as impartial, and highly qualified. The proposed mechanism for the selection of judges is premised on the need to ensure that all regions and major legal systems are adequately represented.

The Statute expressly enshrines the rule of law, transparency, efficiency, consistency, and Members' right to regulate. It contains the fundamentals of procedure and incorporates, inter alia, the UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration. The MIC may regulate its own rules of procedure in greater detail and adapt to the specific needs of future disputes.

With regard to the enforceability of MIC decisions, the Statute foresees a treaty-based obligation on all MIC Members to recognize and enforce them. Arrangements on enforcement in third States can be foreseen in a separate treaty.

⁷⁰² The rich literature on the topic in ISDS is continually bolstered, most recently with Daniel Behn, Ole Kristian Fauchald & Malcom Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge: Cambridge University Press, 2022).

⁷⁰³ Sikora, *supra* note 38.

⁷⁰⁴ Bungenberg & Reinisch, "Draft Statute of the Multilateral Investment Court", *supra* note 700.

The new enforcement system also provides for the establishment of an enforcement fund.”⁷⁰⁵

766. The application of the Castellarin three-prong matrix to assess the strength of the rule of law for the MIC leads us to a conclusion not dissimilar than the one completed for the ICS.

767. First, we submit that **legal certainty** will necessarily be heightened by the appointment of permanent full time judges to the tribunal. Certainty as to selection will provide heightened guarantees against bias, issues related to repeat appointments and help ensure that challenges are lessened as the funding issues will have been dealt with. Certainty is also aided by the text of the treaty which will implement the multilateral investment court, completed with procedural rules. Last, we suppose that the Code of Conduct for Adjudicators will also apply to such a court, as it is currently drafted in this perspective. Here, again, the existence of a text that details the scope of disclosure, conflict of interest, challenges and multiple roles of adjudicators will give legal certainty to the process. On the assessment of this criterion alone, the rule of law is strengthened compared to ISDS.

768. **Procedural fairness**, secondly, is also aided by the existence of texts detailing the selection process of the adjudicators, coupled with the envisaged Code of Conduct for Adjudicators. Concerns regarding repeat appointments, bias, inappropriate ties and issue conflicts will be resolved and the rule of law consequently strengthened.

769. **Procedural transparency**, finally, should be reinforced if current plans for the MIC are upheld to provide the publicity of decisions, as well as more information on disclosure and challenges following on the applicable Code of Conduct for Adjudicators.

770. Much like the assessment of the strength of the rule of law for the Investment Court System at the EU level, the assessment for the MIC reveals strict requirements. While providing a system where strong safeguards now exist to resolve concerns for independence and impartiality, the new proposed MIC may cause concern to proponents of ISDS with a certain level of “impossible ethics” required from adjudicators.

⁷⁰⁵ *Ibid.*

771. For this reason, we must look to other envisaged reforms as alternatives to the MIC, first, the Code of Conduct for Adjudicators, and second, the standalone selection mechanism and appeal level which may reveal a more appropriate strength for the rule of law.

Section 2. Assessing the Contribution of the Code of Conduct for Adjudicators to the Rules of Law

772. Much has been made of the imminent adoption of a Code of Conduct for Adjudicators established by UNCITRAL Working Group III and ICSID. Whilst its final agreement has, at the time we write these lines, now been announced thrice, followed by an unfortunate postponement, we must query whether this new instrument should be qualified as a resounding success or as the gathering of the “lowest hanging fruit”.⁷⁰⁶

773. It is uncontested that the establishment of a Code of Conduct for Adjudicators will contribute to any type of reform determined by WGIII, whether it is to simply provide for an ISDS improved framework or to enact a permanent multilateral tribunal. It is rather the extent of this contribution which remains to be determined. Between the excessive enthusiasm of its proponents, i.e. the Secretariat of WGIII and ICSID, and the lament of its detractors, i.e. Alvarez and his imagery of the Code as the lowest hanging fruit, a more moderate approach might value the contribution of the Code to the dated and slim existing body of law regulating the conduct of arbitrators as a modernized version which aims at tackling legitimacy concerns with ISDS. After contextualizing the negotiation history of the instrument, the potential and perils of codifying the conduct of adjudicators are assessed below, focusing on its most controversial aspects: the scope of the disclosure obligation and the limitation of roles of adjudicators.

1. The Legal Framework: Genesis – The Consensus for a Code of Conduct for Adjudicators

⁷⁰⁶ Alvarez, “The Long View”, *supra* note 55.

a. Evolution of the Negotiation of the Code

774. The UNCITRAL and ICSID Secretariats were given the mandate to develop a Code of Conduct for Adjudicators (the “Code” or the “CCA”) at WGIII’s 38th session in October 2019. This Code is meant to govern the conduct of adjudicators beyond that which is currently provided for in the IBA Guidelines. It resembles more closely existing code of conducts in international investment treaties and for international tribunals.⁷⁰⁷ The below analysis takes into account the first three versions of the draft, examined at WGIII until November 2021.

775. The draft was drawn from discussions at WGIII and reflects contributions from institutions, academics, governments, investor parties and NGOs. ICSID’s participation in the preparation of the Code is important and confirms the Code’s objective to apply to all adjudicators, whether arbitrators or members of permanent structures. The implementation of a new code of conduct was envisaged from the beginning of the discussions as a commonality between ISDS and ICS or any other type of tribunal.⁷⁰⁸ The first draft was even developed by conducting a comparative analysis of existing codes of conduct to draw the essential provisions to be integrated into a modern, mandatory version of such code.⁷⁰⁹

776. A first draft of the Code reflected the objective that it “should be binding and contain concrete rules rather than guidelines (A/CN.9/1004*, paras. 52 and 68). It aims at providing a uniform approach to requirements applicable to adjudicators handling international investment disputes (IID) and at giving more concrete content to broad ethical notions and standards found in the applicable instruments.” The objective of the exercise was also to obtain a “balanced, realistic and workable” document.⁷¹⁰

777. The appropriateness of creating obligations for other actors involved in the process, i.e. counsel, NGO, personnel from arbitral institutions or permanent bodies, experts and

⁷⁰⁷ Note by the Secretariat, Initial draft for comments until 30 June 2022, available at Secretariat paper for comments, 3. A/CN.9/WG.III/WP.167 (see also document A/CN.9/WG.III/WP.151).

⁷⁰⁸ *Draft Code of Conduct: Version One*, *supra* note 271, para 5.

⁷⁰⁹ Below Annex V, UNCITRAL/ICSID Summary of Codes of Conduct in FTAs.

⁷¹⁰ *Draft Code of Conduct: Version One*, *supra* note 271, para 5.

witnesses, was envisaged. However, it was decided that although such codes would be a welcomed addition to the existing instruments to promote a greater independence and impartiality of actors in the system, they would benefit from having their obligations inscribed in a separate instrument.⁷¹¹

778. The Code was first presented for discussion before WGIII at its 40th session held from 8 to 12 February 2021. Shortly thereafter, on 19 April 2021, a second version was released.⁷¹² Now referred to as a “key feature” of the reform process under way at UNCITRAL WGIII, the Code was rapidly presented as the first possible agreed text emerging from the negotiating process initiated in 2017.

779. Version Two introduced important changes to both form and substance. The overall format and structure of the Code is now composed of 11 articles (rather than 12 in the first version) and the language has been streamlined and simplified. The order of provisions has been rearranged, so that the central part of the Code (articles 3 to 9) now groups the substantive obligations. The requirement for disclosure is then set out in Article 10, followed by Article 11 which governs enforcement. Finally, a new feature of the second version is a Model Declaration provided in Annex. This second version of the Code resulted in a reorganized and streamlined draft.

780. Version Three, published in September 2021, was presented for review at the November 2021 meeting of WGIII. Version 3 of the Code continued to streamline its approach focusing on areas of contention. Of note, the modifications and the three options proposed for the limit on multiple roles provision addressed the continued discussion and relevance of the strictness of this provision, depending in particular of its impact whether in ISDS or before a permanent body, whether or not the Multilateral Investment Court.⁷¹³

⁷¹¹ *Draft Code of Conduct: Version One*, *supra* note 271.

⁷¹² *Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Two* (19 April 2021) ICSID and UNCITRAL, online: UNCITRAL <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_code_of_conduct_v2.pdf> [*Draft Code of Conduct: Version Two*].

⁷¹³ *Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Three* <https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf> [*Draft Code of Conduct: Version Three*].

b. Independence and Impartiality

781. Independence and impartiality are “core elements of ethical conduct” and are recognized as “key elements of any system of justice and they are meant to ensure a fair trial and compliance with due process requirements.”⁷¹⁴ Indeed, Prof. Giorgetti et al write that:

Both concepts are recognized widely as key canons of national law, human rights law, and the law governing international adjudication, and as such constitute part of the general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice (ICJ). Independence and impartiality help safeguard the objectivity and fairness of legal proceedings.

782. The third version of the CCA provides as follows:

Article 3 – Independence and Impartiality

1. Adjudicators shall be independent and impartial.
2. Article 3(1) encompasses the obligation not to:
 - (a) [Be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamour;]
 - (b) Be influenced by loyalty to a Treaty Party, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the IID;
 - (c) Take instruction from any organization, government or individual regarding the matters addressed in the IID;
 - (d) Allow any past or present financial, business, professional or personal relationship to influence their conduct or judgement;
 - (e) Use their position to advance any personal or private interest; or
 - (f) Assume an obligation or accept a benefit that could interfere with the performance of their duties.

783. We note a substantial difference from versions 1 and 2 in the deletion of the substance of the first sub-paragraph to 3(1) requiring not only that adjudicators be independent and impartial “at all times” but mostly that they “shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias”. Paragraph 3(2) continues to provide a non-

⁷¹⁴ UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS): Background information on a code of conduct*, Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.167, 31 July 2019 at paras 15-28; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTC 221, art 6 (entry into force: 3 September 1953), includes it as a basic human right and provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

exhaustive list of examples, with its first having now been bracketed to answer the concern by some discussants that its subjective nature could lead to frivolous challenges.

784. It was also suggested that further examples of conduct “falling within article 3(1)” could be given in the Commentary, provided that a caveat indicating the “highly fact dependent” nature of these be included referring, as examples to the IBA Guidelines.

785. Finally, the Secretariat queries whether:

28. The Working Group may wish to consider whether to add an obligation concerning the “appearance” of independence and impartiality in article 3(1). In this respect, the distinction between the adjudicators’ ethical duty to be independent and impartial and the threshold for disqualification should be considered: (i) the ethical duty is to be independent and impartial; (ii) the standard of appearance is applicable to disqualification proposals, i.e. the arbitrator can be disqualified if a reasonable third person consider that there is an appearance of lack of independence and impartiality; (iii) article 3 does not establish a standard of disqualification. It sets out the primary ethical duty for adjudicators. The commonly accepted standard for disqualification is an objective standard, based on a reasonable evaluation by a third party of the relevant facts and circumstances.

786. This crucial determination brings to mind the considerations given not only in applicable arbitral rules but also by the institutions which are called upon to rule on disqualification challenges. The requirement that independence and impartiality be examined from the point of view of the parties, i.e. “in the eyes of the parties”, bring to the forefront the “appearance” requirement.

787. Legitimacy and its related concerns are founded upon appearance. It is widely recognized that the appearance of legitimacy is just as important as legitimacy itself, and that it constitutes an integral part of the requirement. Just as it does for the fundamental obligations upon which rest the system and that call for independence and impartiality of adjudicators. Debate regarding this issue will be of the utmost relevance and the progressive or restrictive stance adopted ultimately could well weight in the debate and the ultimate assessment of the extent to which the CCA truly contributes to a stronger rule of law.

2. Limitations on Multiple Roles of Adjudicators

a. *An impossibly strict objective: version one*

788. The issue of “double hatting” has been long debated and decried. To a large measure, it is often touted as the harbinger of doom to befall upon ISDS.⁷¹⁵ Taken in a measured way, and founded on science and data⁷¹⁶, accusations of the impact on legitimacy caused by “double hatters” must be taken seriously.

789. The term “double hatting” refers to the practice of one individual acting both as an adjudicator and in a different role (legal representative, expert, or mediator) in separate ISDS proceedings simultaneously or within a short time.⁷¹⁷ This practice is also referred to as “role confusion,” or an instance of “revolving doors”⁷¹⁸ and has been seized upon by the UNCITRAL Working Group III as an instance of reform. While it may be that the enactment of the CCA seals a profound reform of ISDS as a whole, it has, as the “Working Group’s fastest work product” to appear to be ready for completion, garnered much attention.⁷¹⁹ We recognize that the nature of this legal framework may not overhaul entirely the ISDS system.⁷²⁰ Nevertheless, it will constitute an essential piece of the puzzle when it comes to fruition, especially if vigorous sanctions are provided and can be enforced. Far from a “low hanging fruit”⁷²¹, it will guide the ISDS system towards an ethical regulation of their members and assist in providing, at least an appearance of, legitimacy.⁷²²

790. In the first version of the CCA, limits on multiples roles of an adjudicator were strictly governed by Article 6. From its introduction, it was evident that this article was likeliest to cause the most discussions in its review, in particular from the camp of the incrementalists, *i.e.* the arbitration practitioners, who tend to consider that the cumulation of roles has no bearing on their independence and impartiality and, in fact, is recommended to an extent.⁷²³

⁷¹⁵ Charles N. Brower and Jawad Ahmad, ‘For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court’ (2018) 41 Fordham Int’l L. J. 791.

⁷¹⁶ Malcolm Langford, Daniel Behn & Runar Hilleren Lie, “The Ethics and Empirics of Double Hatting” (2017) 6:7 ESIL Reflections 1 [Langford, Behn & Lie, “Ethics and Empirics”].

⁷¹⁷ ICSID, “Background Papers: Double-Hatting”, *supra* note 619 at 1.

⁷¹⁸ Langford, Behn & Lie, “Revolving Door”, *supra* note 361.

⁷¹⁹ Lukas Schaugg, “The UNCITRAL Code of Conduct: Breakthrough or diversion?”, Investment Treaty News (10 November 2021) online: IISD <<https://www.iisd.org/itn/en/2021/11/10/the-uncitral-code-of-conduct-breakthrough-or-diversion/>> [Schaugg, “Breakthrough or diversion?”].

⁷²⁰ *Ibid*; Alvarez, “The Long View”, *supra* note 55.

⁷²¹ *Ibid*.

⁷²² Giorgetti et al, *supra* note 1.

⁷²³ See Charles N. Brower and Jawad Ahmad, ‘For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court’ (2018) 41 Fordham Int’l L. J. 791, for the

By way of example, Judge Brower has repeatedly argued that the cumulation of roles is, in a manner, essential to the education of the attorney who becomes an arbitrator. Much like common law systems wherein judges are nominated or elected after excelling in their role as attorney for an established number of years, serving as arbitrator was once considered the epitome of a legal career, a role as international judge after having honed the legal skills as counsel. Fortunately, this particular concern has been welcomed by the Working Group and, beyond the framework provided for the work of an Assistant, a provision allowing for lawyers to “shadow” adjudicators for the purpose of training is also now being envisaged.

791. The first version of the new Article 6 of Code of Conduct for Adjudicators “Limits to Multiple Roles for Adjudicators”, reads as follows:

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

792. Similar to judicial settings, Article 6 introduces strict limits to “external activities” of the adjudicators, to use the terminology of the recent “Compilation of Decisions for external activities of ICJ Members”. Whilst this provision can shock the mind as overly prohibitive to an arbitrator, it may just be read as common sense to a judge.

793. It should be remarked, at the outset, that the existence of limits on multiple roles or external activities is neither new nor particularly original. It is settled practice that judges are not allowed to partake in a number of set activities outside of their remit as national judges. The limitation also exists in several international and regional permanent courts. It is only new that in the legal arbitral order this new limit is introduced formally. To an extent, this consideration is already in practice by numerous arbitrators. The increasing trend for arbitrators to depart from the major firms where they previously practiced and set up a boutique or join chambers is also testimonial to the compliance, in reality, to this practice. It is of course accompanied by the very real consideration of conflicts of interest with the major

argument that part of the training of an arbitrator resides in the possibility to act as counsel. This is the common law approach to the judiciary as opposed to the civil law approach whereby an aspiring judge can simply get trained as a magistrate from its early years with no requirement of practice as an attorney. Unfortunately, as the most criticism to a reform of ISDS is voiced by those most favored by the system and directly impacted by double hatting concerns, their criticism is welcomed with scepticism, to say the least. Although evidently arbitrators who have adopted practices restricted to work as adjudicator are not impacted by such critics.

firms where arbitrators practiced. The now international frameworks of major firms have immensely increased the risk of conflicts of interest arising between parties in the arbitration and clients of the firm. For an arbitrator to be part of chambers or having set up boutiques insulates against this risk and ensures that a higher number of mandates may be accepted by the arbitrator. Of course, by way of additional benefit, this ensures that the arbitrator is also increasingly insulated against circumstances which may call into question her or his independence and impartiality.

794. We can then wonder why the inclusion of a prohibition against multiple roles has inflamed passions in so many fervent ISDS defenders. Perhaps it is so as, on its surface, the inclusion of a limit in the text could be taken as an unnecessary precaution as if, with respect to many aspects of arbitration, the gentleman's code was not honored.

795. Unfortunately, scientific studies have consistently found this issue to be pervasive to the system and a clear sign of a lack of legitimacy.⁷²⁴ The results of a 2017 empirical study conducted by Langford, Behn & Lie focused on the prevalence on double hatting and the resulting impact on challenges. As Professor Lévesque writes:

The researchers analyzed 1,077 cases (including all known treaty-based arbitrations, ICSID contract arbitrations, foreign direct investment law-based arbitrations, as well as ICSID annulment proceedings up until 1 January 2017) and found that a total of 47 percent of cases (509) involved at least one arbitrator acting simultaneously as counsel.

796. The researchers concluded that “[d]ouble hatting is a practice that is dominated by a small group of arbitrators with numerous arbitral appointments, but a comparatively smaller amount of simultaneous legal counsel work.”⁷²⁵ The research and arguments on double hatting are however being used, in a surprising turn of events, by both camps, i.e. by both the reformers and non-reformers.

797. In fact, as recalls Professor Lévesque,

⁷²⁴ John R Crook, “Dual Hats and Arbitrator Diversity: Goals in Tension” (2019) 113 in AJIL Unbound 284 at 286; Langford, Behn & Lie, “Ethics and Empirics”, *supra* note 716; Langford, Behn & Lie, “Revolving Door,” *supra* note 361. For more empirical research on the central players involved in investor-state dispute settlement (ISDS), see Sergio Puig, “Social Capital in the Arbitration Market” (2014) 25:2 EJIL 387; GJ Horvath & R Berzero, “Arbitrator and Counsel: The Double-Hat Dilemma” (2013) 10:4 Transnational Dispute Management 1 at 5-6.; Lévesque, “Canada’s Pro-Ban Stance”, *supra* note 617.

⁷²⁵ Langford, Behn & Lie, “Ethics and Empirics,” *supra* note 716 at 4.

during the discussion on the Draft Code of Conduct for Adjudicators, the Corporate Counsel International Arbitration Group noted that “[m]any of the best arbitrators today also serve as counsel in international arbitration. Indeed, double-hatting is prevalent, notwithstanding the current taboo in some quarters, because parties (both states and investors) consider many double-hatters to be excellent arbitrators — not in spite of, but because of, their experience as counsel.”⁷²⁶

798. The questions arising from limiting roles in a mandatory code of conduct are numerous and complex. First, to what extent should the role be limited: it could be prohibited, as in the ICS, limited or simply disclosed so that the parties can determine themselves whether they consider it raises conflicts in the case. Under the ICS, there is a clear prohibition against double hatting. Second, how long would the limitation be implemented? Should it be considered that the limit on acting in potentially conflicting roles, or wearing different hats, is a concurrent or proximal one. If so, how long should the period be in between. Would it be limited to the same parties or same issues? Or should all of these above limits be established at the same time. Finally, the different application of this provision between ISDS and a permanent court is to be closely examined.⁷²⁷

799. In its first iteration, the language provided for in the ICS, on which the MIC would presumably be modeled, consisted in a blanket prohibition in one of the bracketed options, which provides that “Adjudicators shall [refrain from acting]”. Alongside this first bracket was however inserted into the text the option to insert the alternative “[disclose that they act]”. Such language would fundamentally modify the limit on roles envisaged for the adjudicators as “counsel, expert witness, judge, agent or in any other relevant role at the same time as they are”. Further, we must take into account the essential end of this sentence which confirms that this would be the case only where adjudicators are acting “acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty]”. This article then

⁷²⁶ Lévesque, “Canada’s 2 Stance”, *supra* note 617 at 10; UNCITRAL/ICSID Secretariats, Comments by Article and Topic, *supra* note 13 at UNCITRAL/ICSID Secretariats, Draft Code of Conduct, Comments by Article and Topic (14 January 2021) at 114, para 22 (comments by Canada), online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/code_of_conduct_-_comments_by_article_-_update_01.14.21.pdf> [UNCITRAL/ICSID Secretariats, Comments by Article and Topic]. For all comments made by Canada on version 1 of the Draft Code of Conduct for Adjudicators, see UNCITRAL/ICSID Secretariats, Draft Code of Conduct, Comments by State/ Commenter (14 January 2021) at 12-19, online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/code_of_conduct_-_comments_by_state-commenter_-_updated_01.14.21.pdf> at 123–24.

⁷²⁷ Chiara Giorgetti, “ICSID and UNCITRAL Publish the Anticipated Draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement”, *Kluwer Arbitration Blog* (2 May 2020) online: <http://arbitrationblog.kluwerarbitration.com/2020/05/02/icsid-and-uncitral-publish-the-anticipated-draft-of-the-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement/> [Giorgetti, “Anticipated Draft”].

is much less strict than the standard affirmed in the Code of Conduct for CETA Members which mandates a blanket prohibition on multiple roles.⁷²⁸

800. This measure was also immediately recognized as a potential impact on the ability of new and diverse candidates to become adjudicators.

801. From the onset, Article 6 was likely to be received with doubts. The heart of this severe reform and the imposition of the “impossible ethics” that the Article mandated warrants a reform that some stipulate will reduce drastically the pool of available adjudicators, to the risk that quality will be affected, the very measure that the article wishes to ensure.⁷²⁹

802. The “highest standards of integrity and diligence, including fairness, competence, civility and efficiency” required by Article 6 seemed to promise a return to legitimacy for investor state dispute resolution. The issues may however arise from their strict nature, and lack of flexibility. The “impossible ethics” required by the EU in the ICS and its complementary code of conduct appear to have been reflected, to a certain extent, into this Code of Conduct for Adjudicators.

803. Nevertheless, there has been wide recognition that this Code of Conduct is meant to also apply to ISDS proceedings. For this very reason, from its first draft of, it could already be anticipated that language requiring mandatory limits on multiple roles would inevitably be softened to accommodate the various objects of this Code to ensure that there is engagement by the arbitration community.

b. Compromising positions: version two

804. Accordingly, in an unsurprising update, Version Two of the draft modified the language for the double-hatting prohibition, as the key novel feature introduced by the Code. Much discussed and debated, it continued to undoubtedly stand at the heart of the controversies in which arbitrator ethics are mired. As discussed above, one envisaged

⁷²⁸ See Article 8.30 Ethics, CETA.

⁷²⁹ Sikora, *supra* note 38; Ünüvar & Kreft, “Impossible Ethics?”, *supra* note 7.

approach to resolve the impact on independence and impartiality or the appearance thereof is to limit the role of adjudicators to only that function. This effectively would bar adjudicators under the Code to accept mandates as counsel or experts.

805. There is no need to recount again the debated features of this solution. By curtailing the scope of remits which adjudicators may undertake, the training of the future generation, as well as simple means to function and survive as a business are two main downsides often evoked to denounce the proposed reform. In short, it would be quite unsustainable for adjudicators to be limited to act solely within that strict purview. Aside from a select number of individuals who have long honed their skills and established a world renown practice, few may actually be able to fare well solely on adjudicator mandates.⁷³⁰ This criticism has garnered much sympathy. However, we note the increasing number of younger generation practitioners who decide, after 15 years or so of practice, to depart from the major firms where they have been trained and establish their own practice. In common law systems, the same trend appears with experienced advocates who become door tenants with chambers so that they may have entire freedom of choosing their cases, and of course accepting mandates as arbitrators free of conflict.⁷³¹

806. Article 4 of the Code Version Two provides:

Article 4

Limit on Multiple Roles

Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].

807. It is of utmost importance to note the limits imposed within Article 4 to provide for a number of situations where double-hatting could be acceptable with the informed consent of the disputing parties. Coupled with the disclosure obligation contained in Article 10 which

⁷³⁰ Charles N. Brower and Jawad Ahmad, 'For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court' (2018) 41 Fordham Int'l L. J. 791.

⁷³¹ This trend is also increasingly recognized by multiple organizations who appear to foster diversity and encourage the development or earlier arbitrator appointments and practices, such as the Rising Arbitrator Initiative.

aims “to ensure that such consent is given on an informed basis”⁷³², Article 4 provided accommodations which might render the article more acceptable than in the initially discussed versions.

808. First, Article 4 now limits the “double-hatting” prohibition to concurrent roles and eliminates the previous ongoing obligation that was provided in the first version. This was a welcome change as it significantly opened the realm within which adjudicators may act.

809. It is very likely that Judges would not be permitted to play multiple roles concurrently under the terms of their appointment, so the reference to Judges would require further consideration.

810. Article 4 also addressed overlapping roles as counsel/expert witness on the one hand, and decision-maker on the other hand. This appears to be the overlap that most likely creates conflict, and which is of greatest concern in terms of the legitimacy of IID settlement.

811. Article 4 without the bracketed text reflects a full prohibition on concurrently acting as counsel/expert witness and Adjudicator. Some comments urged a full prohibition due to concern that anything less would adversely affect the legitimacy of IID settlement.

812. Other comments suggested that Article 4 should be tailored to those situations most likely to cause conflict, given the adverse impact of a full prohibition on new entrants in the field and on party freedom of appointment. The bracketed text in Article 4 proposes a possible tailored provision that would prohibit concurrently acting as counsel/expert witness and Adjudicator where the cases involve “the same factual background” and “at least one of the same parties or their subsidiary, affiliate or parent entity”. If the more tailored provision is selected, the Commentary could give examples of when concurrent cases would be considered to address the same factual context or the same party.

813. Modifications to the prohibition on “double hatting” from the former version were numerous and significant. As was evident from the second draft, parties were now allowed to circumvent the imposed limit on multiple roles and expressly so agree that adjudicators

⁷³² *Draft Code of Conduct: Version Two* at 7, Explanation of changes, Article 4.

“wear different hats”. The scope of the limitation had also been “narrowed to counsel and expert only, and does not include ‘witness, judge, agent or any other relevant role.’” As noted above, the limitations have been restricted to contemporaneous limitations and have deleted reference to a temporal limitation.

814. Interestingly, the bracketed text which provides that “[involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity]” could have a drastic effect on the prohibition. As Professor Giorgetti writes:

Without the bracketed text, no adjudicator will be able to serve concurrently as counsel or expert in other IID cases without the disputing parties’ agreements. Conversely, the bracketed text, if added, would limit considerably the provision by restricting the prohibition of multiple roles to cases involving the same factual background and at least one of the same parties, subsidiary, affiliate or parent entity.⁷³³

815. The text without the bracketed language seems to be more in line with the most recent treatment of the issue in new investment treaties.⁷³⁴

816. The revised second version takes a more relaxed, rational and practical approach to the regulation of double hatting. While the first version of the Code ensured that, in this respect, the pool of adjudicators would be severely diminished, just as the interest of adjudicators to even act in this capacity when they would be barred from any other work, the second version proposed a functional solution which appeared to strike a fair balance between the regulation of multiple roles of adjudicators without completely annihilating the possibility for other mandates.

a. Towards a pragmatic compromise: version three

817. In the third version of its proposed draft, the major concerns raised regarding double hatting were addressed through the new proposal of three options for text with a sub-heading directly indicating the scope of the prohibition, ranging from the “full prohibition” (Option 1), to the “full disclosure” (Option 3), with a midway of “Modified Prohibition”. While these

⁷³³ *Ibid.*

⁷³⁴ *Ibid*; ICSID, “Background Papers: Double-Hatting”, *supra* note 619.

were still decried as insufficient by several commentators, they allowed the debate to move forward and progress towards a practical solution.

818. The proposed provision now reads as follows:

Article 4 – Limit on multiple roles

Option 1: “Full prohibition”

An Adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID case [or in any other proceeding relating to the application or interpretation of [an] [the same] investment treaty] unless the disputing parties agree otherwise.

Option 2: “Modified prohibition”

Unless the disputing parties agree otherwise, an Adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID [or other proceeding] involving:

- (a) The same measures;
- (b) [Substantially] the same legal issues;
- (c) One of the same disputing parties or its subsidiary, affiliate, parent entity, State agency, or State-owned enterprise; or [and]
- (d) [The same treaty].

Option 3: “Full disclosure” (with option to challenge)

Adjudicators shall disclose whether they concurrently act as a legal representative, expert, or in any other role on cases involving the same or related parties, the same measures, or [substantially] the same legal issues as are at issue in the IID.

819. This new provision took into account the discussions at WGIII on the two previous versions of the CCA. The Working Group recognized that this provision would likely not be applicable to judges and instead focused on the work of adjudicators who also act as legal representative and experts. The possibility to add further categories was also noted.⁷³⁵ The three options now built in the draft are meant to represent the diversity of views expressed.⁷³⁶

⁷³⁵ *Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Three* (September 2021) ICSID and UNCITRAL at para 30, online: ICSID <https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf> [*Draft Code of Conduct: Version Three*].

⁷³⁶ *Ibid.*

820. The three options provide for (1) a full prohibition, (2) a full prohibition with the possibility for the disputing parties to agree otherwise, and (3) an obligation of the adjudicator to make a full disclosure and the possibility for parties to file a challenge. It is evident that the choice of option will have a fundamental impact on the relevance and impact of the Code. The language remains broad, which can be both criticized for its lack of specificity, and commanded, for the possibility to interpret it largely to provide for the inclusion of concurrent roles as expert witness or mediator, as well as greater diversity and availability of arbitrators.⁷³⁷

821. The Working Group has flagged for consideration the two following issues:⁷³⁸

- Whether the disputing parties should be entitled to consent to an adjudicator concurrently acting in multiple roles; and
- Whether article 4 should be expressly linked to article 10 of the Code to ensure that consent to double hatting is an informed one; in that respect, it may be noted that as article 10 is mandatory and serves multiple purposes, there might be no need for such a link in the text.

822. The first option presented is the “full prohibition”. Designated as “a bright-line rule that can easily be applied by adjudicators and disputing parties » it also “best preserves the legitimacy of IID settlement”.⁷³⁹ This strict prohibition applies to both legal representative and expert witness in investment and commercial cases which regard investment issues. The second option, the “modified prohibition”, proposes some limitations on specific criteria. This option is considered to provide for a prohibition “but with fewer adverse consequences on diversity and party freedom of adjudicator selection”.⁷⁴⁰ In other words, the terms of the “full prohibition” are somewhat relaxed. It has been presented as having the following advantages:

“(i) it better targets those appointments that raise actual conflicts compared to when a broad category of adjudicators are generally excluded ex ante; (ii) it gives parties greater freedom of choice to select among potential candidates; (iii) it would exclude fewer qualified adjudicators; (iv) it would reduce the likelihood of repeat appointment; (iv) it is less likely to create barriers to new entrants to the field; and (v) by creating fewer barriers to entry, it encourages diversity of adjudicators.”⁷⁴¹

⁷³⁷ Schaugg, “Breakthrough or diversion?”, *supra* note 719.

⁷³⁸ *Draft Code of Conduct: Version Three*, *supra* note 713 at para 35.

⁷³⁹ *Ibid* at para 31.

⁷⁴⁰ *Ibid*.

⁷⁴¹ *Ibid*.

Several questions are to be addressed should member states find that Option 2 is to be selected, including the type of case that raises “substantially the same legal issues”, whether conditions a) to d) need to be reconsidered, and are alternative or cumulative.⁷⁴²

823. Lastly, Option 3, titled “full disclosure”, takes the approach of presenting double hatting as part of an extended disclosure requirement. This leaves the opportunity to the parties to challenge and, according to the commentators:

(i) it allows assessment of situations most likely to cause conflict and better targets those appointments that raise actual conflict rather than simply excluding a broad category of adjudicators ex ante; (ii) it is based on specific facts rather than an ex-ante limit defined by the role played; (iii) it best supports party autonomy in appointment; (iv) it does not constrain the development of new entrants in the field; (v) it would minimize the risk of unintended consequences; (vi) it would prevent an increase in repeat appointment; and (vii) it would avoid the potential adverse effect on diversity caused by a prohibition.⁷⁴³

824. The scope of options presented should provide sufficient proposals to satisfy all schools of reformers discussing at WGIII. Ultimately, the legitimacy granted by this crucial choice will be impacted depending on the option selected.

3. Disclosure and Challenges: An impossibly perfect standard

a. An overly ambitious disclosure: version one

825. As with the Code of Conduct for Members of the Tribunal which governs the issues under the CETA, the first version of the Draft Code of Conduct takes an overly ambitious approach. We will see below that with its second iteration of the Code, the UNCITRAL and ICSID Secretariats lower their ambitions, but, in our opinion, still not sufficiently to provide a functional and workable model (provided in Version Three). The extensiveness of the disclosure obligations, and potential lack of temporal limits, or wide temporal limits, are likely to continue to cause alarm in the arbitration community. This too is addressed in the third version of the draft examined.

826. Article 5 of Version One provides for the adjudicators’ disclosure obligations:

⁷⁴² *Ibid.*

⁷⁴³ *Ibid* at para 32.

Article 5 Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.

2. Disclosures made pursuant to paragraph (1) shall include the following:

(a) Any professional, business and other significant relationships, within the past [five] years with:

(i) The parties [and any subsidiaries, parent-companies or agencies related to the parties];

(ii) The parties' counsel;

(iii) Any present or past adjudicators or experts in the proceeding;

(iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];

(b) Any direct or indirect financial interest in:

(i) The proceeding or in its outcome; and

(ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;

(c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and

(d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].

3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.

4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made. Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.

827. Article 12 of Version One governs the procedures for disqualification and removals:

Enforcement of the Code of Conduct

Every adjudicator and candidate has an obligation to comply with the applicable provisions of this code.

The disqualification and removal procedures in the applicable rules shall continue to apply.

[Other options based on means of implementation of the code]

828. The combination of extensive disclosure requirements, which, as we will see, have been dialed back in the second version, and the complete lack of procedure for challenge and removal denotes that the objective of the Code is to provide a soft law framework to guide arbitrator ethics.⁷⁴⁴

829. The extensive requirement for disclosure is evident from the language of Article 5. The objective is to provide parties with the maximum of information prior to the adjudicators' appointments. Following the existing practice, the provision requires an on-going disclosure requirement and a "reasonable effort to become aware of interests, relationships or matters that can create a conflict that could be perceived as affecting their independence and impartiality".⁷⁴⁵ In doubt, the adjudicator must disclose.

830. In its first iteration, the provision was drafted so that member states could determine how and the extent to which disclosure obligations should be in the final version. There was the option to limit in time/previous years the number of activities, the opportunity to include relationships with subsidiaries, parent companies and agencies related to the parties, as well as any third party that has a direct or indirect financial interest in the outcome of the case. All these criteria are the habitual points included in disclosure following practice and the IBA Guidelines. The provision also referred to the disclosure the adjudicator's participation in ISDS and other international proceedings or related domestic arbitrations. This could also include the disclosure of the adjudicator's work as counsel, adjudicator, expert or other function in other international matters. While this full-fledged transparency approach might be commendable for the parties, it should be expected that adjudicators are reticent to reveal the extent of their clients and the scope of work that they do.

831. In this full disclosure, Article 5 addressed the contested issues of repeat appointments and issue conflict. The article does not propose to ban repeat appointments but seeks to regulate them, in combination with Article 8 which governs availability, so the parties obtain further transparency regarding appointments of the adjudicators by the same counsel, client,

⁷⁴⁴ *Draft Code of Conduct: Version One*, supra note 271, paras 39-64.

⁷⁴⁵ *Draft Code of Conduct: Version One*, supra note 271.

party, which could impact or appear to impact its independence and impartiality. This includes appointment as experts, mediators, conciliators, inter alia. The unconscious bias created could stem from a financial dependence or a similar the set of facts. Evidently, this issue is also denounced on the grounds that it contributes to the lack of diversity.

832. Issue conflict is a complex and debated topic. The very fact that it would be included in a draft demonstrates the progressive and far-reaching objective of the first draft. The likelihood that the provision is maintained, however, is another question. Issue conflict consists in the regulation of positions taken by the adjudicator in a public manner, whether in a publication or speech, in a way that can be applied to a legal issue in a case. While the concern is that such public opinion might demonstrate bias or pre-judgement, it is habitually balanced by the argument that adjudicators, as experts within their field, are often called upon to publicly demonstrate their expertise through research and participation to conferences. Challenges based on issue conflict have seldom been successful, although they continue to be increasingly popular.

833. A number of issues immediately appear and may cause concern. The broad and at times seemingly unlimited reach of disclosure required of adjudicators exists in the Code without the pendant of a potential sanction, other than what is required for “disqualification and removal” procedures in the applicable rules (Article 12). This leaves much uncertainty, in addition to failing to provide procedural fairness and certainty. The drafting is both overly broad and overreaching. By requiring that the applicable sanction be found in unidentified sets of rules, it provides no clearness or legal certainty to users. In sum, it fails all three prongs of the Castellarin rule of law matrix despite attempting to provide the exact opposite, i.e. strengthen the rule of law.

834. As we will see, following the receipt of comments from member states and users, the ICSID and UNCITRAL Secretariats provided an overhauled version of the Code when they issued its Version Two on 19 April 2021. Whether the multiple issues identified in the first version, and more specifically its overbroad and restrictive approach will be rectified in Version Two, in order that a rule of law analysis is this time satisfied, is the subject of our analysis in the following section.

b. Dialing back the disclosure: version two

835. Complementary to the issue of double hatting and the new limitation of multiple roles, the issue of repeat appointment is a frequently raised problematic contributing to the controversy surrounding the lack of legitimacy of ISDS. It is imperative that this issue be tackled within the ISDS reform efforts at UNCITRAL. The criticism that only a handful of individuals share the majority of appointments certainly is one that is overly easy to make. The reality of the practice is more nuanced and must be put in context. While it is undeniable that a number of arbitrators have shared in popularity and benefitted from busy dockets, the landscape of arbitrator nomination and pool of available individuals has increasingly diversified in the past years. First, institutions have become well aware of this issue and are requiring additional information with respect to the case load of adjudicators as well as the number of their appointments. This information is also publicly available to parties who wish to proceed to nominations, on the ICC and ICSID website. Jus Mundi, Investor State Law Guide and a number of expert websites also provide this information which is readily accessible.

836. However, as is the parties' prerogative in ISDS, they are the master of the procedure to a greater extent than before the courts and the right to select and nominate their arbitrator has been repeatedly recognized as the foremost feature which draws corporations and parties to arbitration. In order to protect this fundamental right of the parties to select arbitrators, while regulating to restore legitimacy in the eye of the public and the arbitration community, once more, a delicate balance must be stricken to determine the extent to which prohibitions and controls on the number of appointments may be determined.

837. The Code of Conduct Version Two deals with this issue under the Disclosure provision governed by Article 10, which provides as follows:

Article 10 Disclosure Obligations

1. Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.

2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information:

(a) Any financial, business, professional, or personal relationship within [the past five years] with:

(i) the parties, and any subsidiary, affiliate or parent entity identified by the parties;

(ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID [and non-IID] proceedings;

(iii) the other Arbitrators, Judges or expert witnesses in the proceeding; and

(iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party;

(b) Any financial or personal interest in:

(i) the proceeding or its outcome; and

(ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and

(c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator.

3. Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.

4. Adjudicators shall have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information.

5. Adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure by an Adjudicator does not establish a breach of this Code.

838. The language of this provision was revised in Version Two. Repeat appointments, previously regulated under the first version, are no longer envisaged.⁷⁴⁶ The Commentary may provide a limit on the number of appointments, although this very approach was contested by commentators. And for good reason.

⁷⁴⁶ See *Draft Code of Conduct: Version One*, *supra* note 271.

839. Long gone is the original approach of the IBA Guidelines which requires to provide information dating back to 3 years for most cases. The extent of the disclosure required by Article 10 is much more far reaching. Although the “explanation of changes” section of the draft focuses on the modifications made between the first and second version, few comments are reserved to the potentially extremely broad scope of requirement for the disclosure.

840. The standard expected of the disclosure, i.e. that the adjudicator disclose information which may “in the eyes of the parties” give rise to doubts, is no different than existing and enforced standards. Although this article will also apply to judges, the likelihood that they have to provide disclosure is minimal, except for specific situations. Article 10(5) which closes the provision by indicating that the existence of the disclosure itself does not establish a breach of the Code can also be considered useful. This reference was already indicated in the comments on the IBA guidelines and widely renown and communicated to arbitrators to ensure that they would not balk at disclosure in the fear that it would, somehow, be held against them. The cautious approach is always to “err in favor of the disclosure” and the Code strengthens this approach (subsection 5). This text will contribute to bridging the divide between differing legal cultures who continue to have widely different approaches to disclosure.

841. If Article 10 is one of the central tenets of the Code, its most important subsection is Article 10(2). In fact, Article 10 “requires ample and continuous disclosure, including of all prior and concurrent appointments as adjudicator, counsel and expert witness.” The scope of the disclosure obligation is wide. With the exception of Article 10(2)a) which contains bracketed text proposing a five year limit for the disclosure of “Any financial, business, professional, or personal relationship within [the past five years]” with parties, representatives, arbitrators, third party funders, and Article 10(2)c) which contains bracketed text for a future indication of a 5 or 10 year indication, is far beyond the three years provided for in the IBA Guidelines.

842. Whereas the repeat appointment language has been stricken from the second version upon protest, the broader disclosure obligation, including the potential for the upcoming Commentary to include a number as a suggestion for a maximum of repeat appointments is bound to provoke additional challenges from dissatisfied or querulous parties. This strategy

is already prevalent in arbitration, and the widening of the scope for disclosure, including some text in the commentary regarding repeat appointments, may encourage such dilatory tactics.⁷⁴⁷

843. Lastly, we note that the language regarding regulation of issue conflict has also disappeared from the disclosure obligation. Although issue conflict “was addressed only indirectly in the first draft by requiring an adjudicator to disclose all publications and all relevant public speeches”, the commentary of the first version made direct reference to issue conflict. Long debated and recognized as an arduous obligation to define and regulate⁷⁴⁸, all explicit and implicit mentions have as a result of much discussion in WGIII now disappeared from Version Two of the Code. Issue conflict will continue to be challengeable as a lack of independence and impartiality, as it currently is, and not under any other explicit subsection, as firstly attempted in the initial draft of the Code.

Challenge and enforcement

844. The enforcement of the Code is governed by Article 11. This provision is essential to the Code as it will ensure its functioning, as being the condition of the entire functioning of the Code. It seems odd, at first glance, that such an important (if not essential) provision contains so few details and such generic language.

845. Article 11 reads as follows:

Article 11 Enforcement of the Code of Conduct

Every Adjudicator and Candidate shall comply with the applicable provisions of this Code.

The disqualification and removal procedures in the applicable rules shall apply to breaches of Articles 3-8 the Code.

⁷⁴⁷ See challenges for repeat appointments in *Petroceltik holdings*, Sebastian Perry, “Stern sees off challenge over ‘pro-state bias’”, *Global Arbitration Review* (8 June 2020) online: GAR <<https://globalarbitrationreview.com/arbitrator-challenges/stern-sees-challenge-over-pro-state-bias>>.

⁷⁴⁸ See webinar “Is there an Issue with Issue Conflict?”, the first of four webinars that will focus on four of the most urgent and thorny elements of the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (ISDS), which was recently published by ICSID and UNCITRAL: ITA – The Institute for Transnational Arbitration, “Part 1 Is There An Issue With Issue Conflict”, online: YouTube <<https://www.youtube.com/watch?v=w0drVEbIH18&t=1265s>>.

[Other options based on means of implementation of the Code]

846. Article 11 is the mandatory pendant to Article 10. In other words, without the sanction (challenge and removal) provided for in Article 11, the extensive and continuous the disclosure required by Article 10 would have little sense. Although Article 11 closes the Code, it could arguably be considered as the quintessential disposition without which its entire architecture would not function. These two articles will necessarily be the subject of much discussion as the core function of the Code rests on their substance.

847. The scope of Article 11 has been limited to Articles 3 to 8, meaning that adjudicators may only be challenged under these provisions. This leaves out Articles 9 and 10 under which challenge and removals may not be pursued. This, according to the explanation of changes section of the Version Two, was designed to avoid dilatory tactics and strategic challenges which are “strictly unrelated to ethics”.

848. It is noteworthy that Article 10 is excluded from Article 11’s scope – so as to ensure that a failure to disclose will not automatically result in a challenge. However, while this distinction may appear important theoretically, in practice, a failure to disclose will often give rise to a challenge, as it will then be considered to have an impact on the independence and impartiality of the adjudicator. Annex 1 provides a simplified disclosure form, whose model resembles those widely available and currently in use by all arbitral institutions.

849. In the second version of the draft, Article 11(3) had remained bracketed for further consideration of possible sanctions. It may be that institutions have administrative means of addressing breach of obligations under the Code, for example by reducing fees, publishing information about the timeliness of rulings, or otherwise, or that Parties have recourse to complaints under professional accreditation bodies, for example Bar Associations.⁷⁴⁹

⁷⁴⁹ Chiara Giorgetti, “The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement?”, *Kluwer Arbitration Blog* (29 May 2021) online: <http://arbitrationblog.kluwerarbitration.com/2021/05/29/the-second-draft-of-the-code-of-conduct-for-adjudicators-in-international-investment-disputes-towards-a-likely-agreement/>.

c. Towards a practical approach: version three

850. In order to take into account the continued protests regarding Version Two, despite the modifications proposed, Version Three provides for a toned down practical approach to disclosure. The language of Article 10 now reads as follows:

Article 10 – Disclosure obligations

1. Candidates and Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.

2. Candidates and Adjudicators shall include the following information in their disclosures:

(a) Any financial, business, professional, or personal relationship within [the past five/ten years] with:

(i) The disputing parties, and any subsidiary, affiliate, parent entity, State agency or State-owned enterprise identified by the disputing parties;

(ii) The legal representatives of either disputing party;

(iii) The other Adjudicators and expert witnesses in the IID; and

(iv) Any third-party funder with a financial interest in the outcome of the IID and identified by a disputing party;

(b) Any financial or personal interest in:

(i) The IID or its outcome;

(ii) Any other proceeding involving the same measures as the IID; and

(iii) Any other proceeding involving at least one of the same disputing parties or entities identified pursuant to Article 10(2)(a)(i);

(c) All IID [and all related proceedings] in which the Candidate or Adjudicator has been involved in the past [five/ten] years or is currently involved in as a legal representative, expert witness, or Adjudicator; and

(d) Their appointments as legal representative, expert witness, or Adjudicator made by either disputing party or its legal representative in an IID [and non-IID] in the past [five/ten] years.

3. Candidates and Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the disputing parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.

4. Adjudicators shall have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information.

5. Candidates and Adjudicators shall err in favour of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure or failure to disclose does not by itself establish a breach of this Code.

6. [Following disclosure], disputing parties may agree to waive any potential non-compliance with this Code, unless the applicable rules or treaty provide otherwise.

851. The disclosure obligations continue to be extensive, with several of the over restrictive criteria from the two first versions of the draft removed. Nevertheless, the time period provided in brackets for adjudicators to disclose either related cases and mandates (c and d) of five and ten years still go beyond the 3 year time limit currently set by the IBA Guidelines.

852. The Commentary emphasizes that the test for disclosure still may be more lenient than that provided for disqualification, which will follow the applicable rules.⁷⁵⁰

57. It may be noted that a distinction is made between the formal standard for disclosure in the adjudicator's declaration ("in the eyes of the disputing parties") and the standard for disqualification of the adjudicator. The Code also keeps the broad standard for disclosure separate from the standard for disqualification and clarifies the matters to be disclosed.

58. The standard for disclosure is intentionally made broad to enhance transparency and to provide the disputing parties the opportunity to assess a conflict of interest or raise any concerns. This standard is complemented by article 10(5), which directs candidates and adjudicators to err in favour of disclosure if they have any doubt and article 10(2), which provides guidance on matters that they should disclose. In addition, the Commentary could include examples that provide further guidance.

59. The standard for a successful challenge will depend on the applicable rules and will likely be more restrictive than the standard for disclosure. If adjudicators conclude that a matter does affect their independence or impartiality, they should not accept the appointment or should resign. Alternatively, the parties could in certain circumstances waive the conflict of interest that would have otherwise disqualified the arbitrator.

60. Article 10(2) includes a list of matters that should be disclosed, either because they might raise doubts as to independence and impartiality under article 10(1) or to enhance transparency. Among other things, it allows candidates and adjudicators to reflect on their availability for the case and potential conflicts of interest, and allows parties to ask follow-up questions or raise concerns, for instance with regard to potential issue conflicts. The list in article 10(2) is not exhaustive, as there may be matters that are not listed but would be encompassed by article 10(1). Conversely, not all matters listed in article 10(2) must be disclosed in accordance with article 10(1).

⁷⁵⁰ CCA, para 57.

61. A candidate/adjudicator would have a general obligation to make reasonable efforts to become aware of any interest, relationship or matter pursuant to article 10(1), which includes relationships with the disputing parties and potential third-party funders. If a candidate/adjudicator knows or becomes aware of any entity related to the disputing parties or third-party funder that were not identified by the parties, this should be disclosed pursuant to article 10(1). However, it might be too onerous to require candidates/adjudicators to research all potential entities related to the parties and third-party funders involved. The parties may be better positioned to assist the candidate/adjudicator with the conflict check by providing the names of the relevant entities and third-party funders.

62. Article 10(5) states that “the fact of disclosure or failure to disclose does not by itself establish a breach of this Code.” A failure to disclose must be assessed in its context and the circumstances of each case, depending on whether the information that was not disclosed would raise doubts as to the independence or impartiality of the adjudicator.

63. Article 10(6) provides that the parties may waive any conflict of interest, similar to standard 4(c)(ii) of the IBA Guidelines. Any waiver of lack of independence or impartiality would need to be expressed and made having full knowledge of the relevant facts and circumstances based on the candidate's/adjudicator's disclosure. The possibility of a waiver would also be subject to the applicable rules or treaty. For example, a waiver of the qualities required of an arbitrator pursuant to Article 14(1) of the ICSID Convention would not be possible, but the parties may agree that a certain matter does not affect their reliance upon the arbitrator to exercise independent judgment.

Disqualification and removal

64. The Working Group may wish to consider article 11, as follows:

Article 11 - Compliance with the Code of Conduct

1. Every Adjudicator and Candidate shall comply with the applicable provisions of this Code.
2. The disqualification and removal procedures in the applicable rules or treaties shall apply to this Code.
3. [Other options based on means of implementation of the Code.]

Comments

65. The heading of article 11 reflects the expectation that the primary method of implementing the Code will be through voluntary compliance.

66. It may be noted that the availability of disqualification and removal procedures will depend on the rules or treaties applicable to the IID. Accordingly, article 11(2) does not create additional grounds for disqualification or removal under the applicable rules or treaties, including under mandatory domestic laws applicable in ad hoc arbitrations. For example, under the UNCITRAL Arbitration Rules (2013), an arbitrator could only be disqualified “if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence.” Similarly, in ICSID arbitration proceedings, an arbitrator could only be challenged for

manifest lack of the qualities referred to in article 14(1) of the Convention or because the person was ineligible for appointment.

67. A related issue concerns a failure to disclose pursuant to article 10 of the Code. Article 10(5) provides that “the fact of disclosure or failure to disclose does not by itself establish a breach of this Code.” Various views were insofar expressed. Some comments noted that a failure to disclose is not in itself a ground for disqualification, but that it could be factually relevant to establishing a breach of the Code. Other comments suggested that a “serious,” “repeated” or “wilful disregard” of the disclosure obligation should be subject to article 11(2) or could give rise to doubts about an adjudicator's independence and impartiality. The importance of any omission to disclose matters giving rise to a conflict depends on the circumstances of the case.

Article 11(3) remains bracketed for further consideration of possible sanctions.

68. The Working Group may wish to consider document A/CN.9/WG.III/WP.208 regarding the means of implementation of the Code and the possible sanctions.

853. The issue of sanction and compliance, no matter the soft law nature of the Code, remains a challenge. If the Code is integrated as part of an instrument of the MIIR, it could be given a mandatory object. Should that be the case, the sanction upon adjudicators will remain a challenge or removal. Based on the existing compliance of the arbitration community at large with the IBA Guidelines, we could presume that the Code would be a welcome addition. This might only prove truthful if the new obligations or guidelines provided by the Code do not unduly hinder the practice of adjudicators. In other words, should the negotiated solution agree to a prescriptive Code, with wide ranging disclosure and strict limitation on roles, there may be less enthusiasm for adjudicators to become involved in the system. Conversely, if the expected Code reveals a document with reasonable expectations in the eyes of the parties and of the adjudicators, both for disclosure and limitation of roles, the compliance might prove higher. This latter solution however would provide less of an impact on the guarantees of independence and impartiality of adjudicators, and ultimately less of a change in strengthening the rule of law and acting as an agent of change to address ISDS' legitimacy crisis.

4.The Rule of Law Assessment of the Code of Conduct of Adjudicators

854. Applying the rule of law matrix to the envisaged Code, we can only conclude that, no matter the options selected, legal certainty, procedural fairness and procedural efficiency will be strengthened. The risk lies to an extent to an overregulation of the conduct of adjudicators, wherein the Code would then resemble the CETA ICS and attached CETA Code of Conduct, and lead to the conclusion we expressed above, i.e. that the ideal system developed in theory is overly restrictive and impracticable.

855. While the instrument will be a welcome addition to the spaghetti bowl of reform measures, it is bound to have some effect on addressing legitimacy issues with adjudicators but will by no means resolve the entire crisis.

856. At the moment, the question remains of how to convince the negotiators to resolve the two crucial issues of the limitation of roles and the expected disclosure.

Section 3. Assessing the "À La Carte" Reform Framework Proposals and their contribution to the rule of law for the independence and impartiality of arbitrators

857. In evaluating the possible reforms of ISDS at WGIII, several options have been put forward. The “Quadrilemma” in the selection and appointment of adjudicators, following the term coined by Langford, Behn and Malaguti, delineates the opposing values that need to be balanced and the trade-offs to be agreed in the envisaged reform models. These values are identified as independence, accountability, diversity and procedural fairness. Underlining their analysis is the recognition that no one solution is likely to be satisfactory to all states involved in WGIII. In fact, Prof. Anthea Roberts recognizes a convergence of minds in the negotiations, as “islands of persuasion” emerge between certain actors.⁷⁵¹

858. Langford, Behn and Malaguti examined the proposed reform models, which they set out in an explanatory table on the core aspects of the reform models proposing the institutional form, nominator, appointor, type of tenure and adjudicator.⁷⁵²

⁷⁵¹ Anthea Roberts and Taylor St John, UNCITRAL and ISDS Reform (Hybrid): Islands of Persuasion, 18 March 2022, EJIL blog, <https://www.ejiltalk.org/uncitral-and-isds-reform-hybrid-islands-of-persuasion/>.

⁷⁵² Langford, Behn & Malaguti, “The Quadrilemma”, *supra* note 374 at 5.

Table 1. Idealised Reform Models

Institutional form	Nominator	Appointor	Type of tenure	Adjudicators
1. ISDS with no reform	Parties, Institution	Parties, Institution	Ad hoc	Many
2. Roster(s) for party-appointment	Parties, Institution	Parties, Institution	Ad hoc; but roster would have terms	Few, many
3. Institutional appointment of arbitrators	Institution	Institution	Ad hoc; but roster would have terms	Few, many
4. Standing tribunal, no appellate body	States	Institution	Fixed terms that could be renewable	Few, many
5. Appellate body with first instance ISDS	States	Institution	Fixed terms that could be renewable	Few, many
6. Standing tribunal and appellate body	States	Institution	Fixed terms that could be renewable	Few, many
7. No ISDS	N/A	N/A	N/A	N/A

859. The six reform models identified, including the possibility that the current ISDS system be maintained without modifications, are (1) Roster(s) for party-appointment, (2) Institutional appointment of arbitrators, (3) Standing tribunal, (4) no appellate body (5) Appellate body with first instance ISDS, and a (6) Standing tribunal and appellate body. The last option, as previously explained, is not envisaged in the scope of this dissertation. The object is indeed to determine which of the reform options, if any, will provide for a strengthened rule of law to resolve the legitimacy crisis of ISDS without presenting an impossible solution to implement. The “impossible ethics” some have denounced as the new standard established by the EU in the ICS may prove to be a solution to the defaults of the ICS which cannot be put into place in practice.⁷⁵³

860. Alvarez argues that:

In the long run, current reform efforts are likely to produce an ever more complex regime, governed by more diverse substantive rules interpreted by more complex options for dispute resolution. The focus on reforming the ways investor-State disputes are resolved fails to respond to doubts about the need for IIAs, undermines aspirations to harmonize international investment law, and ignores dire needs for stimulating (and protecting) foreign capital flows to achieve the goals of the Sustainable Development Goals – from mitigating climate change to preventing the next pandemic.⁷⁵⁴

861. While we agree with Alvarez that any reform adopted will likely contribute to an increased complexification of the regime, we do not necessarily view this development as

⁷⁵³ Ünüvar & Kreft, “Impossible Ethics?”, *supra* note 7.

⁷⁵⁴ Alvarez, “The Long View”, *supra* note 55.

negative. Far from needing to harmonize international investment law, we argue that the existing system will only benefit from additional pragmatic and workable reform options that will be available to parties to complement the existing dispute resolution mechanism, arguing in favor of a conscious fragmentation. Rather than stepping away from ISDS and losing its many proven benefits, solutions and reforms options à la carte can only benefit to assist to dispel the legitimacy crisis of the regime.

862. Finally, it should also be considered that the EU's effort to present a uniform internal policy continue to be arduous in a regime in which it is autonomous and should be able to control. To harbour the ambition to bring such change and harmonization into the international regime as it exists is not merely short-sighted but simply closer to magical thinking. The obstacles and protests at the negotiation stages at the UNCITRAL Working Group III are a reflection of the gulf that exists between the different schools of reform. After all, following the widely recognized fragmentation of international law due to the proliferation of international tribunals in the 2000s, which has now transformed into an urge to harmonize, it would be surprising to find that the EU can accomplish such a tour de force merely by creating what is essentially just another international tribunal.

863. We submit that the reform options discussed at WGIII merit consideration and consist in much more credible alternatives to foster agreement between the state parties for a combination of à la carte measures available to parties who seek to provide a stronger rule of law without overhauling the entire system.

864. We must also query how to proceed with the opting in for these options. Might they be proposed in a treaty design similar to the Mauritius Convention in the manner proposed for the MIC, i.e. on an opt-in basis. This option allows a party to opt in without having to withdraw from its existing treaties and the provisions of the opt-in Treaty would supersede them. However, this formula remains complicated and would require the formal procedure for signature and ratification. Issues related to implementation of a multilateral convention are addressed below.

865. *Ah hoc* proposals refer to the possibility of having distinct mechanisms that could be selected by the parties to complement the dispute resolution method of their choice. Ideally,

these *ad hoc* self standing systems could be combined to the parties' desire. This refers to the establishment of different options geared towards the selection and appointment of arbitrators. This reform would allow parties to continue to provide for ISDS while correcting the failures discussed above with respect to the rule of law for independence and impartiality. Other failings would also be corrected by way of this type of reform: gender, diversity or inclusiveness, and experience could be addressed through these mechanisms.

866. Such piecemeal reform proposals would address the “concerns regarding independence and impartiality in ISDS are addressed currently at the level of individual disputes through disclosure requirements and challenges procedures.” Which are easier to address than “the systemic aspects, [which] by contrast, are often more elusive and difficult to address.”⁷⁵⁵

867. As Prof. Giorgetti recalls, “we aim at describing the criticism that certain features generated with the goal to assess, in section 3, whether and how the proposals for reform discussed within UNCITRAL Working Group III would be able to address and assuage these criticisms and concerns.”⁷⁵⁶

868. States are increasingly examining options alternative to the MIC, in addition to the Code of Conduct for Arbitrators, in the implementation for the selection mechanism for arbitrators and the stand alone appeal level, as a more flexible and efficient means to provide a reform.⁷⁵⁷

A. SELECTION AND APPOINTMENT OF ARBITRATORS

The process by which selection and appointment takes place is the legitimizing factor for the authority as well as the integrity and credibility of every tribunal or court. The same is true for rule-of-law reasons; impartiality, independence and competence

⁷⁵⁵ Giorgetti et al at 446.

⁷⁵⁶ Giorgetti et al at 452.

⁷⁵⁷ Anthea Roberts and Taylor St John, UNCITRAL and ISDS Reform (Hybrid): Islands of Persuasion, 18 mars 2022, EJIL blog, <https://www.ejiltalk.org/uncitral-and-isds-reform-hybrid-islands-of-persuasion/>.

*of adjudicators are essential criteria to uphold the rule of law and ensure effective access to justice.*⁷⁵⁸

869. Having examined the existing selection and appointment mechanisms in ISDS in the first part, followed by that inherent to a permanent tribunal, in our case the ICS, there remains the consideration of semi-permanent tribunals and rosters.⁷⁵⁹

870. The premise of this evaluation is based on the recognition that:

Members of international courts enjoy a high degree of legitimacy, but only if they have been chosen in accordance with a predetermined selection process that guarantees they possess the qualities necessary to exercise the judicial function, including expertise, independence and impartiality, and if they have been ultimately elected or confirmed by states.⁷⁶⁰

871. An alternative reform proposal to that of a Multilateral Investment Court is one meant to assist in the selection and appointment of arbitrators. Bearing in mind that one of the weakest aspects of ISDS in terms of rule of law and legitimacy is the independence and impartiality of arbitrators, a proposal for reform which federates much interest is for the establishment of an ad hoc selection mechanism for arbitrators.⁷⁶¹

872. In the most recent rounds of negotiations, as Prof. Roberts writes, states appear to have moved to deliberation and discussions of non-binary proposals for reform,

⁷⁵⁸ Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, ‘Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform’, Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019, p. 2.

⁷⁵⁹ These two sections set out proposals in the recent Secretariat note, Possible reform of investor-State dispute settlement (ISDS) Selection and appointment of ISDS tribunal members, Note by the Secretariat, A/CN.9/WG.III/WP.203, at the 8-12 February 2021 session in Vienna, including an emphasis on the three following papers, the CIDS Supplemental Report on “The composition of a multilateral investment court and of an appeal mechanism for investment awards”, 15 November 2017, Gabrielle Kaufmann-Kohler and Michele Potestà (“CIDS Supplemental Report”) available at https://uncitral.un.org/sites/uncitral.un.org/files/media_documents/uncitral/en/cids_supplemental_report.pdf, as well as the publications from members of the Academic Forum, available at <https://www.cids.ch/academic-forum-concept-papers>. The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement, Malcolm Langford, Daniel Behn and Mariachiara Malaguti.

⁷⁶⁰ Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, ‘Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform’, Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019, p. 1.

⁷⁶¹ Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, ‘Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform’, Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019.

understanding that potential alternatives are not exclusives of others.⁷⁶² She recounts that “on selection and appointment of ISDS tribunal members structured the discussions about a permanent tribunal”, emphasizing how “pluralism infuses the Working Group’s approach in big and small ways”. Prof. Roberts gives the example of the discussion presented in that Working Paper with respect to nomination, asking delegates whether potential adjudicators should be (1) nominated by states or (2) self-nominated or nominated by “civil society, bar association, academic and relevant organizations in the investing community”. Singapore’s intervention was telling with respect to this approach, in supporting both options, when its delegate stated:

We do not consider these options to be mutually exclusive ... we agree that there should be a diversity of avenues for nomination, such as active nomination by participating states, self-nomination, or even nominations by stakeholders like the investing community, following an open call. We would therefore be happy to further explore a draft provision that merges these two options for nomination and expresses them as different possible routes to nomination rather than as binary choices as they are currently set out.

873. This position was thereafter adopted by Canada, the EU, Korea, Switzerland who stepped forward and “supported Singapore’s call to move beyond seeing them as binaries.”⁷⁶³

874. Selection and appointment mechanisms in ISDS are being considered under various auspices, through the help of a “Standing multilateral mechanism”, the terminology used by the WGIII Secretariat to include a potential Multilateral Investment Court. The Secretariat considers options for selection and appointment inherent to a permanent tribunal, the consideration of semi-permanent tribunals and rosters.⁷⁶⁴

⁷⁶² Anthea Roberts and Taylor St John, UNCITRAL and ISDS Reform (Hybrid): Islands of Persuasion, 18 mars 2022, EJIL blog, <https://www.ejiltalk.org/uncitral-and-isds-reform-hybrid-islands-of-persuasion/>.

⁷⁶³ Anthea Roberts and Taylor St John, UNCITRAL and ISDS Reform (Hybrid): Islands of Persuasion, 18 mars 2022, EJIL blog, <https://www.ejiltalk.org/uncitral-and-isds-reform-hybrid-islands-of-persuasion/>.

⁷⁶⁴ UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS): Selection and appointment of ISDS tribunal members*, Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.203, 16 November 2020, to be discussed at the session of 8-12 February 2021; UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*, Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.213, 8 December 2021, to be discussed at the session of 14-18 February 2022; Gabrielle Kaufmann-Kohler & Michele Potestà, “The composition of a multilateral investment court and of an appeal mechanism for investment awards” (2017) CIDS Supplemental Report, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457310>; “Concept Papers Project Matching Concerns and Reform Options, online: CIDS <<https://www.cids.ch/academic-forum-concept-papers>>; Langford, Behn & Malaguti, “The Quadrilemma”, *supra* note 374.

875. WGIII, in its note of 8 December 2021 submitted for the 42nd session, proposed a text aimed at codifying the “Standing multilateral mechanism”, setting out specifically the selection and appointment of ISDS members and related matters. It provides for the establishment, jurisdiction, and governance of this framework. The text also governs the selective representation and tribunal members, nomination, selection and appointment of candidates, terms of offices, conditions of service and assignment of cases. Lastly, it addressed the means of establishment, applicable law and treaty interpretation for the Standing multilateral mechanism for the selection and appointment of ISDS tribunal members.⁷⁶⁵

876. Following the acknowledgement by Bjorklund et al that:

the procedure for electing adjudicators has a direct impact on the quality of the entire court or tribunal, as well as on its functioning in an appropriate manner, on its effectiveness, and possibly even on the degree to which its decisions are accepted and enforced. Acceptance requires independent and neutral adjudicators; effectiveness requires highly qualified adjudicators.⁷⁶⁶

877. Fundamental considerations enter into the assessment of independence and impartiality, most notably the nationality and qualifications of the adjudicator. While it is widely recognized that the existing ISDS framework bears improvement, an over regulation through codification will confront the drafters to another danger, as Bjorklund and Vanhonnaeker emphasize when discussing provisions governing “issue conflict”:

Expertise et partialité ne doivent pas être confondues. Un arbitre peut être indépendant et impartial dans une affaire donnée, même s’il possède une vaste expertise sur les questions et principes juridiques soulevés par cette affaire. Au contraire, une telle expertise devrait être considérée comme une qualité essentielle plutôt qu’un éventuel motif de récusation.⁷⁶⁷

⁷⁶⁵ UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*, Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.213, 8 December 2021, to be discussed at the session of 14-18 February 2022.

⁷⁶⁶ Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, ‘Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform’, Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019, p. 2.

⁷⁶⁷ Andrea Bjorklund, Lukas Vanhonnaeker, La conduite des arbitres au travers des codes de conduite: Opportunités et dangers, in Chloé Brière, Louise Fromont, Areg Navasarthian (dir), *Perspectives croisées sur la coopération transatlantique*, Bruxelles, Éditions de l’Université de Bruxelles, 2022, p. 186.

878. As part of its wide mandate, the WGIII was tasked with examining elements pertinent to reform for the selection and appointment of adjudicators. As the Secretariat recalls, from the onset of discussions:

the Working Group concluded that the development of reforms was desirable to address concerns related to: (i) the lack or apparent lack of independence and impartiality of ISDS tribunal members (A/CN.9/964, para. 83); (ii) the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules (A/CN.9/964, para. 90); (iii) the lack of appropriate diversity among persons appointed to serve as ISDS tribunal members (A/CN.9/964, para. 98); and (iv) the mechanisms for constituting ISDS tribunals (A/CN.9/964, para. 108). On the basis of proposals submitted by Governments,² and on the basis of document A/CN.9/WG.III/WP.169, the Working Group undertook, at its resumed thirty-eighth session, a preliminary consideration of the features regarding the qualifications and requirements of ISDS tribunal members, as well as the various selection and appointment models in the framework of ad hoc and standing mechanisms (A/CN.9/1004/Add.1, paras. 95–130).

This reform element is based, inter alia, on the suggestion that there is a need to revisit the party-appointment method in ISDS and to limit the involvement of the disputing parties, as party autonomy need not be a key component of ISDS (A/CN.9/1004/Add.1, para. 104). As an illustration, this reform would result in selection and appointment mechanisms comparable to those in existing international courts, where States, in their capacity as disputing parties, have no say in the selection of the individuals who decide the case, although as treaty parties they have participated in the selection process of the individuals who compose the standing body.⁷⁶⁸

879. In the envisaged text, the first issue to be determined was that of the number of members proposed. The WGIII provides for a selective rather than permanent body, in order to encourage a balanced representation and increased diversity:

it reflects the preference for selective rather than full representation on the basis that an international investment tribunal with a high number of members may be expensive and complex to manage. The preferred approach was therefore to seek broad geographical representation as well as a balanced representation of genders, levels of development and legal systems, and to ensure that the agreement establishing the tribunal would allow the number of tribunal members to evolve over time, following any variation in the number of participating States, as well as in caseload (A/CN.9/1050, paras. 23 and 24).⁷⁶⁹

880. Inspiration for the determination of the sufficient number of members can be found in the existing permanent tribunals. The UN system, with 193 member States, is constituted

⁷⁶⁸ UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*, Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.213, 8 December 2021, to be discussed at the session of 14-18 February 2022, p. 2.

⁷⁶⁹ *Ibid.*, p. 5.

of 15 judges on the International Court of Justice (the “ICJ”).⁷⁷⁰ The United Nations Convention on the Law of the Sea (the “UNCLOS”), with 168 member States, provides for 21 judges the International Tribunal for the Law of the Sea (the “ITLOS”) for an average of 1.2 case per year. The World Trade Organization (the “WTO”), with 164 member States, used to have 7 members at the time when the Appellate Body was functioning. In the case of ISDS reform and the envisaged standing mechanism, the number of members might vary depending on the caseload, number and composition of contracting states, cost, and resources available.⁷⁷¹

881. The possibility for the parties to select *ad hoc* tribunal members is also contemplated, on a similar measure than that which is provided by other international courts, namely the ICJ. The question of whether the nationality criteria would continue to apply would also be envisaged.

882. In addition, discussions have also encompassed the possibility to add junior members as part of the tribunal or as silent observer. While it is not directly contemplated in the text as proposed, this option would further the concern of education of the next generation of adjudicators and cater to the need to increase the pool of candidates, quelling diversity concerns.⁷⁷²

883. The evaluation of the reform to ISDS proposed by WGIII for the nomination, selection and appointment of candidates was done following a clear mandate and agreed principles:

The Working Group considered that, as a matter of principle, the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered as well as to the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity (A/CN.9/964, paras. 91–96). In addition to the qualifications and other requirements, appropriate diversity, such as geographical, gender, and linguistic diversity,¹⁹as well as equitable representation of the different legal systems and cultures was said to be of essence in the ISDS system. It was highlighted that

⁷⁷⁰ See information on the activity of the Court and caseload at www.icj-cij.org/files/annual-reports/2017-2018-en.pdf.

⁷⁷¹ UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*, Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.213, 8 December 2021, to be discussed at the session of 14-18 February 2022, para 20.

⁷⁷² *Ibid*, p. 28.

achieving diversity would enhance the quality of the ISDS process as different perspectives, especially from different cultures and different levels of economic development, could ensure more balanced decision-making (A/CN.9/1004/Add.1, para. 101). Lack of diversity has been said to undermine the legitimacy of the ISDS regime.⁷⁷³

884. Two options have been carved out, the first allowing for the information, participation and consultation of investors, civil society and individuals in the nomination process, and the second leaving it entirely in the states' hands. A screening and filtering could be done by an outside expert committee, as is currently done for the ECtHR or the CJEU, for example:

42. It may be noted that screening committees, consultative appointment committees, and appointment committees have been introduced in some international courts (A/CN.9/1004/Add.1, para. 118). They are meant to be expert-based, and their function is to filter out candidates that do not meet qualifications.²⁹ Even if States retain control over appointments, this design feature is meant to lead to the appointment of more qualified and more independent tribunal members. Their function usually does not include consultation with non-state entities.³⁰

43. Regarding composition, the Working Group may wish to consider that a larger screening panel would accommodate the intended diversity. Further, the Working Group may wish to consider whether members of the selection panel should also comprise persons who represent the views of other non-State stakeholders, such as the investing community, as this may be critical to promote greater actual and perceived legitimacy by all users of such a body.⁷⁷⁴

885. Finally, provisions will have to determine the desired length of terms of office. For international courts, at the moment, terms may be renewable or not, and range from 4, 6 to 9 years. While some tribunals refuse that judges' mandates be renewed more than once, most have for the moment adopted a policy that allows members to return so as not to lose the knowledge. Assignment of cases could be done on a rotating basis, a fixed list or through an individual assignment. Finally, the text developed links the compliance of adjudicators with the Code of Conduct.

⁷⁷³ *Ibid*, para 29.

⁷⁷⁴ *Ibid*, paras 42-43: "29. Draft provision 7(a) refers to the eligibility criteria, as done for instance in the ECtHR context (where the screening panel "shall advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria stipulated in Article 21§1 of the European Convention on Human Rights"); see also discussion in CIDS Supplemental Report, paras. 145–146. 30. For example, an "Article 255 Panel" was established to assess nominated candidates for the CJEU in 2010. The panel merely issues recommendations, and it is composed of "seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament" (Article 255 of the Treaty on the Functioning of the European Union)."

886. This reform is particularly delicate as it takes away the party’s autonomy for one of the most appreciated features of arbitration: the arbitrator’s nomination. While it reinforces all three criteria from the Castellarin matrix and provides strengthened legal certainty, procedural fairness and procedural transparency, it will not provide a perfect solution to the legitimacy problem.

887. Transparency, in fact, is not to be confused with the main guarantee of efficiency, granting legitimacy of the process, is the moral and ethical sense of adjudicators themselves. As Bjorklund and Vanhonnaeker conclude on the relevance on regulating adjudicators’ conduct through codes:

La transparence n’est donc par la réponse à tout problème et, au final, il est important de ne pas perdre de vue que la principale garantie d’efficacité et de légitimité du processus arbitral est le sens moral et éthique des arbitres eux-mêmes.⁷⁷⁵

B. THE STANDALONE APPELLATE MECHANISM

888. The reform options which have been increasingly welcome with enthusiasm are the “stand alone” frameworks that could be added by parties as an option.⁷⁷⁶ In the case of a stand alone appeal level, this particular body would serve to address some of the criticism concerning the independence and impartiality of adjudicators in ISDS. Often referred to as the “Multilateral Investment Appeals Mechanism” (MIAM).⁷⁷⁷

889. Giorgetti submits that a stand-alone panel would not address particular concerns with respect to first instance adjudicators. The direct consequence of an appeal level is to contribute to bolstering the predictability and consistency. The scope of review will be of utmost importance in determining the extent to which these two factors are strengthened.

890. Complementary instruments to this appeal body might also address concerns regarding independence and impartiality in ISDS. Although it is not likely that such language

⁷⁷⁵ Andrea Bjorklund, Lukas Vanhonnaeker, *La conduite des arbitres au travers des codes de conduite : Opportunités et dangers*, in Chloé Brière, Louise Fromont, Areg Navasarthian (dir), *Perspectives croisées sur la coopération transatlantique*, Bruxelles, Éditions de l’Université de Bruxelles, 2022, p. 187.

⁷⁷⁶ UNCITRAL, “Working Group III”.

⁷⁷⁷ Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Special Issue of the European Yearbook of International Law)(Switzerland: Springer, 2018), at 55-56.

or provisions be contained in the legal instrument itself creating the appeal body, it would be found in the application of the Code of Conduct of Adjudicators. As with all legal treaties, there could also be a separate provision allowing for the development of rules to allow for the functioning of this tribunal and in which could be addressed identified issues of disclosure, challenge, inappropriate ties or contacts, issue conflict and multiple roles and repeat appointments. Jurisprudence developed by this body, which would be predictable and consistent, could contribute to solidifying the existing body of jurisprudence on independence and impartiality of arbitrators. The key to this important contribution to jurisprudence would reside in the transparency and publicity criteria applied for its decisions.

891. The independence and impartiality of the adjudicators of the appeal mechanism, in addition to that of its adjudicators, will play a key role in returning legitimacy to ISDS. The selection and election of members will be of utmost importance. Envisaged mechanism might resemble those of international courts, such as the ICJ or that of the ICC. Evidently, however, election by member states will not dispel all existing concerns about independence and impartiality. These have already been identified for existing international tribunals as stemming from undue influence of states, the possibility to nominate *ad hoc* judges when the nationality is not represented (such as the ICJ) or the lack of a nominating or selection committee. Issues developed by the members in their position once elected could just as well cause concern to parties under the guise of issue conflict, considering further that with a standing body adjudicators will be expected to provide a consistent and predictable body of case law.

892. Distinguishing for the adjudicators on the possibility for them to be both on first instance and appeal level either through permanent selection or eventual rosters will also be crucial. This narrowing of the scope would also resolve some existing issues with the current system, for example if it were to be applied to the ICSID system where arbitrators can also act as annulment panel members (provided it is not for the same case).

893. Finally, the returning concern of “staff and secretariat loyalties”, as identified by Giorgetti, must be taken into account. This factor has already been denounced for the WTO,

and it would “depend on the degree of insulation of a secretariat from the parties.”⁷⁷⁸As Giorgetti writes: “Even in the absence of specific rules, the mere existence of an appeals mechanism has the potential to address many of the issues raised by critics in respect of the independence and impartiality of investment arbitration. For example, the instruments creating an appeals body may not specifically address permissible contact between arbitrators and parties, but in resolving specific cases the appeals mechanism may incrementally develop applicable standards. Similarly, in relation to multiple appointments, double-hatting, or issue conflicts, an appeals mechanism may contribute to developing jurisprudence that will be seen as more in line with the principles of independence and impartiality.”⁷⁷⁹

894. At the moment, WGIII is examining the different elements of an Appellate mechanism in an all-encompassing approach, no matter the ultimate form that this body takes. Accordingly, the latest Note by the Secretariat on “Possible reform of investor-State dispute settlement (ISDS) Appellate Mechanism”.⁷⁸⁰

895. In sum, considers Giorgetti, “the creation of an appeal system has the potential to address many concerns relating to independence and impartiality”. The proof will be made through its success and will hinge on the “appeal mechanism’s institutional form, powers, and constraints.” To address the most salient issues that might hinder its realisation, “such as double-hatting by arbitrators and multiple arbitral appointments” she suggests regulating these “ – in the applicable rules of procedure or in the legal instrument that establishes the appeals mechanism.”⁷⁸¹

896. Despite the promises of an appellate mechanism, a number of challenges and pitfalls remain. First, concerns will appear depending on the determined framework for this appeal level. While WGIII has decided to examine the content and provisions of such a body, pushing to later a decision on its architecture, perhaps again in a strategic decision to foster

⁷⁷⁸ Chiara Giorgetti et al, “Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options” (2020) 21 *Journal of World Investment & Trade* at 441 [Giorgetti et al].

⁷⁷⁹ *Ibid.*

⁷⁸⁰ UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate Mechanism”, Note by the Secretariat, for comment until 15 May 2022, online: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_for_the_website.pdf.

⁷⁸¹ Giorgetti et al *supra* note 778.

discussions and agree to as much as delegates can, while side-stepping the more controversial or divisive EU proposal for a MIC, there will nonetheless be a multitude of concerns to address depending on the form the Appeal mechanism takes. Whether as part of a MIC, as a standing appellate mechanism or as an ad hoc mechanism, whereby parties appoint their appeal panel upon agreement, relevant rules will differ.

897. Second, concerns regarding additional time and costs, the habitual flagship advantage of arbitration, must be taken into account.

898. Third, on a general level, this appeal mechanism will surely contribute to the fragmentation of international law – although this is may not be a real concern when one adopts the approach the refined fragmentation approach proposed by Peters, as we have.

C. COMPARING THE IMPACT OF THE MIC AND THE REFORM PROPOSALS AT WGIII ON THE INDEPENDENCE AND IMPARTIALITY OF ADJUDICATORS

899. Following the comparative analysis under the guise of the contribution and strength of the rule of law to the independence and impartiality of arbitrators and adjudicators, we are left with a final overarching examination, that of the impact of MIC and the Reform Proposals at WGIII on the independence and impartiality of Adjudicators.

900. Far from the disappointment denounced by Alvarez⁷⁸², the “complexification of the spaghetti bowl”⁷⁸³ should be a welcome addition to the investment arbitration framework. Even under the “building block” theory followed by the EU, these developments should be seen as contributing to a strengthening of the rule of law and ultimately the independence and impartiality of adjudicators. Although the perils of fragmentation have long been recognized, and the view that the international investment law community, and more generally, we should strive towards. The reality of this framework is more delicate and its portrayal as a “living organism”⁷⁸⁴ is closer to a pragmatic reality. At this point, an evolution in the theory appraising international law should evolve past the fear of fragmentation or the

⁷⁸² Alvarez, “The Long View”, *supra* note 55.

⁷⁸³ Bhagwati, “US Trade Policy”, *supra* note 151.

⁷⁸⁴ Meunier & Morin, *supra* note 291.

unique solution of uniform law. By its very nature, it has long been recognized that international law stems from pluralism. It is time that the actors of international investment law recognize the evolving practice which strives towards a jurisprudence *constante*, a certain homogeneity and a “refined fragmentation”.

901. Alongside the international tribunals which exist for arbitration, national courts are increasingly developing their expertise for this field of law. A leader in the field, the Paris Court of Appeal and the Cour de Cassation have long had specialized chambers with renowned arbitration practitioners at their helm. In the place of arbitration that is Paris, such a judicial measure was a necessity. The model has in recent years begun to multiply with a variety of high profile courts announcing that they created a division consecrated to international commercial decisions.

902. The rule of law assessment of the MIC, just as with that of the ICS, has revealed a framework that strives towards perfection and, as such, risks being impracticable. With the difference that the MIC is meant to be a multilateral tribunal and thus meant to answer to a wider body of parties.

D. THE MULTILATERAL INSTRUMENT ON ISDS REFORM: THE CRUX OF A SUCCESSFUL REFORM

903. Working Group III participants have recognized from the start of discussions that any reform would hinge on a successful treaty or instrument allowing parties to opt-in the reform(s) and permitting implementation. At its 38th session, the Working Group requested the Secretariat examine the possible means to implement the reform options and prepare a paper on a multilateral instrument on ISDS reform (A/CN.9/1004, para. 104). This resulted in a Note

presenting the key issues relevant to designing a multilateral instrument on ISDS reform, outlining how such an instrument could be structured to incorporate different reform options that would be developed by the Working Group (A/CN.9/1004, paras. 101 and 104). The focus of this Note is therefore not on the reform options, but on their implementation through a single instrument that would provide an overall framework.⁷⁸⁵

⁷⁸⁵ Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform, Note by the Secretariat, 16 January 2020, available online: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/003/15/PDF/V2000315.pdf?OpenElement>, para 2.

904. The aim of this work was to set out a possible structure of a multilateral instrument, allowing for a framework to implement multiple reform options with a built-in flexibility. At the same time, this analysis examined the relationship between the proposed multilateral instrument and investment treaties for its application to existing and future treaties, with an envisaged possible model based on the Mauritius and the OECD most recent conventions.

905. Initially framed as a mirror treaty to the Mauritius Convention on Transparency, with an opt-in mechanism allowing an accessible access to the Treaty combined with a low threshold for entry into force,⁷⁸⁶ the instrument has now been reframed as the Multilateral Instrument for ISDS Reform (the “MIIR”).⁷⁸⁷

906. Various solutions have been submitted by governments, providing solutions for instruments providing blocks, a core, a suite or an opt-in treaty. The guiding principle for the instrument is to allow for a variety of existing agreed reform to be available to parties, with a minimal impact on implementation.

907. Legal existing solutions focus on the possibility to provide a core or common guiding principles, accompanied by guidelines or annexes which would each contain one of the reform instruments envisaged, such as the Code, the stand alone appeal mechanism, the selection and nomination mechanism or the Multilateral Investment Court. State parties could there opt in to any or all of these options. Through the envisaged use of reservations or declarations, as is currently done with UNCLOS, for example, they could indicate which of the annexes or guidelines they seek to adhere to. A default option would also have to be provided in the case that the state party would not enter into a reservation or declaration. A conflict and/or compatibility clause should also be included to provide for the relationship of the treaties between themselves for the signatory states.

908. The existing models discussed from which inspiration can be taken for an opt-in treaty applying to existing and future treaties, thus reducing the potential impact of an interminable

⁷⁸⁶ Kaufmann-Kohler & Potestà, 2016, *supra* note 226.

⁷⁸⁷ Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform, Note by the Secretariat, 16 January 2020, available online: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/003/15/PDF/V2000315.pdf?OpenElement>.

amendment process for states, are the recently entered into Mauritius and OECD Conventions.

909. The United Nations Convention on Transparency in Treaty-based Investor State Arbitration (the “Mauritius Convention on Transparency”) was prepared in order to allow the new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Transparency Rules”), which came into effect on 1 April 2014, to apply broadly to the existing body of the approximately existing 3000 investor state treaties. In sum,

28. The Mauritius Convention on Transparency allows the Transparency Rules to be applied to all existing bilateral, regional, and multilateral investment treaties, and in all available arbitral fora, if both the respondent State and the investor’s home State are Contracting Parties to the Mauritius Convention or, alternatively, if the investor (as claimant) accepts the unilateral offer of the respondent State to apply the Transparency Rules. In essence, the “Mauritius Convention approach” can be described as introducing the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument. It introduces a flexible regime as it foresees a limited number of reservations that Contracting Parties may formulate (see above, para. 19).⁷⁸⁸

910. The OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“MLI”) is “aimed at modifying tax treaties between two or more Parties to the MLI, when those tax treaties have been listed by both Contracting Jurisdictions as an agreement they wish to cover in the MLI.”⁷⁸⁹ It is not an amending protocol but works alongside existing tax treaties. It modifies their application and implements measures addressing domestic tax base erosion and profit shifting (BEPS). It is flexible and allows parties to indicate to which tax treaty the MLI applies. It also provides alternatives for an application to minimum standards, as well as some options where parties may opt out, coupled with a multitude of optional provisions.⁷⁹⁰

⁷⁸⁸ *Ibid*, para 28.

⁷⁸⁹ *Ibid*.

⁷⁹⁰ Note by the OECD Directorate of Legal Affairs. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“Multilateral Instrument” or “MLI”). The Organization for Economic Cooperation and Development (OECD). <https://www.oecd.org/tax/treaties/legal-note-on-the-functioning-of-the-MLI-under-public-international-law.pdf>; Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The Organization for Economic Cooperation and Development (OECD). <https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>.

911. While this evaluation could appear as preliminary in view of the continuing discussions on all of the issues set out, at a stage where none have yet been agreed, there is use in this prospective exercise. First, it continues to emphasize the will for a coherent, flexible and consistent reform, including for its implementation. Second, the issue of implementation is a crucial one as no envisaged reform can successfully be brought forth if its execution is not provided. Third, while recognizing that this continues to be an “early stage”, the Secretariat was able to set out some pressing issues to resolve in the coming discussions:

(i) Should there be core provisions or minimum standards that should be adopted in the multilateral instrument and that all parties to that instrument must accept? If so, what should such core provisions or minimum standards address in order to result in an agreeable multilateral framework?

(ii) Should the instrument apply to both existing and future investment treaties?

(iii) What guiding principles should apply to determine the reform options that should be included in a multilateral instrument? For instance, should it be the nature of the instrument to implement the specific reform option?

(iv) Based on the assumption that the multilateral instrument would cover different reform options, should combinations of various options be provided for? How would the process of opting into or out of the reform options work? Should the instrument include the flexibility to allow over time accession by States Parties to certain reform options?

(v) What form for a multilateral instrument would be the most appropriate to keep the ISDS reformed framework coherent and relatively easy to refer to and understand for users?⁷⁹¹

912. The Secretariat therefore comes to the early conclusion that the initially envisaged model provided for in the CIDS Report prepared by Kauffman-Kohler and Potestà continues to be the most viable option, as it would allow states to choose from different modes of dispute settlement.

E. CONCLUSION: AN "À LA CARTE" REFORM FRAMEWORK COMPROMISE

913. It is rarely the case that one is as satisfied by a generic all-inclusive formula instead of a meticulously cured approach. And so it is with ISDS and its proposed reforms. The first attraction of ISDS is the flexibility of an enforceable system where the parties' will, to a large

⁷⁹¹ *Ibid*, para 89.

extent, allows them to be the master of the procedure with appropriate safeguards to ensure a fair, efficient and unbiased system.

914. Despite all best efforts by the EU to impose its own unilateral vision for a judicial approach which would bear resolution of the existing ISDS critics, the discussions at WGIII reveal the increasing interest for a tailored solution to everyone's needs.

915. The likeliest resolution of current reform efforts, in our opinion, are therefore expected to result in an "à la carte" approach whereby the users can select from an array of safeguards and ad hoc standing mechanism for selection and/or appeal, either through a multilateral convention, the engagement either in the BIT, or upon the initiation of a dispute.

916. The result of the rule of law assessment of ISDS for independence and impartiality for arbitrators revealed a faulty and "thin" rule of law system. For this reason, there is widespread agreement that ISDS is in dire need of reform. In contradistinction, the rule of law assessment of the ICS exposed an overly strict framework through a prescriptive draft Code of Conduct for Adjudicators. By attempting to provide an exceedingly perfect detailed framework, unfortunately, the EU has designed an unfeasible system.

917. True to the diplomatic origins of arbitration, the solution resides in a compromise of both stances. The proposal of a menu of "à la carte" options for the parties to choose from to strengthen the rule of law for adjudicators stands, in our opinion, most likely to be the option for reform selected by UNCITRAL WGIII.

918. The rule of law assessment according to Professor Castellarin's matrix provides safeguards unique and tailored to the parties' wishes. We have seen from the above assessment on Selection and Appointment of ISDS Arbitrators with the rule of law matrix that all three criteria are satisfied in the event that parties choose to resort to these mechanisms.

919. The first criteria, **legal certainty** is ensured through the separate *ad hoc* mechanisms which would be bound by detailed text. The certainty is ensured by a prescriptive framework guiding the selection and appointment of arbitrators, responding to concerns on the lack, or perceived lack, of legitimacy in this respect. As for the appeals mechanism, the certainty is

propounded by the possibilities for parties who wish to have access to an appeal and retain an arbitral mechanism. The legal certainty of the case law is satisfied, as, despite the absence of *stare decisis*, the consistency of awards will be protected, or at least increased, by this measure.

920. The second prong of the rule of law test, **procedural fairness**, is satisfied through the consideration of the two discussed separate mechanisms, for selection of arbitrators and appeal, which are designed to respond to this very concern.

921. Last, the third prong, **procedural transparency** would also be respected thanks to the existence of the mechanisms confirmed by the agreed text for the *ad hoc* mechanism. The publication of determinations of challenges, with respect to the selection and appointment of arbitrators, as well as the publication of appeals decisions, will be a core consideration to guarantee the respect of procedural transparency. Provided that the legal instruments designed to entertain these two proposals do mandate publication, the assessment will then yield a “thick” or “stronger” rule of law.

922. Our analysis reveals that, with all three prongs of the rule of law test satisfied, the proposal for discrete adhesion either on a case by case basis, or on a treaty basis, will contribute to strengthening the rule of law for ISDS. This result is achieved without suffocating the parties’ flexibility and the core autonomy inherent to arbitration.

923. The possibility for users to select from a bouquet of options, *a contrario*, will likely boost ISDS and contribute to its further possibility. The nature of the contestation and controversy of ISDS has evolved since Professor Franck’s call of the clarion in 2005 alerting to the legitimacy crisis of ISDS. Death chants have since calmed, although some pockets of contestation remain.⁷⁹² From a more global perspective, ISDS users and detractors alike have united in their object of reforming ISDS through their work at UNCITRAL WGIII. In that forum, all manners of reform are envisaged and discussed in true diplomatic fashion, from the old guard of ISDS, persuaded that the system functions and should continue as is, to the

⁷⁹² Charles N. Brower and Jawad Ahmad, ‘For the Two-Headed Nightingale to the Fifteen- Headed Hydra: The Many Follies of the Proposed International Investment Court’ (2018) 41 Fordham Int’l L. J. 791.

new visionaries who have nary a concern with the evolutions proposed to protect ISDS while erecting new safeguards.

924. The EU's role in the reform discussions is singular as a negotiating stance. It is undoubtedly thanks to the EU's own internal reform and introduction of the ICS, coupled with pressures on the international community to adopt a MIC that the *travaux* of UNCITRAL WGIII were directed to ascertain the necessity thereof and address ISDS reform. This demonstrates the importance of the EU as a negotiating partner, who, at that time, had concluded what was referred to as the largest trading partnership with Canada, and had approached an even more prestigious trade overture with its negotiations with the United States. Even though these negotiations were aborted, the EU retains the glory and glow of having, albeit for a few years, been involved in the possibility of opening an immense trading market. The power of the EU, as a major negotiating partner, was clearly established.

925. At the same time, its role before WGIII is somewhat restrained by its very affirmed position. Having designed and introduced a new internal model replacing ISDS, and supporting a plea to replace the complex interrelations of international investment agreements with a permanent court, the MIC, the EU, as a negotiator, announced its position before the mandate and scope of the working group was even defined. Unfortunately, this leaves the EU with very little flexibility to adapt its position or vary its stance. The red lines defined by the EU for itself appear to be much stricter than many other countries. In a forum where multilateral discussions have been ongoing since 2017, and expected to last until 2026, the EU has pitted itself against many negotiating partners. In simpler terms, the EU, by attempting to present a strong, clear and pro-active position for reform, has instead drastically limited itself and constrained its negotiating positions. The question will be how the EU manages to overcome the obstacle it has itself created.

CONCLUSION : IN FAVOR OF A PRO-ISDS REFORM

« La vérité, c'est que l'arbitrage n'est pas, dans son essence, un phénomène juridique; l'arbitrage est dans son essence un phénomène distinct du droit, antagoniste au droit, et c'est la raison pour laquelle les juristes n'arrivent ni à le saisir parfaitement ni à le régler convenablement. »⁷⁹³

René David

926. In the quest to quell legitimacy concerns for the independence and impartiality of adjudicators in the context of ISDS reform, we navigated in this dissertation multiple legal orders, i.e. the European legal order and the Arbitral legal order, assessing through each of the proposed reform scenarios the strength of the rule of law.

927. Having determined that any proposed reform would only contribute to the fragmentation of international investment law, we nevertheless submit that in the refined fragmentation perspective proposed by Peters, the impact is limited and contributes positively to a practical and efficient reform of ISDS with minimal negative impact.

928. Recalling our research question, which was to determine whether the EU reforms for ICS and the MIC would strengthen the rule of law for the independence and impartiality of arbitrators, the analysis conducted leads us to the clear conclusion that it does. However, and as noted in the analysis, it also consists in a restrictive and perhaps even impossible approach. While the EU has all power to enact a reform within its own internal framework, and must now live with the consequences, it does not have the power to impose this framework within international negotiations.

929. WGIII deliberations and work conducted so far reveal an appetite by states for ISDS reform without a full-fledged acceptance of a multilateral investment court. Rather, the red line uniting both detractors and proponents of a reform stands in the adoption of “à la carte” reform alternatives. By adding to the existing building blocks and providing users of ISDS with complementary structures to heighten the rule of law, identified concerns with ISDS can be quelled. Bias and lack of independence will be dealt with through requirements for greater disclosure, strengthened mechanisms for challenges, increased publicly, and the possibility

⁷⁹³ René David, p. 9.

for states to refer to a selection mechanism for adjudicators. In addition, a stand-alone appeal facility will provide reassurance with respect of consistency and correction of awards, including on the basis of issues related to independence and impartiality.

930. Analyzing the reform alternatives with the assistance of the Castellarin rule of law matrix, we are able to rank clearly the proposed reforms from weakest to more robust proposal. ISDS as it currently exists is ranked on the lowest echelon (1), with only a weak rule of law for the independence and impartiality of arbitrators, principally due to the failings of safeguards for the selection, disclosure, challenge and removal procedures. Then comes the revised ISDS chapter with additional safeguards as provided in the CPTPP (2). Following are the two proposed alternatives for reform before the WGIII for a standalone selection mechanism and standalone appeal mechanism – both of which provide the flexibility for parties to agree at any time of the proceedings to decide to complement their procedure and refer to these mechanism, coupled with heightened legal certainty, procedural fairness and transparency that governs with the existence of these specific mechanisms which directly answer concerns with respect to the legitimacy of arbitrators in ISDS (3). In fourth place, we submit that the Multilateral Investment Court proposed by the EU increases the strength of the rule of law to a level that may become impractical and uncomfortable for adjudicators, due to potentially excessive constraints on the Members (4). Last, finally, comes the Investment Court System now integrated by the EU to its investment policy and part of several newly negotiated agreements (5). The ICS comes last mainly due to the restrictive limitations imposed through its Code of Conduct to Members of the Tribunal, and in particular to the prohibition to act as counsel and limitations of their other roles.

931. Following the in-depth analysis conducted in this dissertation, we therefore believe that any combination of the standalone selection mechanism and appellate level, together with a model of investment chapter following the recent CPTPP would provide adequate, efficient, flexible and robust rule of law safeguards for the independence and impartiality of adjudicators. All to restore faith in the system in the wake of its ongoing legitimacy crisis. We suggest that future research could be conducted on the detail of these possible combinations and the implementation and enforcement issues related to such a proposal.

932. The theoretical exercise of a doctoral dissertation calls for an in-depth analysis of singular and specific questions of law. It may sometimes then be transformed in a practical exercise to assist policy makers and practitioners to aid in shaping the future legal systems. This is the objective with the current thesis. As with Working Group III at UNCITRAL, the present research has examined in detail, in a comparative perspective, and with the rule of law as silver lining to guide us, the potential benefits and drawbacks of the Investment Court System at the EU level, and those of a Multilateral Court System at the international level for the role and ethics of adjudicators.

933. In our opinion, the wide-ranging menu of reforms made available on their own or as part of an adaptable package are more likely to succeed than the EU proposal for ISDS reform. The standalone appointment and selection mechanism for arbitrators have the most chances of succeeding as a viable reform to ISDS, offering, on balance, increased safeguards to a functioning system that will ensure that legitimacy is once more perceived as restored due to a strengthened rule of law. It will also minimize the potential pitfalls tied to implementation of complex international conventions. The *caveat*, however, will always remain with the time and cost efficiency of any such reform. Coming back to the wider mandate of WGIII to consider reform of ISDS, we recall the tension between concerns with respect to consistence and independence and impartiality, on the one hand, and those of time and costs related to a proceeding, on the other. We note the risk, ever present, of setting up a system that would take “twice the time, and cost twice as much” as the original ISDS system.⁷⁹⁴

934. In closing, we must insist, once more, on the capital importance of the perceptions. As with perceived bias, perceived lack of legitimacy can be just as harmful to a fully functional dispute resolution system. The EU has provided a picture perfect system, on paper, to resolve any criticism that the system is skewed, private, unfair and advantages foreign investors. And yet, although we conclude that the ICS and MIC model have little chance of fostering change or being widely adopted, even these state-of-the-art reform models have garnered criticism.

⁷⁹⁴ Sikora, *supra* note 38.

935. It is never possible to please all. Nor is it to provide a perfect system. The system that we must strive for is one that provides the strongest rule of law guarantees, without being paralyzed by impossible standards to implement. Legal certainty, procedural fairness and procedural transparency may all be guaranteed in ways that ensure that both States and foreign investors have a forum devoid of bias, and that their grievances may be heard by independent and impartial adjudicators.

936. This is what the stand-alone selection and appointment systems will provide on the multilateral terrain. And most certainly the inspiration of this model could trickle down to bilateral and regional trade agreements with minor adjustments to the bodies of treaties compared to the proposed EU reform.

937. Unfortunately, any reform to ISDS which does not buy into the EU proposal will only further contribute to the fragmentation of international law. In Gaillard's tradition of the legal arbitral order, an additional mechanism, or even a full array of additional safeguards for the parties to choose from in appointing their arbitrators, will in the grander scheme of international investment law create additional instances within which the existing complex and interrelated instruments must exist. And like the "living organism" with which this complex body of treaties has sometimes been compared⁷⁹⁵, the new instruments will adapt and live within the existing framework. The pretention for the EU to provide for a unified resolution for dispute resolution in international investment law while reforming the system with an unprecedented overhaul is, at the very least, ambitious. Perhaps even visionary. But, by its very nature, international investment law and ISDS provide for a system whereby interconnections and interrelations between treaties form the core of the system. Such a fragmented body also provides for flexibility and the autonomy of the arbitral legal order.⁷⁹⁶ While laudable, the EU's ambition risks being defeated by the harsh realities of competing interests and different accepted systems for dispute resolution. If all participants to WGIII agree that reform is necessary, it appears less likely with every session that they will strike a compromise reflecting the EU's MIC proposal.

⁷⁹⁵ Meunier & Morin, *supra* note 291.

⁷⁹⁶ Gaillard, *Legal Theory of International Arbitration*, *supra* note 292; Bermann, 2020, *supra* note 292.

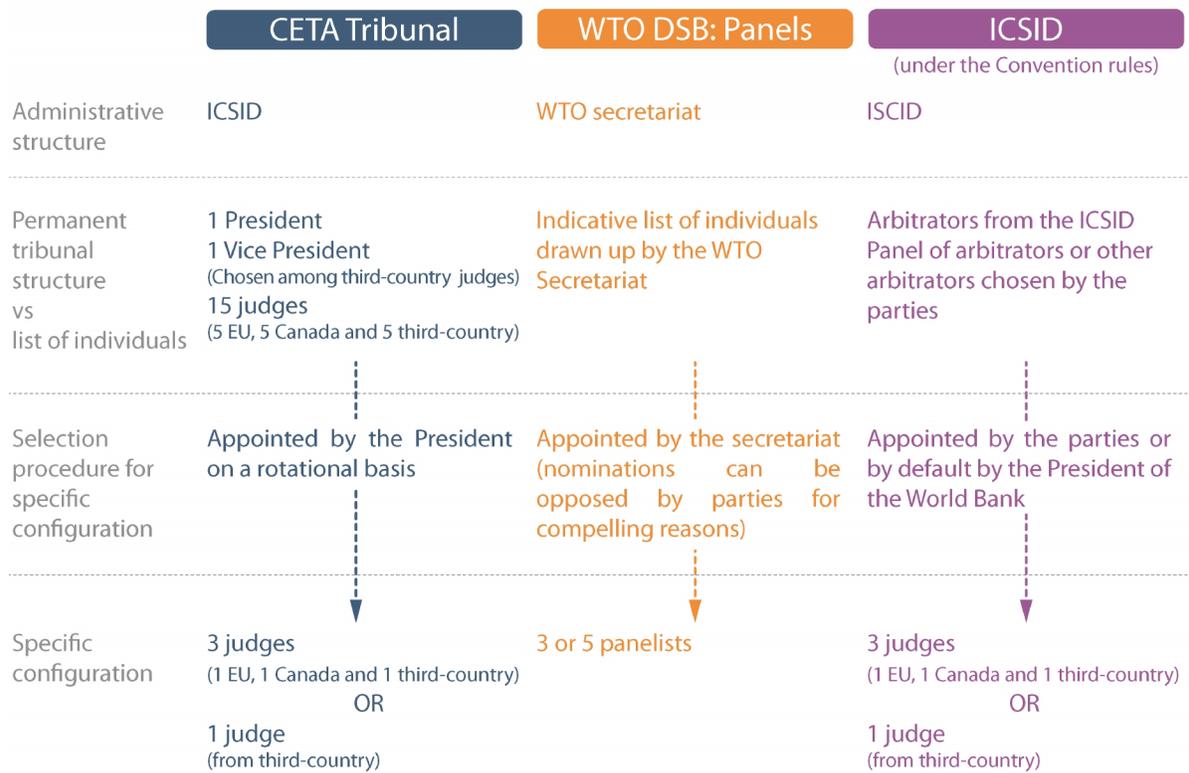
938. This thesis, and the second part in particular, is based on past and current reform attempts. Working Group III has explicitly indicated that there remains much work for it to complete, despite advancing at a brisk pace in the negotiations. Wider factors such as the new American administration may also skew the perspective and the role and impact of the US in the reform of the system. Although the Biden Administration, at the time of writing, has indicated its wish to entertain a stricter Buy America approach, thus favoring extreme protectionism, there are other indicia that the current administration will be more open to multilateralism, discussion with China and other key players of trade, than the prior Trump administration. And while we should always be wary in international law of focusing to an undue level on national players, we must at the same time recognize the importance of politics in international law. The impact and impetus that major players have had in the development of international law, including international investment law, explains to a large extent the legitimacy crisis that has afflicted ISDS.

939. The perception that ISDS is faulty begs for a solution. But, contrary to the EU's position, ISDS is far from dead. We must profit from its lessons and build upon the existing virtues of the system, such as with the recently revamped investment chapter of the CPTPP, to provide a stronger and more efficient model of dispute resolution. Introducing an arbitrator selection and appointment system as well as a standalone appeal mechanism "à la carte" will, in our view, confer the right amount of safeguards to preserve an efficient and flexible system. For a stronger, safer and user-oriented ISDS focused on preserving and protecting the rule of law within the system, once the conversation at UNCITRAL WGIII has borne its fruits, we might not, all told, hope for a better resolution.

ANNEX I COMPARISON OF CETA TRIBUNAL, WTO DSB PANELS AND ICSID ARBITRAL PANELS

From arbitration to the investment court system (ICS): The evolution of CETA rules⁷⁹⁷

Figure 3 – Comparison of CETA Tribunal, WTO DSB panels and ICSID arbitral panels



Source: EPRS.

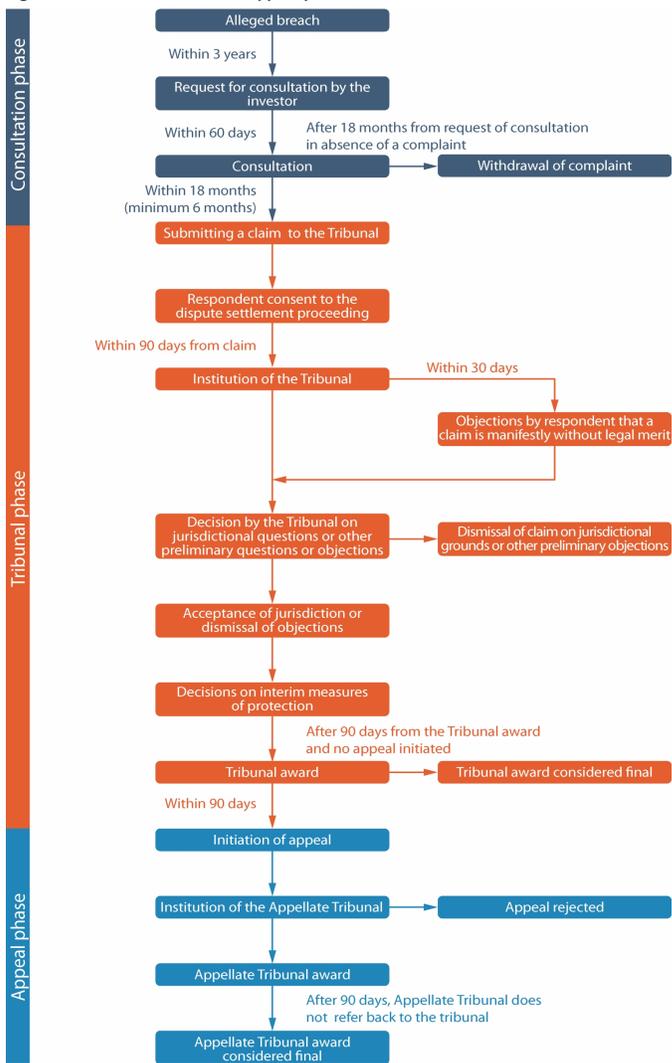
Figure 4 – Comparison of CETA Appellate Tribunal, WTO DSB Appellate Body and ICSID appeal facility (1994 proposal)

⁷⁹⁷ Laura Puccio & Roderick Harte, “From arbitration to the investment court system (ICS): The evolution of CETA rules” (2017) In-Depth Analysis PE 607.251 (European Parliamentary Research Service) online: European Parliament <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA\(2017\)607251_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf)>.

	CETA appellate Tribunal	WTO DSB: Appellate Body	ICSID Appeal facility: 2004 proposal
Administrative structure	CETA Joint Committee must decide: <ul style="list-style-type: none"> • administrative support • remuneration • number of members • other administrative decisions 	WTO secretariat	ICSID
Permanent tribunal structure vs list of individuals	EU judges Canada judges Third-country judges	7 Appellate Body members appointed for four-year terms	15 elected members composing the Appeal Panel
Selection procedure for specific configuration	Appointed by the president on a rotational basis	Appointed on a rotational basis	Appointed by the Secretary General of ICSID
Specific configuration	Judges (Numbers to be determined)	3 Appellate Body Members	3 Appeal Tribunal members

Source: EPRS.

Figure 5 – From consultation to appeal procedure under CETA



Source: EPRS.

⁷⁹⁸ Ibid.

ANNEX III QM-CCIAG-SURVEY-ISDS-2020

Chart 1: Views on various dispute resolution mechanisms

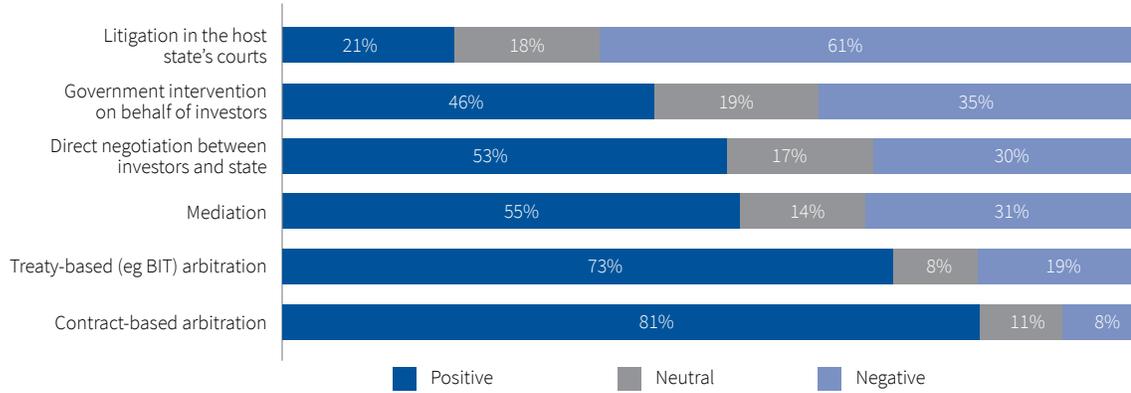


Chart 2: Factors that influence an investment decision

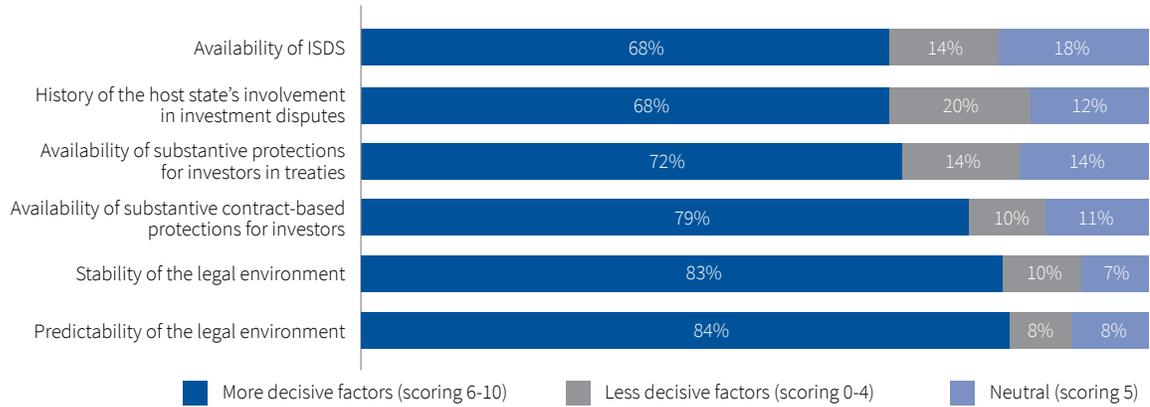


Chart 3: Assessment of commonly accepted ISDS perceptions

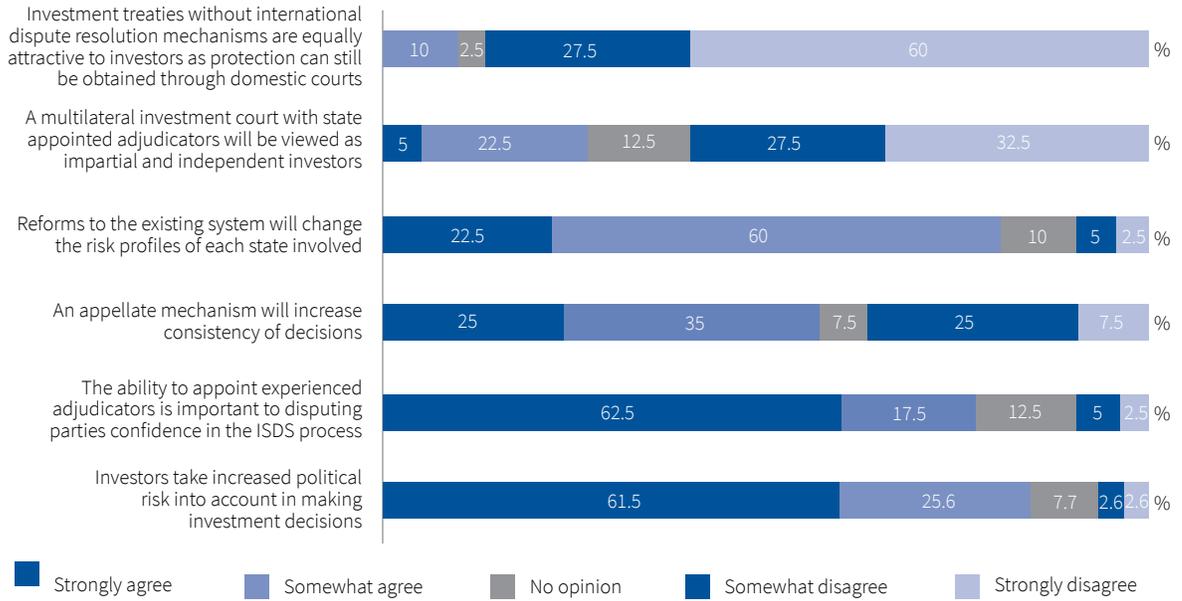


Chart 4: Scope for reforms that can improve consistency of ISDS

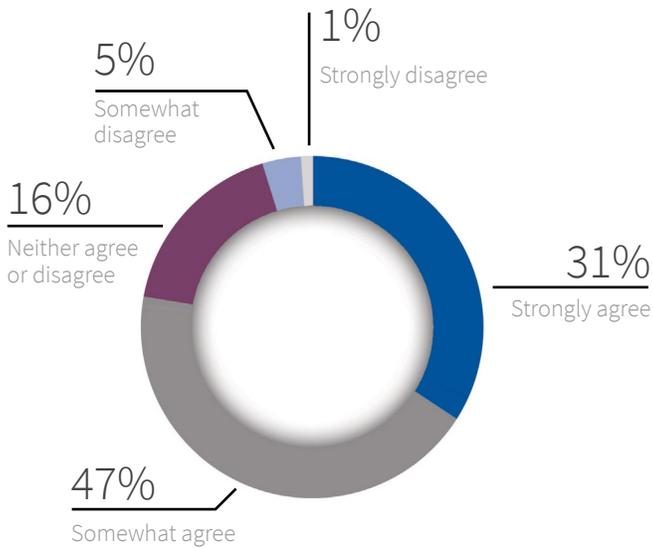


Chart 5: Scope for reforms that can improve efficiency of ISDS

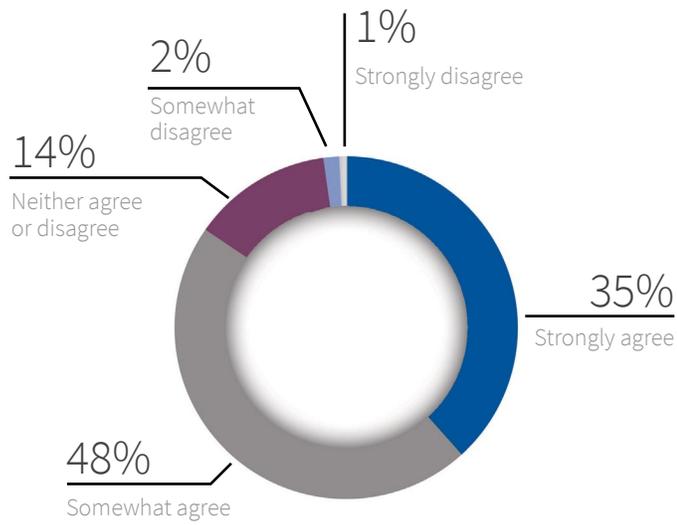


Chart 6: Proposal for an advisory centre for investment disputes

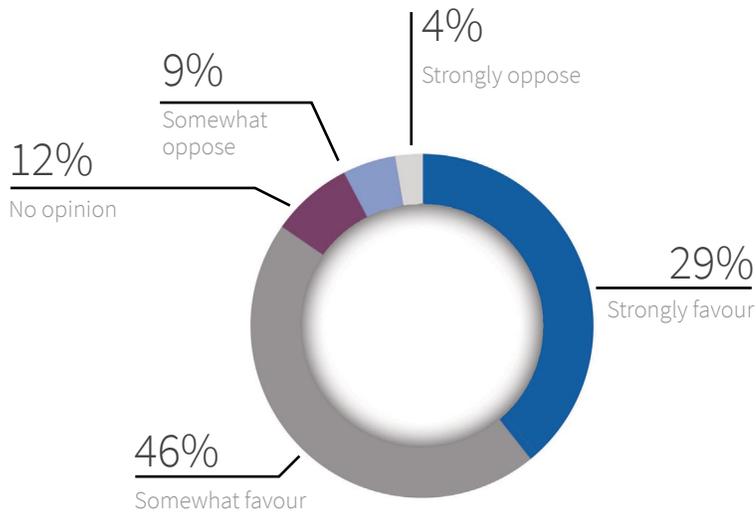


Chart 7: Who should have access to the proposed advisory centre services?

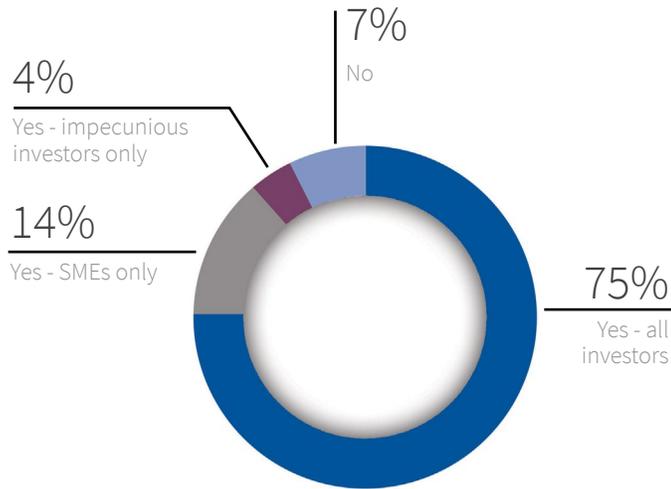


Chart 8: Investor views on services an advisory centre could provide²

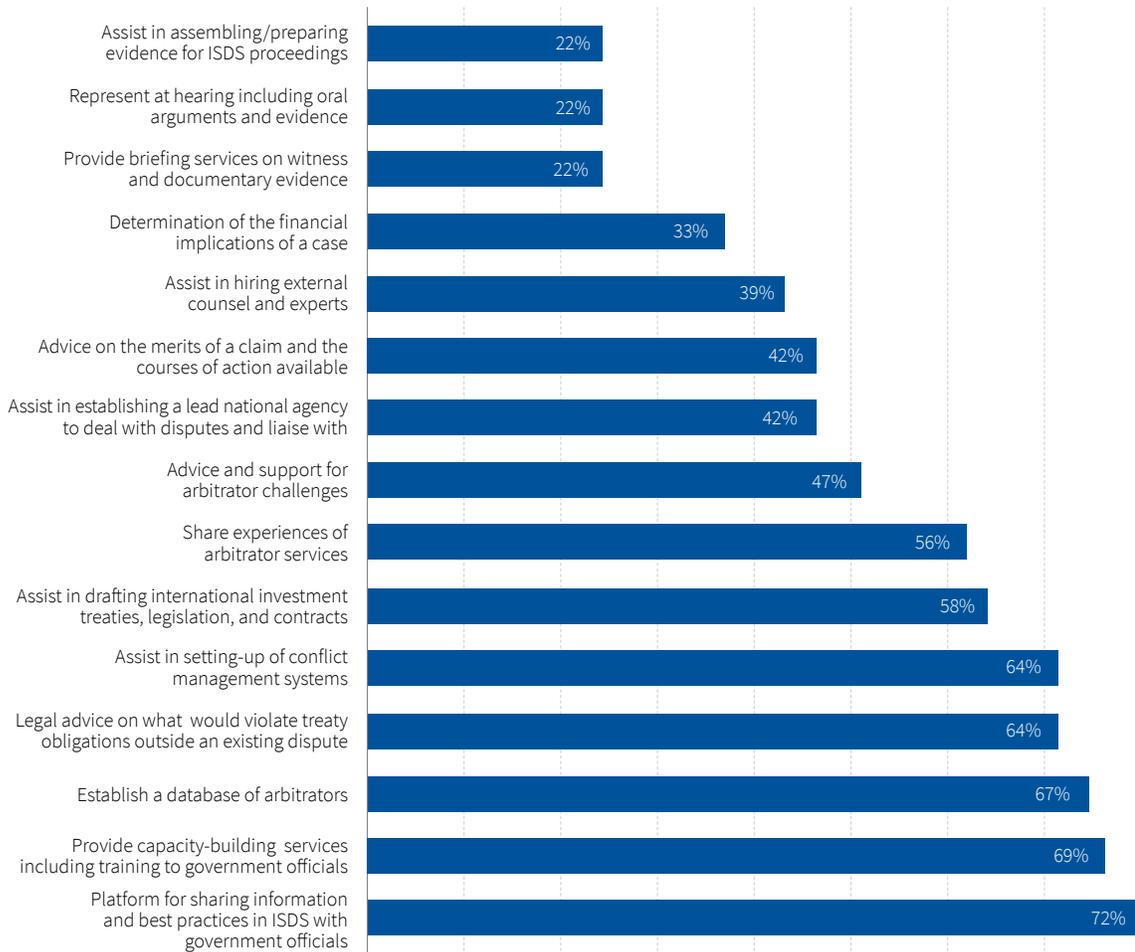


Chart 9: Would a code of conduct for arbitrators improve ISDS?

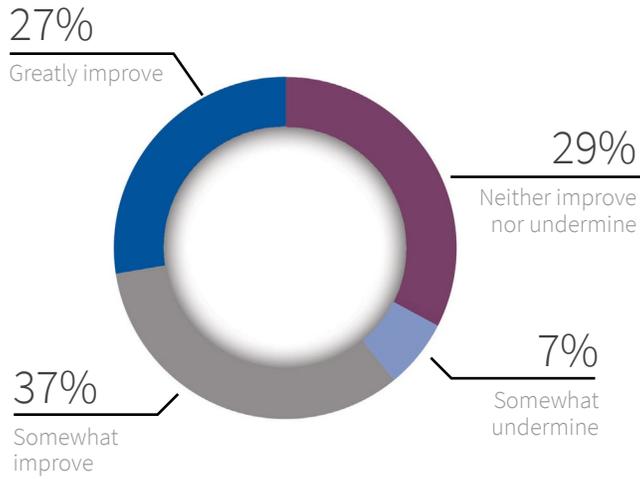


Chart 10: Impact of restrictions on the activity of arbitrators

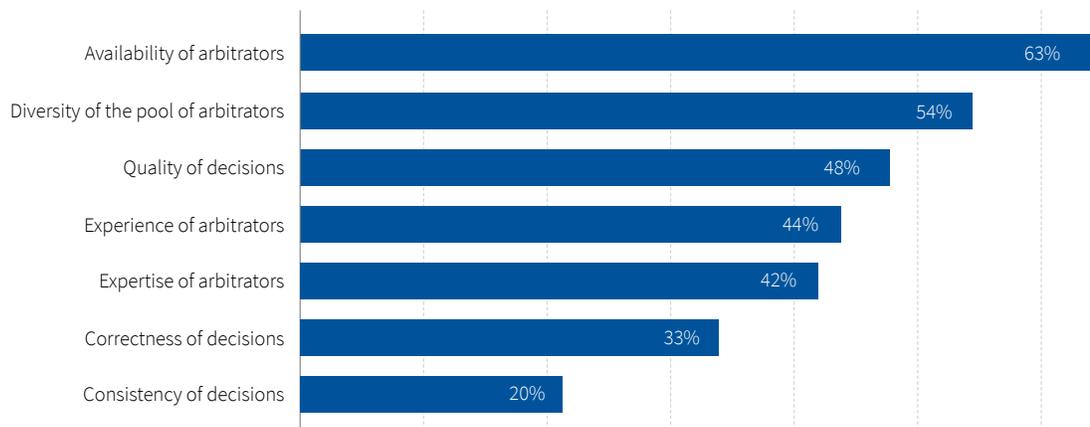


Chart 11: Do you think the following mechanisms for the selection and appointment of ISDS arbitrators, if introduced, would increase your confidence in the impartiality and independence of the system?

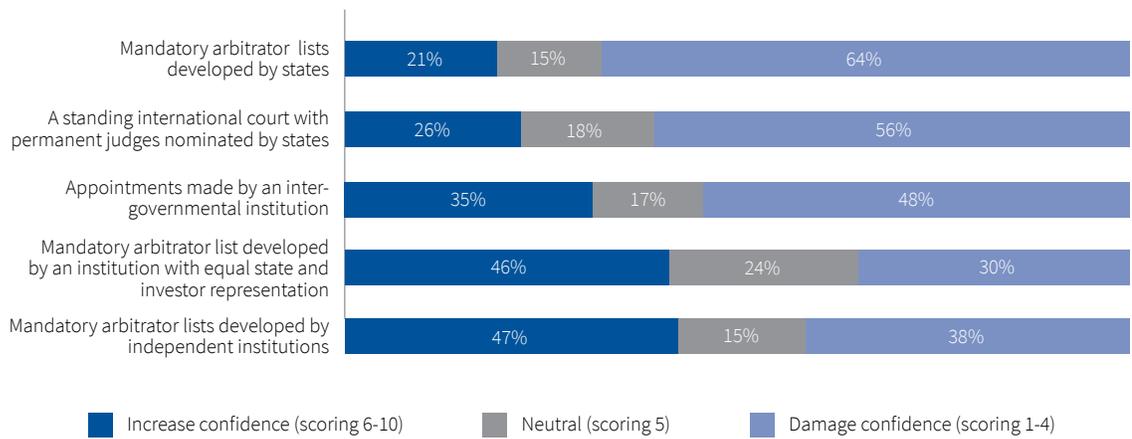


Chart 12: Impact of the method of appointment of ISDS tribunals on risk assessment

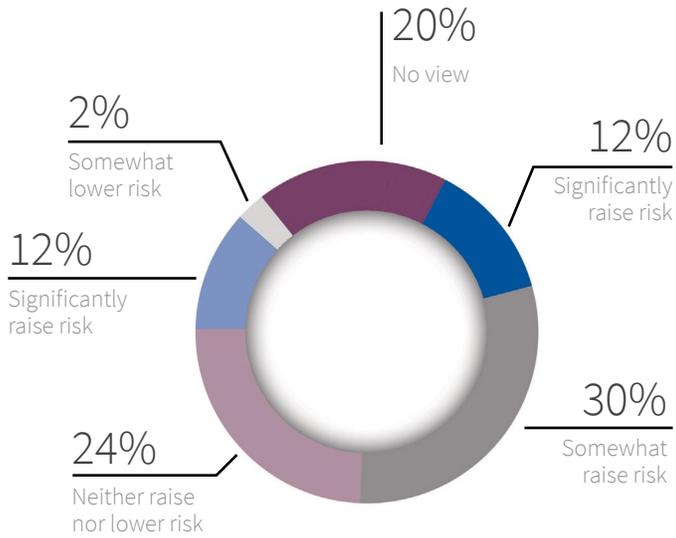


Chart 16: Scope of review an appellate mechanism could undertake

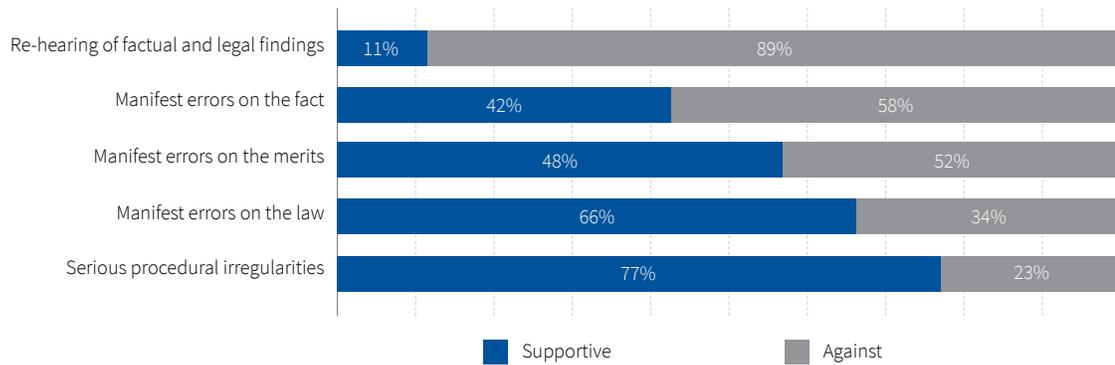


Chart 17: Investor views on the creation of a MIC for ISDS to replace arbitrators

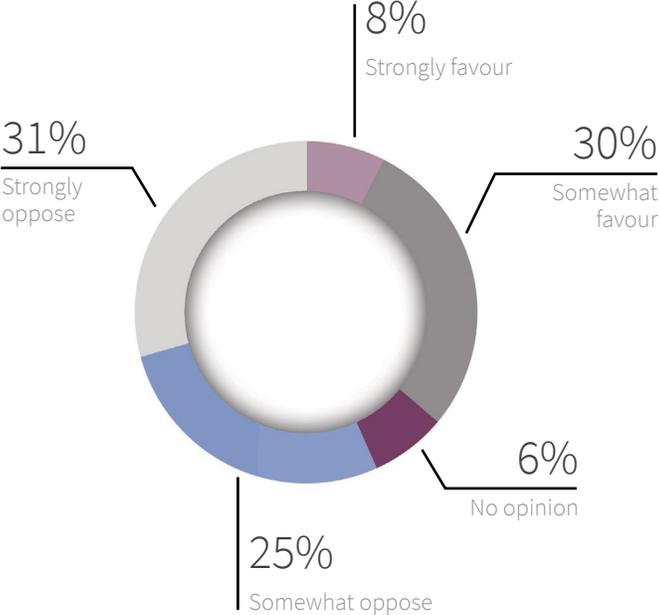


Chart 18: Would you use the MIC?

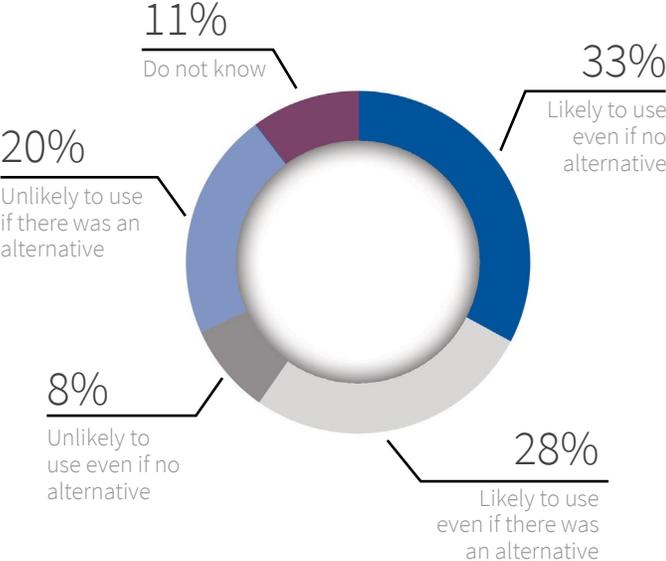


Chart 19: Views on mandatory mediation prior to arbitration

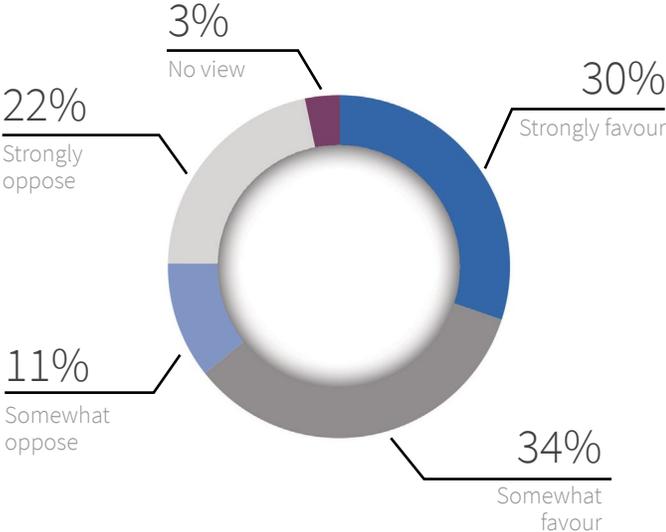
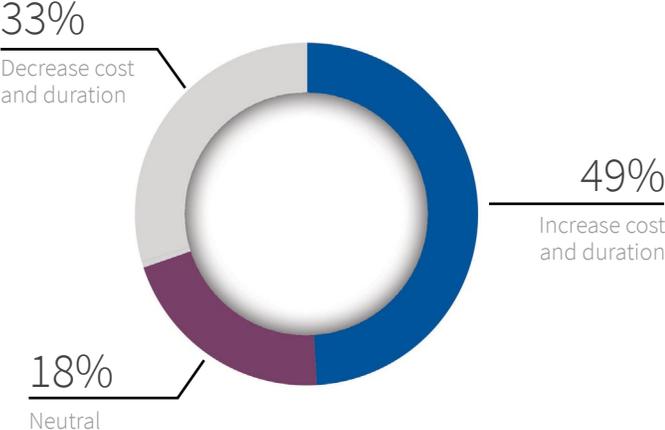
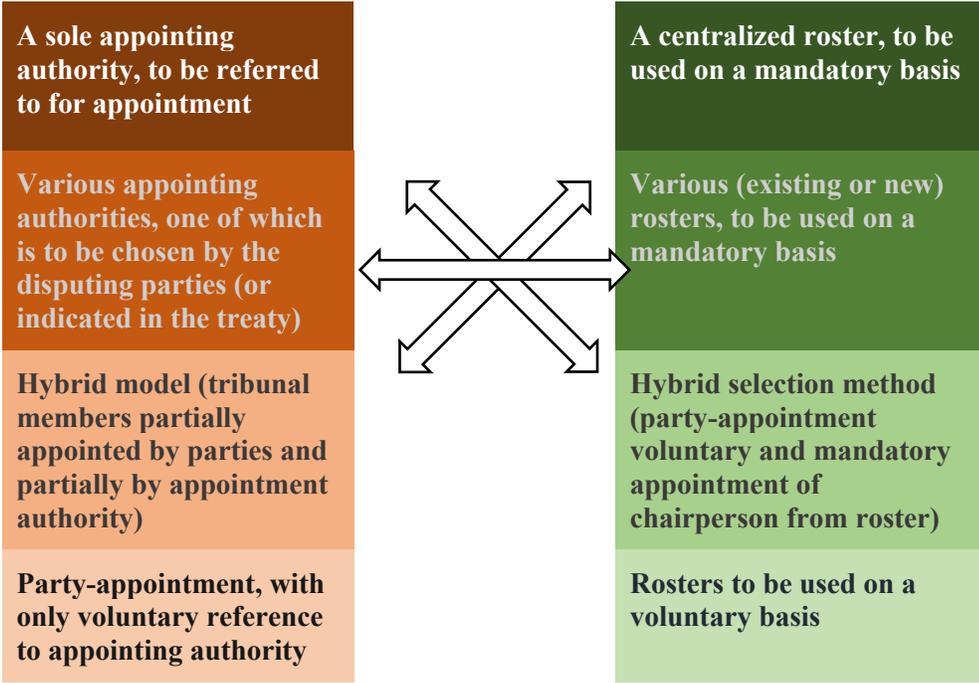


Chart 20: Impact of mandatory mediation on cost and duration of ISDS



ANNEX IV UNCITRAL WORKING GROUP DRAFT WORKING PAPER CHART POSSIBLE COMBINATIONS FOR THE SELECTION AND APPOINTMENT OF ISDS ARBITRATORS



ANNEX V UNCITRAL/ICSID SUMMARY OF CODES OF CONDUCT IN FTAs

(updated as of 8 May 2020, including new treaties and updated references)

Annex B Summary of Codes of Conduct in FTAs

(Updated as of 8 May 2020, including new treaties and updated references)

Annex B provides excerpts from a variety of recent Codes of Conduct, and serves as background to the draft text proposed by the UNCITRAL & ICSID Secretariats on 1 May 2020.

PROVISION	NAFTA	EU-Singapore IPA	Australia-Japan EPA	CETA	CP TPP	EU-Vietnam FTA	EU-Vietnam IPA	Indonesia-Australia CEPA
	(Only applicable to Chapter 19 and 20) Full text available here	(Annex 7 Code of Conduct for Members of the Tribunal, The Appeal Tribunal and Mediators) (FTA in force Nov. 21, 2019/ IA will enter in force when ratified by all EU MS) Full text available here	(Annex B Code of Conduct of Arbitrators, Rules of Procedure of Arbitral Tribunals) (EPA in force Jan. 15, 2015) Full text available here	(Annex 29-B (State-State)) (In force provisionally Sept. 21, 2017) (Code applicable to ISDS has not yet been published) Full text available here	(Chapter 9, Section B, Code for ISDS) (In force Dec. 30, 2018) Full text available here	(Annex 15-B (State-State)) (Draft) Full text available here	(Annex 11 Code of Conduct for Members of the Tribunal, Members of The Appeal Tribunal and Mediators) (Draft) Full text available here	(Annex 14-A Code of Conduct for Arbitrators) (CEPA ratified by Australia in Nov. 2019, and Indonesia in Feb. 2020) Full text available here
Definitions /scope	A. In this Code of Conduct, "Agreement" means the North American Free Trade Agreement; "assistant" means a person who, under the terms of appointment of a member, conducts research or provides support for the member; "candidate" means (a) an individual whose name appears on a roster or list established under Article 1414, Annex 1901.2 or Article 1903, 1904 or 2011, or (b) an individual who is under consideration for appointment as a member of a panel pursuant to Annex 1901.2 or Article 1903, 1904 or 2011, or (c) an individual who is under consideration for appointment as a member of a committee pursuant to Annex 1904.13 or Article 1905; "member" means (a) a member of a panel constituted pursuant to Annex 1901.2 or Article 1414, 1903, 1904, 2008 or 2011, (b) a member of an extraordinary challenge committee constituted pursuant to Article 1905, (c) a member of a special committee constituted pursuant to Article 1905; "participant" has the meaning assigned in the Rules of Procedure for Article 1904 Binational Panel Reviews.	1. In this Code of Conduct: "Member" means a Member of the Tribunal or a Member of the Appeal Tribunal established pursuant to Chapter Three (Dispute Settlement) Section A (Resolution of Disputes between Investors and Parties); "mediator" means a person who conducts mediation in accordance with Chapter Three (Dispute Settlement) Section A (Resolution of Disputes between Investors and Parties); "candidate" means an individual who is under consideration for selection as a Member; "assistant" means a person who, under the terms of appointment of a Member, conducts research or provides assistance to the Member; "staff", in respect of a Member, means persons under the direction and control of the Member, other than assistants.	I. Scope 1. This Code of Conduct shall apply to each person serving as an arbitrator, arbitrator's assistant or administration personnel involved in the proceedings of an arbitral tribunal (hereinafter referred to as "covered person") established under Article 13.6 (Establishment and Composition of Arbitral Tribunals) of the Agreement. 2. Each arbitrator shall take all reasonable measures to ensure that his or her assistants or administration personnel comply with Parts IV to VII of this Code of Conduct. The Parties may agree to exempt any covered person, other than an arbitrator, from application of a part or all of this Code of Conduct. II. Governing Principle Each arbitrator shall be independent and impartial, and shall avoid direct or indirect conflicts of interest. Furthermore, each arbitrator and former arbitrator shall respect the confidentiality of proceedings of the arbitral tribunal. Through the observance of such standards of conduct the integrity and impartiality of dispute settlement proceedings conducted pursuant to Chapter 19 (Dispute Settlement) of the Agreement are preserved.	Definitions 1. For this Chapter and under this Code of Conduct: assistant means a person who, under the terms of appointment of an arbitrator, conducts, researches or provides assistance to the arbitrator; candidate means an individual whose name is on the list of arbitrators referred to in Article 29.8 and who is under consideration for selection as an arbitrator under Article 29.7; mediator means a person who conducts a mediation in accordance with Article 29.5; arbitrator means a member of an arbitration panel established under Article 29.7; proceeding, unless otherwise specified, means an arbitration proceeding; staff, in respect of an arbitrator, means persons under the direction and control of the arbitrator, other than assistants.	Definitions 1. For the purposes of this Code of Conduct: arbitrator means a member of a tribunal constituted pursuant to Article 9.22 (Selection of Arbitrators); assistant means a person who, under the terms of appointment of an arbitrator, conducts research or provides support for the arbitrator; candidate means an individual who is under consideration for selection as an arbitrator pursuant to Article 9.22 (Selection of Arbitrators); expert means a person appointed pursuant to Article 9.27 (Expert Reports) or applicable arbitration rules; family member means the spouse of an arbitrator or candidate; or a parent, child, grandparent, grandchild, sister, brother, aunt, uncle, niece or nephew of the arbitrator or candidate or spouse of the arbitrator or candidate (including whole and half blood relatives and step relatives); or the spouse of such an individual. Family member also includes any resident of an arbitrator's or candidate's household whom the arbitrator or candidate treats as a member of his or her family; Rules means applicable rules pursuant to Article 9.19.4 (Submission of a Claim to	Definitions 1. For the purposes of this Code of Conduct: (a) "arbitrator" means a member of an arbitration panel established under Article 15.7 (Establishment of the Arbitration Panel); (b) "assistant" means a person who, under the terms of appointment of an arbitrator, conducts research or provides assistance to that arbitrator; (c) "candidate" means an individual whose name is on the list of arbitrators referred to in Article 15.23 (List of Arbitrators) and who is under consideration for selection as a member of an arbitration panel under Article 15.7 (Establishment of the Arbitration Panel); (d) "mediator" means a person who conducts a mediation procedure in accordance with Annex 15-C (Mediation Mechanism); (e) "proceedings", unless otherwise specified, means dispute settlement proceedings of an arbitration panel under Chapter 15 (Dispute Settlement); and (f) "staff", in respect of an arbitrator, means a person under the direction and control of the arbitrator, other than assistants.	ARTICLE 1 Definitions For the purposes of this Code of Conduct: (a) "Member" means a Member of the Tribunal or a Member of the Appeal Tribunal established pursuant to Section B (Resolution of Disputes between Investors and Parties); (b) "mediator" means a person who conducts the mediation procedure in accordance with Article 3.31 (Mediation) and Annex 10 (Mediation Mechanism for Disputes between Investors and Parties); (c) "candidate" means an individual who is under consideration for selection as a Member of the Tribunal or a Member of the Appeal Tribunal; (d) "assistant" means a person who, under the terms of appointment of a member, assists the member in his research or supports him in his duties; (e) "staff", in respect of a member, means persons under the direction and control of the member, other than assistants.	
	(Only applicable to Chapter 19 and 20) Full text available here	(Annex 7 Code of Conduct for Members of the Tribunal, The Appeal Tribunal and Mediators) (FTA in force Nov. 21, 2019/ IA will enter in force when ratified by all EU MS) Full text available here	(Annex B Code of Conduct of Arbitrators, Rules of Procedure of Arbitral Tribunals) (EPA in force Jan. 15, 2015) Full text available here	(Annex 29-B (State-State)) (In force provisionally Sept. 21, 2017) (Code applicable to ISDS has not yet been published) Full text available here	(Chapter 9, Section B, Code for ISDS) (In force Dec. 30, 2018) Full text available here	(Annex 15-B (State-State)) (Draft) Full text available here	(Annex 11 Code of Conduct for Members of the Tribunal, Members of The Appeal Tribunal and Mediators) (Draft) Full text available here	(Annex 14-A Code of Conduct for Arbitrators) (CEPA ratified by Australia in Nov. 2019, and Indonesia in Feb. 2020) Full text available here
	"Party" means a Party to the Agreement; "proceeding", unless otherwise specified, means (a) a panel review under Article 1903 or 1904, (b) an extraordinary challenge proceeding under Annex 1904.13, (c) a special committee proceeding under Article 1905, (d) a panel proceeding under Chapter 20, or (e) a proceeding in a dispute arising under Chapter 11 or 14 to which Chapter 20 applies; "Secretariat" means the Secretariat established pursuant to Article 2002; and "staff", in respect of a member, means persons under the direction and control of the member, other than assistants. B. Any reference made in this Code of Conduct to an Article, Annex or Chapter is a reference to the appropriate Article, Annex or Chapter of the Agreement.	2. Every candidate and Member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Members shall not take instructions from any organization or government with regard to matters before the Tribunal or the Appeal Tribunal. Former Members must comply with the obligations established in paragraphs 15 through 21 of this Code of Conduct.	III. Observance of the Governing Principle To ensure the observance of the Governing Principle of this Code of Conduct, each arbitrator is expected: (a) to adhere strictly to the provisions of Chapter 19 (Dispute Settlement) of the Agreement and the Rules of Procedure; (b) to maintain confidentiality; (c) to disclose the existence or development of any interest, relationship or matter that the arbitrator could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that arbitrator's independence or impartiality; and	Responsibilities of candidates and arbitrators 2. Every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former arbitrators must comply with the obligations established in paragraphs 16 through 19.	2. Responsibilities to the Process Each candidate, arbitrator and former arbitrator shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.	Responsibilities 2. Every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, be independent and impartial, avoid direct and indirect conflicts of interests and observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former arbitrators shall comply with the obligations set out in rules 15 to 18 of this Code of Conduct.	ARTICLE 2 Responsibilities to the Process Every candidate and every Member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, avoid direct and indirect conflicts of interest.	Responsibilities to the Process 1. Every arbitrator shall avoid impropriety and the appearance of impropriety, be independent and impartial, avoid direct and indirect conflicts of interests and observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved. Former arbitrators shall comply with the obligations in paragraphs 16, 17, and 18 of 19.

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	(Only applicable to Chapter 19 and 20) (Full text available here)	(Annex 7 Code of Conduct for Members of The Tribunal, The Appeal Tribunal and Mediators) (FTA in force Nov. 21, 2019/ IA will enter in force when ratified by all EU MS) (Full text available here)	(Annex 8 Code of Conduct of Arbitrators, Rules of Procedure of Arbitral Tribunals) (EPA in force Jan. 15, 2015) (Full text available here)	(Annex 29-B (State-State)) (In force provisionally Sept. 21, 2017) (Code applicable to ISDS has not yet been published) (Full text available here)	(Chapter 9, Section B, Code for ISDS) (In force Dec. 30, 2018) (Full text available here)	(Annex 15-B (State-State)) (Draft) (Full text available here)	(Annex 11 Code of Conduct for Members of The Tribunal, Members of The Appeal Tribunal and Mediators) (Draft) (Full text available here)	(Annex 14-A Code of Conduct for Arbitrators) (CEPA ratified by Australia in Nov. 2019, and Indonesia in Feb. 2020) (Full text available here)
Disclosure	Introductory Note: The governing principle of this Code of Conduct is that a candidate or member must disclose the existence of any interest, relationship or matter that is likely to affect the candidate's or member's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created where a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquirer would disclose, would conclude that a candidate's or member's ability to carry out the duties with integrity, impartiality and competence is impaired. These disclosure obligations, however, should not be interpreted so that the burden of detailed disclosure makes it impractical for persons in the legal or business community to serve as members, thereby depriving the Parties and participants of the services of those who might be best qualified to serve as members. Thus, candidates and members should not be called upon to disclose interests, relationships or matters whose bearing on their role in the proceeding would be trivial. Throughout the proceeding, candidates and members have a continuing obligation to disclose	3. Prior to his or her appointment as a Member, a candidate shall disclose to the Parties any past or present interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters. 4. A Member shall communicate matters concerning actual or potential violations of this Code of Conduct to the disputing parties and the non-disputing Party. 5. Members shall at all times continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 3 of this Code of Conduct and shall disclose them. The disclosure obligation is a continuing duty which requires a Member to disclose any such interests, relationships or matters that may arise during any stage of the proceeding at the earliest time the Member becomes aware of them. The Member shall disclose such interests, relationships or matters by informing the disputing parties and the non-disputing Party, in writing, for their consideration.	(d) to take due care in the performance of his or her duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject matter of the proceedings. 3. Prior to confirmation of her or his selection as an arbitrator, at the time of the request, shall receive a copy of this Code of Conduct from the requesting Party. Any such person, prior to confirmation of his or her appointment, shall disclose in writing to the requesting Party any information relevant to the matter under dispute, such as: (a) financial interests (e.g. investments, loans, shares, interests, other debts), business interests (e.g. directorship or other contractual interests) and property interests relevant to the dispute in question; (b) professional interests relevant to the dispute in question (e.g. any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question); (c) other active interests relevant to the dispute in question (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question); (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements); and (e) employment or family interests relevant to the dispute	Disclosure obligations 3. Prior to confirmation of her or his selection as an arbitrator under this Chapter, a candidate shall disclose any interest, relationship or matter that is likely to affect her or his independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters. 4. Without limiting the generality of the foregoing, candidates shall disclose the following interests, relationships and matters: (1) any financial interest of the candidate; (a) in the proceeding or in its outcome, and (b) in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration; (2) any financial interest of the candidate's employer, partner, business associate or family member; (a) in the proceeding or in its outcome, and (b) in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be	3. Governing Principles (a) Each candidate or arbitrator shall be independent and impartial, and shall avoid direct or indirect conflicts of interest. (b) Each arbitrator and former arbitrator shall respect the confidentiality of tribunal proceedings. (c) Each candidate or arbitrator shall disclose the existence of any interest, relationship or matter that is likely to affect the candidate's or arbitrator's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created when a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquirer would disclose, would conclude that a candidate's or arbitrator's ability to carry out the duties with integrity, impartiality and competence is impaired. (d) Upon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or potential dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement. (e) An arbitrator shall comply with internationally recognised standards or guidelines	Disclosure Obligations 3. Prior to the appointment as an arbitrator under Chapter 15 (Dispute Settlement), a candidate shall disclose any interests, relationships, or matters, that are likely to affect that candidate's independence or impartiality, or that might reasonably create an appearance of impropriety or bias in the proceedings. To that end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships or matters. 4. A candidate or arbitrator shall communicate, in writing, matters concerning actual or potential violations of this Code of Conduct to the Trade Committee for consideration by the Parties. 5. Once appointed, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in rule 3 of this Code of Conduct and shall disclose them by informing the Trade Committee, in writing, for consideration by the Parties. The disclosure obligation is a continuing duty which requires an arbitrator to disclose any such interests, relationships or matters that may arise during any stage of the proceedings.	ARTICLE 3 Disclosure Obligations 1. Prior to their appointment, candidates shall disclose to the Parties any past and present interest, relationship or matter that is likely to affect their independence or impartiality or that might reasonably create an appearance of impropriety or bias. To that end, a candidate shall make all reasonable efforts to become aware of any such interest, relationship or matter. 2. Members shall communicate matters concerning actual or potential violations of this Code of Conduct in writing to the disputing parties Members shall at all times continue to make all efforts to become aware of any interests, relationships or matters referred to in paragraph 1. Members shall disclose such interests, relationships or matters to the disputing parties. [FN n. 1: For greater certainty, this obligation does not extend to information which is already in the public domain or was known, or should have reasonably been known, by all disputing parties.]	Disclosure Obligations 2. Prior to confirmation of his or her selection as an arbitrator under this Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters. 3. Once selected, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships and matters referred to in paragraph 2 and shall disclose them by communicating them in writing to the disputing parties. The obligation to disclose is a continuing duty, which requires an arbitrator to disclose any such interests, relationships and matters that may arise during any stage of the proceeding.

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	interests, relationships and matters that may bear on the integrity or impartiality of the dispute settlement process. This Code of Conduct does not determine whether or under what circumstances the Parties will disqualify a candidate or member from being appointed to, or serving as a member of, a panel or committee on the basis of disclosures made. A candidate shall disclose any interest, relationship or matter that is likely to affect the candidate's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters. The candidate shall disclose such interests, relationships and matters by completing an Initial Disclosure Statement provided by the Secretariat and sending it to the Secretariat. Without limiting the generality of the foregoing, candidates shall disclose the following interests, relationships and matters: (1) any financial interest of the candidate (a) in the proceeding or in its outcome, and (b) in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration;	2. The obligation of self-disclosure referred to in paragraph 1 shall also apply to the arbitrator after the confirmation of his or her appointment and throughout the proceedings. During the course of proceedings, the arbitrator shall disclose in writing to the Parties any information relevant to paragraph 1 when he or she becomes aware of it. 3. In meeting these disclosure requirements, personal privacy shall be respected. The application of these disclosure requirements shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve as arbitrators.	in question (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members). 2. The obligation of self-disclosure referred to in paragraph 1 shall also apply to the arbitrator after the confirmation of his or her appointment and throughout the proceedings. During the course of proceedings, the arbitrator shall disclose in writing to the Parties any information relevant to paragraph 1 when he or she becomes aware of it. 3. In meeting these disclosure requirements, personal privacy shall be respected. The application of these disclosure requirements shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve as arbitrators.	decided in the proceeding for which the candidate is under consideration; (3) any past or existing financial, business, professional, family or social relationship with the interested parties in the proceeding, or their counsel, or such relationship involving a candidate's employer, partner, business associate or family member, and (4) public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same matters. 5. A candidate or arbitrator shall communicate matters concerning actual or potential violations of this Code of Conduct to the CETA Joint Committee for consideration by the Parties. 6. Once selected, an arbitrator shall continue to make all reasonable efforts to become aware of interests, relationships or matters referred to in paragraph 3 and shall disclose them. The disclosure obligation is a continuing duty which requires an arbitrator to disclose such interests, relationships or matters that may arise during all stages of the proceeding. The arbitrator shall disclose such interests, relationships or matters by informing the CETA Joint Committee promptly, in writing, for consideration by the Parties.	regarding direct or indirect conflicts of interest, such as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. (f) In the event of an alleged breach of this Code of Conduct, the Rules governing the arbitration shall apply to any challenge, disqualification or replacement of an arbitrator. 4. Disclosure Obligations (a) Throughout the tribunal proceeding, candidates and arbitrators have a continuing obligation to disclose interests, relationships and matters that may bear on the integrity or impartiality of the dispute settlement process. (b) The disputing parties or the Secretary-General, as the appointing authority for an arbitration referred to in Article 9.2.2 (Selection of Arbitrators), will provide a candidate a copy of this Code of Conduct and the Initial Disclosure Statement set out in the Appendix to this Code of Conduct. (c) A candidate shall submit the Initial Disclosure Statement set out in the Appendix to this Code of Conduct to the disputing parties or the Secretary-General, as the appointing authority, no later than seven days after receipt of that Statement. [FN 1: This subparagraph does not prevent the appointment of arbitrators by the disputing parties prior to the submission of the Initial Disclosure Statement.] [FN 2: For greater certainty, the submission of the Initial Disclosure Statement is without	Disclosure Obligations (a) Throughout the tribunal proceeding, candidates and arbitrators have a continuing obligation to disclose interests, relationships and matters that may bear on the integrity or impartiality of the dispute settlement process. (b) The disputing parties or the Secretary-General, as the appointing authority for an arbitration referred to in Article 9.2.2 (Selection of Arbitrators), will provide a candidate a copy of this Code of Conduct and the Initial Disclosure Statement set out in the Appendix to this Code of Conduct. (c) A candidate shall submit the Initial Disclosure Statement set out in the Appendix to this Code of Conduct to the disputing parties or the Secretary-General, as the appointing authority, no later than seven days after receipt of that Statement. [FN 1: This subparagraph does not prevent the appointment of arbitrators by the disputing parties prior to the submission of the Initial Disclosure Statement.] [FN 2: For greater certainty, the submission of the Initial Disclosure Statement is without		

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	(2) any financial interest of the candidate's employer, partner, business associate or family member (a) in the proceeding or in its outcome, and (b) in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration; (3) any past or existing financial, business, professional, family or social relationship with any interested parties in the proceeding, or their counsel, or any such relationship involving a candidate's employer, partner, business associate or family member; and (4) public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same goods. B. A member in an Article 1904 proceeding shall, after receiving the complaint, disclose any interests, advocacy or representation referred to in paragraph A(1)(b) or (2)(b) or subsection (4) by completing a Supplementary Disclosure Statement provided by the Secretariat and sending it to the Secretariat for consideration by the appropriate Parties. C. Once appointed, a member shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in section A and shall disclose them. The obligation to disclose is a continuing duty which requires a member to disclose				prejudice to any further disclosure required pursuant to the Rules.] (d) A candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the tribunal proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters. Therefore, a candidate shall disclose, at a minimum, the following interests, relationships and matters: (i) any financial or personal interest of the candidate in: (A) the tribunal proceeding or its outcome; and (B) an administrative proceeding, a domestic judicial proceeding or another international dispute settlement proceeding that involves issues that may be decided in the tribunal proceeding for which the candidate is under consideration; (ii) any financial interest of the candidate's employer, business partner, business associate or family member in: (A) the tribunal proceeding or its outcome; and (B) an administrative proceeding, a domestic judicial proceeding or another international dispute settlement proceeding that involves issues that may be decided in the tribunal proceeding for which the candidate is under consideration; (iii) any past or current financial, business, professional, family or			

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	(Only applicable to Chapter 19 and 20) (Full text available here)	(Annex 7 Code of Conduct for Members of The Tribunal, The Appeal Tribunal and Mediators) (FTA in force Nov. 21, 2019/ IA will enter in force when ratified by all EU MS) (Full text available here)	(Annex B Code of Conduct of Arbitrators, Rules of Procedure of Arbitral Tribunals) (EPA in force Jan. 15, 2015) (Full text available here)	(Annex 29-B (State-State)) (In force provisionally Sept. 21, 2017) (Code applicable to ISDS has not yet been published) (Full text available here)	(Chapter 9, Section B, Code for ISDS) (In force Dec. 30, 2018) (Full text available here)	(Annex 15-B (State-State)) (Draft) (Full text available here)	(Annex 11 Code of Conduct for Members of The Tribunal, Members of The Appeal Tribunal and Mediators) (Draft) (Full text available here)	(Annex 14-A Code of Conduct for Arbitrators) (CEPA ratified by Australia in Nov. 2019, and Indonesia in Feb. 2020) (Full text available here)
	any such interests, relationships and matters that may arise during any stage of the proceeding. The member shall disclose such interests, relationships and matters by communicating them in writing to the Secretariat for consideration by the appropriate Parties.				social relationship with any interested parties in the tribunal proceeding, or their counsel, or any such relationship involving a candidate's employer, business partner, business associate or family member; and [FN: For greater certainty, "interested parties" may include the home country of the investor.] (iv) public advocacy or legal or other representation concerning an issue in dispute in the tribunal proceeding or involving the same investment. (e) Once appointed, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in subparagraph (d) and shall disclose them. The obligation to disclose is a continuing duty that requires an arbitrator to disclose any such interests, relationships and matters that may arise during any stage of the tribunal proceeding. (f) In the event of any uncertainty regarding whether an interest, relationship or matter must be disclosed under subparagraph (d) or subparagraph (e), a candidate or arbitrator should err in favour of disclosure. Disclosure of an interest, relationship or matter is without prejudice as to whether the interest, relationship or matter is covered by subparagraph (d) or subparagraph (e), or whether it warrants recusal, amelioration or disqualification. (g) The disclosure obligations set out in subparagraphs (a) through (f) should not be interpreted so that the burden of detailed disclosure makes it impractical			

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					for individuals in the legal or business community to serve as arbitrators, thereby depriving the disputing parties of the services of those who might be best qualified to serve as arbitrators. Thus, candidates and arbitrators should not be called upon to disclose interests, relationships or matters whose bearing on their role in the tribunal proceeding would be trivial.			
Duties	Part III: The Performance of Duties by Candidates and Members A. A candidate who accepts an appointment as a member shall be available to perform, and shall perform, a member's duties thoroughly and expeditiously throughout the course of the proceeding. B. A member shall ensure that the Secretariat can, at all reasonable times, contact the member in order to conduct panel or committee business. C. A member shall carry out all duties fairly and diligently. D. A member shall comply with the provisions of Chapter 19 or 20 and the applicable rules. E. A member shall not deny other members the opportunity to participate in all aspects of the proceeding. F. A member shall consider only those issues raised in the proceeding and necessary to a decision and shall not delegate the duty to decide to any other	6. A Member shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding and with fairness and diligence. 7. A Member shall consider only those issues raised in the proceeding and necessary for a ruling and shall not delegate this duty to any other person. 8. A Member shall take all appropriate steps to ensure that his or her assistants and staff are aware of, and comply with, paragraphs 2, 3, 4, 5, 19, 20 and 21 of this Code of Conduct. 9. A Member shall not engage in ex parte contacts concerning the proceeding.	V. Performance of Duties 1. In performing his or her duties, each arbitrator shall recognise that prompt settlement of disputes is essential to the effective functioning of the Agreement. 2. An arbitrator shall carry out all duties fairly and diligently. 3. To ensure transparency and impartiality, no arbitrator may discuss any aspect of the subject matter referred to the arbitral tribunal, in the absence of either Party or in the absence of the other arbitrators. 4. An arbitrator shall consider only those issues raised in the proceeding and necessary to a decision and shall not delegate the duty to decide to any other person, except as provided in the Rules of Procedure. 5. An arbitrator shall not communicate matters concerning actual or potential violations of this Code of Conduct unless the communication is to both Parties or is necessary to ascertain whether that arbitrator has violated or may violate this Code of Conduct.	Duties of arbitrators 7. Upon selection an arbitrator shall be available to perform and shall perform her or his duties thoroughly and expeditiously throughout the course of the proceeding, and with fairness and diligence. 8. An arbitrator shall consider only those issues raised in the proceeding and necessary for a ruling and shall not delegate this duty to any other person. 9. An arbitrator shall take all appropriate steps to ensure that he or she is contactable, at all reasonable times, by the Secretariat-General, disputing parties, arbitration institution in charge of the proceeding and other arbitrators of the tribunal in order to conduct tribunal work. (c) An arbitrator shall comply with the provisions of Chapter 9 Section 8 (Investor-State Dispute Settlement) and the Rules. (d) An arbitrator shall not deny other arbitrators the opportunity to participate in all aspects of the tribunal proceeding. (e) An arbitrator shall consider only those issues raised in the tribunal proceeding and necessary to make a decision, order or award.	5. Performance of Duties by Candidates and Arbitrators (a) A candidate who accepts an appointment as an arbitrator shall be available to perform, and shall perform, once the arbitrator is appointed pursuant to Article 9.22 (Selection of Arbitrators), an arbitrator's duties thoroughly, fairly, diligently and expeditiously throughout the course of the tribunal proceeding. (b) An arbitrator shall ensure that he or she is contactable, at all reasonable times, by the Secretariat-General, disputing parties, arbitration institution in charge of the proceeding and other arbitrators of the tribunal in order to conduct tribunal work. (c) An arbitrator shall comply with the provisions of Chapter 9 Section 8 (Investor-State Dispute Settlement) and the Rules. (d) An arbitrator shall not deny other arbitrators the opportunity to participate in all aspects of the tribunal proceeding. (e) An arbitrator shall consider only those issues raised in the tribunal proceeding and necessary to make a decision, order or award.	Duties of Arbitrators 6. An arbitrator shall be available to perform, and shall perform his duties thoroughly, expeditiously, and with fairness and diligence, throughout the course of the proceedings. 7. An arbitrator shall consider only those issues raised in the proceedings and necessary for a ruling and shall not delegate this duty to any other person. 8. An arbitrator shall take all appropriate steps to ensure that his assistant and staff are aware of, and comply with, paragraphs 2, 3, 4, 5, 16, 17 and 18 of this Code of Conduct. 9. An arbitrator shall not engage in ex parte contacts concerning the proceedings.	ARTICLE 4 Duties of Members 1. Members shall perform their duties thoroughly and expeditiously throughout the course of the proceedings and shall do so with fairness and diligence. 2. Members shall consider only those issues raised in the proceedings which are necessary for a ruling and shall not delegate this duty to any other person. 3. Members shall take all appropriate steps to ensure that their assistants and staff are aware of, and comply with, Articles 2, 3, 5 and 7 of this Code of Conduct. 4. Members shall not discuss any aspect of the subject matter of the proceedings with a disputing party or the disputing parties in the absence of the other members of the division of the Tribunal or the Appeal Tribunal.	Performance of Duties by Arbitrators 4. An arbitrator shall comply with the provisions of this Chapter and the applicable rules of procedure. 5. On selection, an arbitrator shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding with fairness and diligence. 6. An arbitrator shall not deny other arbitrators the opportunity to participate in all aspects of the proceeding. 7. An arbitrator shall consider only those issues raised in the proceeding and necessary to rendering a decision and shall not delegate the duty to decide to any other person. 8. An arbitrator shall take all appropriate steps to ensure that his or her assistant and staff are aware of, and comply with, paragraphs 1, 2, 3, 18, 19 and 20. 9. An arbitrator shall not engage in ex parte contacts concerning the proceeding. 10. An arbitrator shall not communicate matters concerning actual or potential violations by another arbitrator unless the communication is to

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PROVISION	NAFTA	EU- Singapore IPA	Australia-Japan EPA	CETA	CPTPP	EU-Vietnam FTA	EU-Vietnam IPA	Indonesia-Australia CEPA
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	person, except as provided in the applicable rules. G. A member shall take all reasonable steps to ensure that the member's assistant and staff comply with Parts I, II and VI of this Code of Conduct. H. A member shall not engage in ex parte contacts concerning the proceeding. I. A candidate or member shall not communicate matters concerning actual or potential violations of this Code of Conduct unless the communication is to the Secretariat or is necessary to ascertain whether that candidate or member has violated or may violate the Code.	10. A Member must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political	VI. Independence and Impartiality of Arbitrators 1. An arbitrator shall be independent and impartial. An arbitrator shall not allow past or existing financial, business, professional, family or social	Independence and impartiality of arbitrators 11. An arbitrator shall avoid creating an appearance of bias and shall not be influenced by self-interest, outside pressure, political considerations, public	(f) An arbitrator shall not delegate the duty to make a decision, order or award to any other individual. (g) An arbitrator shall take all reasonable steps to ensure that his or her assistants and staff comply with paragraphs 2 (Responsibilities to the Process), 4(a), 4(d), 4(e), 4(f) and 4(g) (Disclosure Obligations), 5(c), 5(h) and 5(i) (Performance of Duties by Candidates and Arbitrators), and 8 (Maintenance of Confidentiality) of this Code of Conduct. (h) An arbitrator shall not engage in any ex parte contact concerning the tribunal proceeding. (i) A candidate or arbitrator shall only communicate matters concerning actual or potential violations of this Code of Conduct to the Secretary-General, disputing parties and arbitration institution in charge of the proceedings, or if necessary to ascertain whether that candidate or arbitrator has violated or may violate this Code of Conduct, to the Secretary-General, the disputing parties, and arbitration institution in charge of the proceedings. (j) Each arbitrator shall keep a record and render a final account of the time devoted to the proceeding and of his or her expenses, as well as the time and expenses of his or her staff and assistants. 6. Independence and impartiality of Arbitrators (a) A candidate or arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall not create an appearance of impropriety or an			both disputing parties or is necessary to ascertain whether that arbitrator has violated or may violate this Annex.
Independence and Impartiality	Part IV: Independence and Impartiality of Members A. A member shall be independent and impartial. A member shall act in a fair manner and shall avoid creating	10. A Member must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political	VI. Independence and Impartiality of Arbitrators 1. An arbitrator shall be independent and impartial. An arbitrator shall not allow past or existing financial, business, professional, family or social	Independence and impartiality of arbitrators 11. An arbitrator shall avoid creating an appearance of bias and shall not be influenced by self-interest, outside pressure, political considerations, public	(f) An arbitrator shall not delegate the duty to make a decision, order or award to any other individual. (g) An arbitrator shall take all reasonable steps to ensure that his or her assistants and staff comply with paragraphs 2 (Responsibilities to the Process), 4(a), 4(d), 4(e), 4(f) and 4(g) (Disclosure Obligations), 5(c), 5(h) and 5(i) (Performance of Duties by Candidates and Arbitrators), and 8 (Maintenance of Confidentiality) of this Code of Conduct. (h) An arbitrator shall not engage in any ex parte contact concerning the tribunal proceeding. (i) A candidate or arbitrator shall only communicate matters concerning actual or potential violations of this Code of Conduct to the Secretary-General, disputing parties and arbitration institution in charge of the proceedings, or if necessary to ascertain whether that candidate or arbitrator has violated or may violate this Code of Conduct, to the Secretary-General, the disputing parties, and arbitration institution in charge of the proceedings. (j) Each arbitrator shall keep a record and render a final account of the time devoted to the proceeding and of his or her expenses, as well as the time and expenses of his or her staff and assistants. 6. Independence and impartiality of Arbitrators (a) A candidate or arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall not create an appearance of impropriety or an		ARTICLE 5 Independence and Impartiality of Members 1. Members shall be independent and impartial and avoid creating an appearance of bias or	Independence and impartiality of Arbitrators 11. An arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall avoid creating

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	an appearance of impropriety or an apprehension of bias. B. A member shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or fear of criticism. C. A member shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of his or her duties. D. A member shall not use the member's position on the panel or committee to advance any personal or private interests. A member shall avoid actions that may create the impression that others are in a special position to influence him or her. E. A member shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgment. F. A member shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the member's impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.	considerations, public clamour, loyalty to a disputing party or a non-disputing Party or fear of criticism. 11. A Member shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of his or her duties. 12. A Member may not use his or her position on the Tribunal to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence him or her. 13. A Member may not allow financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgment. 14. A Member must avoid entering into any relationship or acquiring any financial interest that is likely to affect him or her impartiality or that might reasonably create an appearance of impropriety or bias.	relationships or responsibilities to influence his or her conduct or fear of criticism. 12. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of her or his duties. 13. An arbitrator may not use her or his position on the arbitration panel to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him. 14. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgment. 15. An arbitrator must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of impropriety or bias.	clamour, loyalty to a Party, or fear of criticism. 12. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of her or his duties. 13. An arbitrator may not use her or his position on the arbitration panel to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him. 14. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgment. 15. An arbitrator must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of impropriety or bias.	apprehension of bias. (a) An arbitrator shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or a non-disputing Party or fear of criticism. (c) An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his or her duties. (d) An arbitrator shall not use his or her position on the tribunal to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence the arbitrator. An arbitrator shall make every effort to prevent or discourage others from representing themselves as being in such a position. (e) An arbitrator shall not allow past or ongoing financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgment. (f) An arbitrator shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. (g) If an interest, relationship or matter of a candidate or arbitrator is inconsistent with subparagraphs (a) through (f), the candidate may accept appointment to a tribunal and an arbitrator may continue to serve on a tribunal if the disputing	clamour and loyalty to a Party or fear of criticism. 11. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his duties. 12. An arbitrator shall not use his position on the arbitration panel to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence him. 13. An arbitrator shall not allow financial, business, professional, personal or social relationships or responsibilities to influence his conduct or judgment. 14. An arbitrator shall avoid entering into any relationship or acquiring any financial interest that is likely to affect his impartiality or that might reasonably create an appearance of impropriety or bias.	impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or fear of criticism. 2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere with the proper performance of their duties. 3. Members shall not use their position as a member to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence them. 4. Members shall not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment. 5. Members shall avoid entering into any relationship or acquiring any financial interest that is likely to affect his impartiality or that might reasonably create an appearance of impropriety or bias. [FN n. 1 For greater certainty, the fact that a Member receives an income from a government or has a family relationship with a person who receives an income from the government shall not in itself be considered to be inconsistent with paragraph 2 and 5.]	an appearance of impropriety or bias. 12. An arbitrator shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or a disputing party or fear of criticism. 13. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his or her duties. 14. An arbitrator shall not use his or her position on the arbitral tribunal to advance any personal or private interests. An arbitrator shall make every effort to prevent or discourage others from representing themselves as being in such a position. 15. An arbitrator shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the arbitrator's conduct or judgment. 16. An arbitrator shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or bias.

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PROVISION	NAFTA	EU-Singapore IPA	Australia-Japan EPA	CETA	CPTPP	EU-Vietnam FTA	EU-Vietnam IPA	Indonesia-Australia CEPA
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Obligations after proceeding	Part V: Duties in Certain Situations A. For a period of one year after the completion of an Article 1904 proceeding, a former member shall not personally advise or represent any participant in the proceeding with regard to antidumping or countervailing duty matters. B. In the case of an Article 1904 proceeding, a member or a former member shall not represent a participant in an administrative proceeding, a domestic court proceeding or another Article 1904 proceeding involving the same goods. C. A former member shall avoid actions that may create the appearance that the member was biased in carrying out the member's duties or would benefit from the decision of the panel or committee.	Obligations of former Members 15. All former Members must avoid actions that may create the appearance that they were biased in carrying out their duties or derived any advantage from the decision or ruling of the Tribunal or the Appeal Tribunal. 16. Without prejudice to Article 3.9(5) (Tribunal of First Instance) and Article 3.10(4) (Appeal Tribunal), Members shall undertake that after the end of their term, they shall not become involved in any manner whatsoever: (a) in investment disputes which were pending before the Tribunal or the Appeal Tribunal before the end of their term; (b) in investment disputes directly and clearly connected with disputes, including concluded disputes, which they have dealt with as Members of the Tribunal or the Appeal Tribunal. 17. Members shall undertake that for a period of three years after the end of their term, they shall not act as representatives of one of the disputing parties in investment disputes before the Tribunal or the Appeal Tribunal. 18. If the President of the Tribunal or of the Appeal Tribunal is informed or otherwise becomes		Obligations of former arbitrators 16. All former Arbitrators must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decision or ruling of the arbitration panel.	parties waive the violation or if, after the candidate or arbitrator has taken steps to ameliorate the violation, the disputing parties determine that the inconsistency has ceased. 7. Duties of Former Arbitrators A former arbitrator shall avoid actions that may create the appearance that the arbitrator was biased in carrying out his or her duties or would benefit from the decision, order or award of the tribunal.	Obligations of Former Arbitrators 15. All former arbitrators shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or rulings of the arbitration panel.	ARTICLE 6 Obligations of Former Members 1. All former members shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the Tribunal or the Appeal Tribunal. 2. Without prejudice to paragraph 5 of Article 3.18 (Tribunal) and paragraph 9 of Article 3.39 (Appeal Tribunal), members shall undertake that after the end of their term, they shall not become involved in: (a) investment disputes which were pending before the Tribunal or the Appeal Tribunal before the end of their term; (b) investment disputes with which they dealt with as members of the Tribunal or the Appeal Tribunal and other disputes that have matters of fact in common with such disputes or arise out of the same events and circumstances as such disputes. 3. Members shall undertake that for a period of three years after the end of their term, they shall not act as representatives of one of the disputing parties in investment disputes before the Tribunal or the Appeal Tribunal 4.] If the President of the Tribunal or of the Appeal Tribunal is informed or otherwise becomes aware that a former Member of the Tribunal or of the Appeal Tribunal, respectively, is alleged	Duties in Certain Situations 17. An arbitrator or former arbitrator shall avoid actions that may create the appearance that the arbitrator was biased in carrying out his or her duties or would benefit from the decision or award of the arbitral tribunal.

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PROVISION	NAFTA (Only applicable to Chapter 19 and 20) (Full text available here)	EU- Singapore IPA (Annex 7 Code of Conduct for Members of The Tribunal, The Appeal Tribunal and Mediators) (FTA in force Nov. 21, 2019/ IA will enter in force when ratified by all EU MS) (Full text available here)	Australia-Japan EPA (Annex B Code of Conduct of Arbitrators, Rules of Procedure of Arbitral Tribunals) (EPA in force Jan. 15, 2015) (Full text available here)	CETA (Annex 29-B (State-State)) (In force provisionally Sept. 21, 2017) (Code applicable to ISDS has not yet been published) (Full text available here)	CTPP (Chapter 9, Section B, Code for ISDS) (In force Dec. 30, 2018) (Full text available here)	EU-Vietnam FTA (Annex 15-B (State-State)) (Draft) (Full text available here)	EU-Vietnam IPA (Annex 11 Code of Conduct for Members of The Tribunal, Members of The Appeal Tribunal and Mediators) (Draft) (Full text available here)	Indonesia-Australia CEPA (Annex 14-A Code of Conduct for Arbitrators) (CEPA ratified by Australia in Nov. 2019, and Indonesia in Feb. 2020) (Full text available here)
		aware that a former Member of the Tribunal or of the Appeal Tribunal, respectively, is alleged to have breached the obligations set out in paragraphs 15 through 17, he shall examine the matter, and provide the opportunity to the former Member to be heard. If, after verification, he finds the alleged breach to be confirmed, he shall inform: (a) the professional body or other such institution with which that former Member is affiliated; (b) the Parties; and (c) the President of any other relevant investment tribunal or appeal tribunal. The President of the Tribunal or of the Appeal Tribunal shall make public its findings pursuant to this paragraph.					to have acted inconsistently with the obligations set up in paragraphs 1 to 3, the President shall examine the matter, provide the opportunity to the former member to be heard, and, after verification, inform thereof: (a) the professional body or other relevant investment tribunal or appeal tribunal in view of the initiation of appropriate measures. The President of the Tribunal or of the Appeal Tribunal shall make public its decision to take any actions referred to in subparagraphs (a) to (c), together with the reasons therefor.	
Confidentiality	Part VI: Maintenance of Confidentiality A. A member or former member shall not at any time disclose or use any non-public information concerning a proceeding or proceedings or acquired during the proceeding except for the purposes of the proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of another. B. A member shall not disclose a declaratory opinion under Article 1903 or a panel or extraordinary challenge committee order or decision under Article 1904 prior to its issuance by the panel or committee.	19. No Member or former Member shall at any time disclose or use any non-public information concerning a proceeding or proceedings or acquired during the proceeding, except for the purposes of that proceeding, and shall not, in particular, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of others. 20. A Member shall not disclose a decision or award or parts thereof prior to its publication in accordance with Annex 8. 21. A Member or former Member shall not at any time disclose the deliberations of the Tribunal or Appeal Tribunal, or any Member's view regarding the deliberations.	VII. Confidentiality 1. Each covered person shall at all times maintain the confidentiality of non-public information acquired during deliberations and proceedings of the arbitral tribunal. No covered person shall at any time use such information to gain personal advantage or advantage for others. 2. No covered person shall disclose the award of the arbitral tribunal, or to make any statements on the arbitral tribunal's proceedings or the issues in dispute, until the final award is made available to the public in accordance with paragraph 7 of Article 19.12 (Award) of the Agreement. 3. A covered person shall not at any time disclose which arbitrators are associated with any majority or minority opinions	Confidentiality 17. No arbitrator or former arbitrator shall at any time disclose or use any non-public information concerning a proceeding or acquired during the proceeding except for the purposes of that proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others. 18. An arbitrator shall not disclose an arbitration panel ruling or parts thereof prior to its publication in accordance with this Chapter. 19. An arbitrator or former arbitrator shall not at any time disclose the deliberations of an arbitration panel, or any member's view.	8. Maintenance of Confidentiality (a) An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning the tribunal proceeding or acquired during the tribunal proceeding except for the purposes of that proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of another. (b) An arbitrator shall not disclose an arbitration panel ruling or parts thereof prior to its publication in accordance with Chapter 9 Section B (Investor-State Dispute Settlement), except in accordance with Article 9.23.10 (Conduct of the Arbitration).	Confidentiality 16. No arbitrator or former arbitrator shall at any time disclose or use any non-public information concerning proceedings or acquired during proceedings except for the purposes of those proceedings and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others. 17. An arbitrator shall not disclose an arbitration panel ruling or parts thereof prior to its publication in accordance with Chapter 15 (Dispute Settlement). 18. An arbitrator or former arbitrator shall not disclose the deliberations of an arbitration panel, or any arbitrator's view at any time.	ARTICLE 7 Confidentiality 1. Members and former Members shall not disclose or use at any time any non-public information concerning proceedings or acquired during proceedings, except for the purposes of the proceedings, and shall not, in any event, disclose or use such information to gain personal advantage or advantage for others or to adversely affect the interest of others 2. Members shall not disclose a decision or award or parts thereof prior to its publication in accordance with the transparency provisions of Article 3.36 (Transparency of Proceedings). 3. Members and former Members shall not disclose at	Maintenance of Confidentiality 18. An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning the proceeding or acquired during the proceeding except for the purposes of the proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of others. 19. An arbitrator shall not disclose an arbitral tribunal award or parts thereof prior to its publication. 20. An arbitrator or former arbitrator shall not at any time disclose the deliberations of an arbitral tribunal, or any arbitrator's view, except as required by legal or constitutional requirements.

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PROVISION	NAFTA (Only applicable to Chapter 19 and 20) (Full text available here)	EU- Singapore IPA (Annex 7 Code of Conduct for Members of The Tribunal, The Appeal Tribunal and Mediators) (FTA in force Nov. 21, 2019/ IA will enter in force when ratified by all EU MS) (Full text available here)	Australia-Japan EPA (Annex B Code of Conduct of Arbitrators, Rules of Procedure of Arbitral Tribunals) (EPA in force Jan. 15, 2015) (Full text available here)	CETA (Annex 29-B (State-State)) (In force provisionally Sept. 21, 2017) (Code applicable to ISDS has not yet been published) (Full text available here)	CTPP (Chapter 9, Section B, Code for ISDS) (In force Dec. 30, 2018) (Full text available here)	EU-Vietnam FTA (Annex 15-B (State-State)) (Draft) (Full text available here)	EU-Vietnam IPA (Annex 11 Code of Conduct for Members of The Tribunal, Members of The Appeal Tribunal and Mediators) (Draft) (Full text available here)	Indonesia-Australia CEPA (Annex 14-A Code of Conduct for Arbitrators) (CEPA ratified by Australia in Nov. 2019, and Indonesia in Feb. 2020) (Full text available here)
	C. A member shall not disclose a special committee report or decision under Article 1905 prior to its public release by the Secretariat. A member or former member shall not at any time disclose which members are associated with majority or minority opinions in an Article 1905 proceeding. D. A member shall not disclose a panel report issued under Chapter 20 prior to its publication by the Commission. A member or former member shall not at any time disclose which members are associated with majority or minority opinions in a proceeding under Chapter 20. E. A member or former member shall not at any time disclose the deliberations of a panel or committee, or any member's view, except as required by law.	Expenses 22. Each Member shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred. Mediators 23. The disciplines described in this Code of Conduct applying to Members or former Members shall apply, mutatis mutandis, to mediators. Consultative Committee 24. The President of the Tribunal and the President of the Appeal Tribunal shall each be assisted by a Consultative Committee, composed of the respective Vice-President and the most senior member by age of the Tribunal and the Appeal Tribunal	in the award of the arbitral tribunal.	Expenses 20. Each arbitrator shall keep a record and render a final account of the time devoted to the procedure and of her or his expenses as well as the time and expenses of her or his assistant. Mediators 21. This Code of Conduct applies, mutatis mutandis, to mediators	9. Responsibilities of Experts, Assistants and Staff Paragraphs 2 (Responsibilities to the Process), 4(a), 4(b), 4(c), 4(d) and 4(e) (Disclosure Obligations), 5(c), 5(f) and 5(i) (Performance of Duties by Candidates and Arbitrators), 7 (Duties of Former Arbitrators) and 8 (Maintenance of Confidentiality) of this Code of Conduct shall also apply to experts, assistants and staff. 10. Review A Party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership may request the Trans-Pacific Partnership Commission established under Article 27.1 (Establishment of the Trans-Pacific Partnership Commission) to review and	Expenses 19. Each arbitrator shall keep a record and render a final account of the time devoted to the procedure and of his expenses, as well as the time and expenses of his assistant and staff. Mediators 20. This Code of Conduct applies mutatis mutandis to mediators.	ARTICLE 8 Expenses Each Member shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred Mediators. ARTICLE 9 Mediators The rules set out in this Code of Conduct as applying to Members or former Members apply, mutatis mutandis, to mediators.	any time the deliberations of the Tribunal or the Appeal Tribunal, or any member's views, whatever they may be.
Others	Part VII: Responsibilities of Assistants and Staff Parts I (Responsibilities to the Process), II (Disclosure Obligations) and VI (Maintenance of Confidentiality) of this Code of Conduct apply also to assistants and staff.							

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PROVISION	NAFTA	EU- Singapore IPA	Australia-Japan EPA	CETA	CPTPP	EU-Vietnam FTA	EU-Vietnam IPA	Indonesia-Australia CEPA
	(Only applicable to Chapter 19 and 20)	(Annex 7 Code of Conduct for Members of The Tribunal, The Appeal Tribunal and Mediators) (FTA in force Nov. 21, 2019/ IA will enter in force when ratified by all EU MS)	(Annex B Code of Conduct of Arbitrators, Rules of Procedure of Arbitral Tribunals) (EPA in force Jan. 15, 2015)	(Annex 29-B (State-States)) (In force provisionally Sept. 21, 2017) (Code applicable to ISDS has not yet been published)	(Chapter 9, Section B, Code for ISDS) (In force Dec. 30, 2018)	(Annex 15-B (State-State)) (Draft)	(Annex 11 Code of Conduct for Members of The Tribunal, Members of The Appeal Tribunal and Mediators) (Draft)	(Annex 14-A Code of Conduct for Arbitrators) (CEPA ratified by Australia in Nov. 2019, and Indonesia in Feb. 2020)
	(Full text available here)	(Full text available here)	(Full text available here)	(Full text available here)	(Full text available here)	(Full text available here)	(Full text available here)	(Full text available here)
		respectively, for ensuring the proper application of this Code of Conduct, Article 3.11 (Ethics) and for the execution of any other task, where so provided.			amend the Code of Conduct for Investor-State Dispute Settlement to take into account, as appropriate, relevant developments concerning Investor-State Dispute Settlement.			

Other FTAs that provide for a Code of Conduct that has not been issued:

Canada-Honduras FTA (in force Oct. 1, 2014)	Canada- Peru FTA (in force June 20, 2007)	TPP (draft)
<p><u>Commission has not issued Code of Conduct to this date</u></p> <p>Article 10.26: Arbitrators</p> <p>1. Except in respect of a Tribunal established under Article 10.29, and unless the disputing parties decide otherwise, the Tribunal shall consist of 3 arbitrators. Each disputing party shall appoint one arbitrator. The disputing parties shall jointly appoint the third, who shall be the presiding arbitrator.</p> <p>2. Arbitrators shall:</p> <p>(a) have expertise or experience in public international law, international trade or international investment rules, or the settlement of disputes arising under international trade or international investment agreements;</p> <p>(b) be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor; and</p> <p>(c) comply with the Code of Conduct for Dispute Settlement established by the Commission.</p> <p>3. If the disputing parties do not agree on the remuneration of the arbitrators before the Tribunal is constituted, the prevailing ICSID rate for arbitrators applies.</p> <p>4. The Commission may establish rules relating to the expenses incurred by the Tribunal.</p>	<p><u>Commission has not issued Code of Conduct to this date</u></p> <p>ARTICLE 29 Arbitrators</p> <p>1. Except in respect of a Tribunal established under Article 32 (Consolidation), and unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.</p> <p>2. Arbitrators shall:</p> <p>(a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;</p> <p>(b) be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor; and</p> <p>(c) comply with any Code of Conduct for Dispute Settlement as agreed by the Commission.</p> <p>3. Where a disputing investor claims that a dispute involves measures adopted or maintained by a Party relating to financial institutions of the other Party, or investors of the other Party and investments of such investors, in financial institutions in a Party's territory, then</p> <p>(a) where the disputing parties are in agreement, the arbitrators shall, in addition to the criteria set out in paragraph 2, have expertise or experience in financial services law or practice, which may include the regulation of financial institutions; or</p> <p>(b) where the disputing parties are not in agreement,</p> <p>(i) each disputing party may select arbitrators who meet the qualifications set out in subparagraph (a), and</p> <p>(ii) if the Party complained against invokes Articles 14(6) or 17, the chair of the panel shall meet the qualifications set out in subparagraph (a).</p> <p>4. The disputing parties should agree upon the arbitrators' remuneration. If the disputing parties do not agree on such remuneration before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply.</p> <p>5. The Commission may establish rules relating to expenses incurred by the Tribunal.</p>	<p>6. The Parties shall, prior to the entry into force of this Agreement, provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (Dispute Settlement) to arbitrators selected to serve on investor-State dispute settlement tribunals pursuant to this Article, including any necessary modifications to the Code of Conduct to conform to the context of investor-State dispute settlement. The Parties shall also provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration. Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators.</p>

ANNEX VI – IBA GUIDELINES ON CONFLICTS OF INTEREST

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IBA Guidelines on Conflicts of Interest in International Arbitration 2014

Since their issuance in 2004, the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the ‘Guidelines’) have gained wide acceptance within the international arbitration community. Arbitrators commonly use the Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators, and arbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators. As contemplated when the Guidelines were first adopted, on the eve of their tenth anniversary it was considered appropriate to reflect on the accumulated experience of using them and to identify areas of possible clarification or improvement. Accordingly, in 2012, the IBA Arbitration Committee initiated a review of the Guidelines, which was conducted by an expanded Conflicts of Interest Subcommittee (the ‘Subcommittee’), representing diverse legal

1. 1 The 2004 Guidelines were drafted by a Working Group of 19 experts: Henri Alvarez, Canada; John Beechey, England; Jim Carter, United States; Emmanuel Gaillard, France; Emilio Gonzales de Castilla, Mexico; Bernard Hanotiau, Belgium; Michael Hwang, Singapore; Albert Jan van den Berg, Belgium; Doug Jones, Australia; Gabrielle Kaufmann-Kohler, Switzerland; Arthur Marriott, England; Tore Wiwen Nilsson, Sweden; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Klaus Sachs, Germany; Nathalie Voser, Switzerland (Rapporteur); David Williams, New Zealand; Des Williams, South Africa; and Otto de Witt Wijnen, The Netherlands (Chair).
2. 2 The members of the expanded Subcommittee on Conflicts of Interest were: Habib Almulla, United Arab Emirates; David Arias, Spain (Co-Chair); Julie Bédard,

cultures and a range of perspectives, including counsel, arbitrators and arbitration users. The Subcommittee was chaired by David Arias, later co-chaired by Julie Bédard, and the review process was conducted under the leadership of Pierre Bienvenu and Bernard Hanotiau.

While the Guidelines were originally intended to apply to both commercial and investment arbitration, it was found in the course of the review process that uncertainty lingered as to their application to investment arbitration. Similarly, despite a comment in the original version of the Guidelines that their application extended to non-legal professionals serving as arbitrator, there appeared to remain uncertainty in this regard as well. A consensus emerged in favour of a general affirmation that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrator.

The Subcommittee has carefully considered a number of issues that have received attention in international arbitration practice since 2004, such as the effects of so-called ‘advance waivers’, whether the fact of acting concurrently as counsel and arbitrator in unrelated cases raising similar legal issues warrants disclosure, ‘issue’ conflicts, the independence and impartiality of arbitral or administrative secretaries and third- party funding. The revised Guidelines reflect the Subcommittee’s conclusions on these issues.

The Subcommittee has also considered, in view of the evolution of the global practice of international arbitration, whether the revised Guidelines should impose stricter standards in regard to arbitrator disclosure. The revised Guidelines reflect the conclusion that, while the basic approach of the 2004 Guidelines should not be altered, disclosure should be required in certain circumstances not contemplated in the 2004 Guidelines. It is also essential to reaffirm that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the arbitrator. Indeed, the standard for disclosure differs from the standard for challenge. Similarly, the revised Guidelines are not in any way intended to discourage the service as arbitrators of lawyers practising in large firms or legal associations.

The Guidelines were adopted by resolution of the IBA Council on Thursday 23 October 2014.

Signed by the Co-Chairs of the Arbitration Committee Thursday 23 October 2014

Eduardo Zuleta Paul Friedland

Introduction

1. Arbitrators and party representatives are often unsure about the scope of their disclosure obligations. The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues. Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it is important that more information be made available to the parties, so as to protect awards against challenges based upon

alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.

2. Parties, arbitrators, institutions and courts face complex decisions about the information that arbitrators should disclose and the standards to apply to disclosure. In addition, institutions and courts face difficult decisions when an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence in order to protect the parties' right to a fair hearing, and, on the other hand, the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing.
3. It is in the interest of the international arbitration community that arbitration proceedings are not hindered by ill-founded challenges against arbitrators and that the legitimacy of the process is not affected by uncertainty and a lack of uniformity in the applicable standards for disclosures, objections and challenges. The 2004 Guidelines reflected the view that the standards existing at the time lacked sufficient clarity and uniformity in their application. The Guidelines, therefore, set forth some 'General Standards and Explanatory Notes on the Standards'. Moreover, in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals, the Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator. Such lists, designated 'Red', 'Orange' and 'Green' (the 'Application Lists'), have been updated and appear at the end of these revised Guidelines.

4. The Guidelines reflect the understanding of the IBA Arbitration Committee as to the best current international practice, firmly rooted in the principles expressed in the General Standards below. The General Standards and the Application Lists are based upon statutes and case law in a cross-section of jurisdictions, and upon the judgement and experience of practitioners involved in international arbitration. In reviewing the 2004 Guidelines, the IBA Arbitration Committee updated its analysis of the laws and practices in a number of jurisdictions. The Guidelines seek to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international arbitration. Both the 2004 Working Group and the Subcommittee in 2012/2014 have sought and considered the views of leading arbitration institutions, corporate counsel and other persons involved in international arbitration through public consultations at IBA annual meetings, and at meetings with arbitrators and practitioners. The comments received were reviewed in detail and many were adopted. The IBA Arbitration Committee is grateful for the serious consideration given to its proposals by so many institutions and individuals.

5. The Guidelines apply to international commercial arbitration and investment arbitration, whether the representation of the parties is carried out by lawyers or non-lawyers, and irrespective of whether or not non-legal professionals serve as arbitrators.
6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that, as was the case for the 2004 Guidelines and other sets of rules and guidelines of the IBA

Arbitration Committee, the revised Guidelines will find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation.

7. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be exhaustive, nor could they be. Nevertheless, the IBA Arbitration Committee is confident that the Application Lists provide concrete guidance that is useful in applying the General Standards. The IBA Arbitration Committee will continue to study the actual use of the Guidelines with a view to furthering their improvement.
8. In 1987, the IBA published *Rules of Ethics for International Arbitrators*. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the *Rules of Ethics* as to the matters treated here.

Part I: General Standards Regarding Impartiality, Independence and Disclosure

(1) General Principle

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

Explanation to General Standard 1:

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable.

The question has arisen as to whether this obligation should extend to the period during which the award may be challenged before the relevant courts. The decision taken is that this obligation should not extend in this manner, unless the final award may be referred back to the original Arbitral Tribunal under the relevant applicable law or relevant institutional rules. Thus, the arbitrator's obligation in this regard ends when the Arbitral Tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been issued, or the time for seeking the same has elapsed, the proceedings have been finally terminated (for example, because of a settlement), or the arbitrator otherwise no longer has jurisdiction. If, after setting aside or other proceedings, the dispute is referred back to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interests may be necessary.

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

Explanation to General Standard 2:

(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.

(b) In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.

(d) The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. For example, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.

(b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).

(c) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned.

(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(e) When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.

Explanation to General Standard 3:

(a) The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. Accordingly, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure. However, situations that, such as those set out in the Green List, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed. As reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator under General Standard 2.

The duty of disclosure under General Standard 3(a) is ongoing in nature.

(b) The IBA Arbitration Committee has considered the increasing use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law.

(c) A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent

of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met. Under Comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

(d) In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.

(e) Disclosure or disqualification (as set out in General Standards 2 and 3) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal. As a practical matter, arbitration institutions may make a distinction depending on the stage of the arbitration. Courts may likewise apply different standards. Nevertheless, no distinction is made by these Guidelines depending on the stage of the arbitral proceedings. While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

(a) If, within 30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any objection based on such facts or circumstances at a later stage.

(b) However, if facts or circumstances exist as described in the Non-Waivable Red List, any waiver by a party (including any declaration or advance waiver, such as that contemplated in General Standard 3(b)), or any agreement by the parties to have such a person serve as arbitrator, shall be regarded as invalid.

(c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the Waivable Red List, exists. Nevertheless, such a person may accept

appointment as arbitrator, or continue to act as an arbitrator, if the following conditions are met:

(i) all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the conflict of interest; and

(ii) all parties expressly agree that such a person may serve as arbitrator, despite the conflict of interest.

(d) An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

Explanation to General Standard 4:

(a) Under General Standard 4(a), a party is deemed to have waived any potential conflict of interest, if such party has not raised an objection in respect of such conflict of interest within 30 days. This time limit should run from the date on which the party learns of the relevant facts or circumstances, including through the disclosure process.

(b) General Standard 4(b) serves to exclude from the scope of General Standard 4(a) the facts and circumstances described in the Non-Waivable Red List. Some arbitrators make declarations that seek waivers from the parties with respect to facts or circumstances that may arise in the future. Irrespective of any such waiver sought by the arbitrator, as provided in General Standard 3(b), facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure.

(c) Notwithstanding a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, the parties may wish to engage such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well-established in some jurisdictions, but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest.

Certain jurisdictions may require such consent to be in writing and signed by the parties. Subject to any requirements of applicable law, express consent may be sufficient and may be given at a hearing and reflected in the minutes or transcript of the proceeding. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the mediation is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.

(5) Scope

(a) These Guidelines apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed.

(b) Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.

Explanation to General Standard 5:

(a) Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards do not distinguish between sole arbitrators, tribunal chairs, party-appointed arbitrators or arbitrators appointed by an institution.

(b) Some arbitration institutions require arbitral or administrative secretaries and assistants to sign a declaration of independence and impartiality. Whether or not such a requirement exists, arbitral or administrative secretaries and assistants to the Arbitral Tribunal are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration. Furthermore, this duty applies to arbitral or administrative secretaries and assistants to either the Arbitral Tribunal or individual members of the Arbitral Tribunal.

(6) Relationships

(a) The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

(b) If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case. General Standard 6(a) uses the term 'involve' rather than 'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel. When a party to an arbitration is a member of a group of companies, special questions regarding conflicts of interest arise. Because individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case.

(b) When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such legal persons and individuals may be considered effectively to be that party. Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support,

to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

(7) Duty of the Parties and the Arbitrator

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a

duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.

(b) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.

(c) In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide any relevant information available to it.

(d) An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.

Explanation to General Standard 7:

(a) The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

(b) Counsel appearing in the arbitration, namely the persons involved in the representation of the parties in the arbitration, must be identified by the parties at the earliest opportunity. A party's duty to disclose the identity of counsel appearing in the arbitration extends to all members of that party's counsel team and arises from the outset of the proceedings.

(c) In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence.

(d) In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them.

Part II: Practical Application of the General Standards

1. If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today's arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. For this purpose, the Guidelines categorise situations that may occur in the following Application Lists. These lists cannot cover every situation. In all cases, the General Standards should control the outcome.
2. The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).
3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).
4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, he or she can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification.
5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by

itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.

Situations not listed in the Orange List or falling outside the time limits used in some of the Orange List situations are generally not subject to disclosure. However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts as to his or her impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is ‘yes’, the arbitrator should consider a disclosure.

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of ‘the eyes’ of the parties.

8. The borderline between the categories that comprise the Lists can be thin. It can be debated whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as ‘significant’ and ‘relevant’. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive.

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

2.2 Arbitrator's direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.

2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3 Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.

2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

3. 3 Throughout the Application Lists, the term 'close family member' refers to a spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.
4. 4 Throughout the Application Lists, the term 'affiliate' encompasses all companies in a group of companies, including the parent company.
7. 2.3.7 The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.
8. 2.3.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.
9. 2.3.9 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.

3. Orange List

3.1 Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

5 It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to

3.1.4 The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

2. 3.2 Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.2.2 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator's law firm renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

3.2.3 The arbitrator or his or her firm represents a party, or an affiliate of one of the parties to the arbitration, on a regular basis, but such representation does not concern the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.

frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.

3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.

3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties, or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personal friendship exists between an arbitrator and a counsel of a party.

3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

3.3.9 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.

3.4 Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.

3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.5 If the arbitrator is a former judge, he or she has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.

3.5 Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.

3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1 Previously expressed legal opinions

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

4.2 Current services for one of the parties

4.2.1 A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.

4.3 Contacts with another arbitrator, or with counsel for one of the parties

4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.

4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.

4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.

4.3.4 The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.

4.4 Contacts between the arbitrator and one of the parties

4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.

4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.

4.4.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case.

4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.

ANNEX VII – DRAFT STATUTE OF THE MULTILATERAL INVESTMENT COURT

November 2020

This Draft Statute of the Multilateral Investment Court is the result of a three-year research project. It is based on the study ‘From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court’, which was first published in German by Nomos, Facultas and Dike in 2018 ([available here](#)). A second, English edition, published by Springer in 2020, is now also available as an open access book ([available here](#)).

The draft Statute is meant to stimulate discussion and to demonstrate that it is possible to create a Multilateral Investment Court (MIC) on the basis of a treaty.

The institutional and general legal setting of this draft Statute advocates for the establishment of an international organization based on a treaty, open to States as well as to international organizations. The Statute prescribes the MIC’s jurisdiction over investor-State as well as State-State disputes. By joining the MIC, Members recognize its international and domestic legal personality, accord it with the privileges and immunities required for its independent functioning, and contribute to its budget.

The draft Statute also provides for a bench of judges (sitting as a Court of First Instance and an Appellate Court), a Secretariat, a Plenary Body, and an Advisory Centre. The Statute envisages that judges will be appointed for a longer period of time, be independent as well as impartial, and highly qualified. The proposed mechanism for the selection of judges is premised on the need to ensure that all regions and major legal systems are adequately represented.

The Statute expressly enshrines the rule of law, transparency, efficiency, consistency, and Members’ right to regulate. It contains the fundamentals of procedure and incorporates, inter alia, the UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration. The MIC may regulate its own rules of procedure in greater detail and adapt to the specific needs of future disputes.

With regard to the enforceability of MIC decisions, the Statute foresees a treaty- based obligation on all MIC Members to recognize and enforce them. Arrangements on enforcement in third States can be foreseen in a separate treaty. The new enforcement system also provides for the establishment of an enforcement fund.

With this proposal, we hope to contribute to the ongoing discussion. For short introductory videos by the authors, see [here](#) or [here](#).

DRAFT STATUTE OF THE MULTILATERAL INVESTMENT COURT

by **Marc Bungenberg/August Reinisch**

With the assistance of Angshuman Hazarika, Andrés Alvarado, Anna Holzer, Vishakha Choudhary, Afolabi Adekemi, Céline Braumann, and Sara Mansour Fallah.

This draft is based on: Marc Bungenberg/August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, 2nd edition 2019, downloadable at <https://link.springer.com/book/10.1007/978-3-662-59732-3>

Foreword

This draft statute for a Multilateral Investment Court (MIC) is based on the study “*From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*” which was first published in 2018. It is meant to stimulate discussion and to demonstrate that it is possible to devise a statute for a MIC without major hurdles. This proposal does not contend that the current system is not working or should be replaced; it merely demonstrates that it is possible to have a new one.

Every issue and problem addressed herein may be handled in different ways. The drafters of the statute seek to show what is possible on the basis of current debates, crystallizing in UNCITRAL, UNCTAD and other fora. The proposed articles of the statute may be amended and streamlined and are expected to be supplemented by the enactment of secondary rules.

We are very thankful for the assistance of Angshuman Hazarika, Andrés Alvarado, Anna Holzer, Vishakha Choudhary and Afolabi Adekemi, Céline Braumann, and Sara Mansour Fallah. We would also like to express our appreciation to Julian Scheu for his feedback.

Marc Bungenberg 16 October 2020 August Reinisch [...]

PREAMBLE **Considering** the significance of robust investment relations for global economic development;

Bearing in mind the *consensus* achieved in the United Nations Commission on International Trade Law to develop solutions to concerns with investor-State dispute settlement;

Conscious of the need to devise a system which is subject to *democratic principles and scrutiny* and upholds the *rule of law* and the protection of *fundamental rights*;

Desiring to develop a system that facilitates *transparent* dispute settlement by *independent and neutral adjudicators* and ensures *consistent* application of substantive and procedural standards of investment protection;

Recognizing that an *accessible* and *procedurally efficient*, permanent investment court would serve the interests of investors, States and other stakeholders alike, and

Emphasizing the contributions that a multilateral dispute settlement mechanism can make to the *legitimacy*, coherence, and stability of investor-State dispute settlement,

Have agreed as follows:

PART I ESTABLISHMENT OF THE MULTILATERAL INVESTMENT COURT

Article 1 Establishment of the Multilateral Investment Court

The Multilateral Investment Court ('the MIC') is hereby established.

The MIC is a permanent court in the form of an international organization. It shall exercise jurisdiction over all disputes related to the protection of investments referred to it in accordance with this Statute.

Article 2 Seat of the MIC

The seat of the MIC shall be located in ### ('the Host State'). The proceedings of the MIC shall be held at the seat of the MIC except as hereinafter provided.

Proceedings may be held, if the parties so agree,

at the seat of the Permanent Court of Arbitration, of the International Centre for Settlement of Investment Disputes, or of any other dispute settlement institution with which the MIC may make arrangements for that purpose; or at any other place approved by the MIC.

The MIC shall enter into a headquarters agreement with the Host State, as well as into seat agreements with other States, which shall be negotiated by the Director-General of the MIC. Subject to approval by the Plenary Body, such agreement will be concluded by the President of the MIC on its behalf.

The Parties to this Statute,

2 Part I Establishment of the Multilateral Investment Court

Article 3 General Structure of the MIC

The MIC shall have the following organs:

The Plenary Body
The Court of First Instance The Appellate Court
The Advisory Centre
The Secretariat

Article 4 Membership of the MIC

The original Members of the MIC shall be the parties which sign the present Statute and ratify it in accordance with Articles 59 and 60.

States and other international entities, which have the power to enter into investment agreements, may accede to the MIC.

The Plenary Body shall approve accessions by a two-thirds majority of the Members of the MIC.

Article 5 Legal Status and Powers of the MIC

The MIC shall have international legal personality and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

The MIC shall exercise its functions and powers, as provided in this Statute, in the territory of each Member and, by special agreement, in the territory of any non-Member.

Article 6 Privileges and Immunities

The MIC shall be accorded such privileges and immunities as are necessary for the exercise of its functions. The privileges and immunities to be accorded by a Member to the MIC, its staff members, and the representatives of its Members shall correspond to those stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

The judges of the MIC, the Director-General, and staff members of the MIC shall be immune during and after expiry of their terms of office from any legal proceedings regarding all acts conducted in connection with their duties.

In addition, the judges of the MIC and the Director-General shall enjoy the same immunity during their tenure on the MIC as enjoyed by the head of a diplomatic mission. This immunity may be waived only by an unanimous decision taken by a vote in a plenary of all judges of the MIC where immunity would impede the course of justice, and can be waived without prejudice to the interests of the Court. The judge whose immunity is under consideration will not be permitted to vote.

Part II Composition of the MIC

Article 7 Budget of the MIC

The annual budget of the MIC shall be prepared by the Director-General assisted by the Secretariat of the MIC in consultation with the President of the MIC.

The annual budget shall be put forward and approved by the Plenary Body with a two-thirds majority in a session where more than half of the Members of the MIC are present and voting.

The annual budget shall be borne by the Members as apportioned by the Plenary Body for the particular year. The proportion of the contribution to the budget by a Member will be determined by taking the proportion of foreign direct investment outflow of the particular Member in relation to the total foreign direct investment outflow of all MIC Members. Members of the MIC may be permitted to pay a reduced contribution or may be fully exempted from the payment of their contribution subject to approval by a ### (simple/qualified) majority of the Plenary Body.

PART II COMPOSITION OF THE MIC

Article 8 The Plenary Body

There shall be a Plenary Body composed of representatives of all the Members, which shall meet regularly and as appropriate to ensure the functioning of the MIC.

The Plenary Body shall carry out the functions assigned to it by this Statute. The Plenary Body shall establish its own rules of procedure and adopt or modify the Rules of Procedure for the Court of First Instance, the Appellate Court, the Advisory Centre, and the Secretariat.

The Plenary Body has the power to undertake necessary amendments of the Statute through consensus and pursuant to Article 63 *et seq.* to ensure the proper functioning of the MIC. It may also adopt interpretations of the Statute by consensus, which will be binding on the other organs of the MIC.

The Plenary Body shall adopt: a code of ethics and a code of conduct for the judges of the MIC, rules of conduct and ethics for all staff members, and regulations on procedure to be followed for the registration, allocation and conduct of proceedings before the Court of First Instance and the Appellate Court, transparency, costs and Court fees. These regulations will be drafted in accordance with the principles of the rule of law and will implement the UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration.

The Plenary Body may adopt any additional regulations or guidelines necessary for the functioning of the MIC and its organs.

The Plenary Body may form different committees as required to perform its functions.

Decisions on regulations concerning the procedure to be followed by the MIC must be approved by two-thirds majority when consensus cannot be reached.

The Plenary Body shall elect a Chairperson. The Chairperson has the administrative function of presiding over the meetings of the Plenary Body and will serve for two years.

Part II Composition of the MIC

Article 9 Judges of the MIC

The MIC shall comprise initially 24 judges in full time office, no two of whom may be nationals of the same State. A judge who is considered a national of more than one State shall be deemed to be a national of the State in which he or she ordinarily exercises civil and political rights.

The judges shall be persons of high moral character, enjoying the highest reputation for fairness and integrity with recognised competence in the fields of public international law, especially international investment law and international dispute settlement, administrative, commercial and constitutional law.

A judge of the MIC shall not exercise any political or administrative function, or engage in any occupation of a professional nature during his or her tenure at the MIC unless exemption is granted by the Plenary Body, acting by a simple majority.

The number of judges of the MIC may be amended by a two-thirds majority of the Members in the Plenary Body.

Article 10 The Advisory Centre

The Advisory Centre shall have a separate budget allocated by the Plenary Body. It shall operate independently from other organs of the MIC through staff members appointed by the Plenary Body.

The Advisory Centre may upon request provide legal assistance for disputes before the MIC to:

(a) companies which are eligible for classification as Small and Medium Enterprises (SME) and (b) all Members who are regarded as ‘developing economies’ pursuant to the Country Classification of the United Nations system.

The Advisory Centre may provide training on international investment law and further education to members of the MIC.

The Plenary Body shall draft rules, specifying the role of the Advisory Centre, its duties, and provisions on confidentiality in the internal functioning and publication of information by the Advisory Centre. The strict separation of responsibilities and information between the Advisory Centre and other bodies of the MIC must be ensured.

The Advisory Centre will cooperate with other international organizations and other entities working in similar areas as required to perform its functions.

Article 11 The Secretariat

The Secretariat of the MIC shall consist of staff members headed by a Director-General. The Secretariat may have internal departments as required to perform its functions.

The Plenary Body shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and terms of office of the Director-General and staff members. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with the regulations adopted by the Plenary Body.

The Secretariat shall perform the administrative functions for the operation of the MIC. Its duties, functions, working procedures, and responsibilities shall be specified in detail by regulations on procedure adopted by the Plenary Body. The Secretariat may provide administrative and legal support to the judges of the MIC.

In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the MIC. The Director-General and all staff members of the MIC shall refrain from any action, which might adversely reflect on their position as officials of an international organization. The Members of the MIC shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

PART III THE JUDGES, COURT OF FIRST INSTANCE, AND THE APPELLATE COURT

Article 12 Nomination, Screening, and Election of Judges

Each Member of the MIC has the right to nominate candidates to a list for consideration to be elected as a judge of the MIC, through an internal selection procedure conducted by the Member.

The persons nominated to the list shall be evaluated by a sub-committee of the Plenary Body called the 'Screening Committee' for their suitability to be appointed as judges of the MIC on the parameters of professional qualifications, ethical standards, independence, and impartiality. The Screening Committee shall comprise seven persons chosen by the Plenary Body from among former judges of the MIC, members of national supreme and international courts, and lawyers of recognised competence. The Screening Committee may use additional criteria for the screening process as it deems fit and would seek to ensure that the persons who are finally selected represent the principal legal systems of the world.

The Screening Committee shall publish the names of the candidates who are eligible for election as judges of the MIC by classifying them in one of the following regional groups based on the nationality of the country which nominated them for the election: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe. The names will be published in an alphabetical order and each name will indicate the regional group which has the right to vote for the candidate.

The Members of a particular regional group in the Plenary Body will vote on the candidates eligible for election from their regional group with the aim to select an initial number of 15 judges, of which the following number of judges shall be chosen from each regional group:

Asia: ### judges

Africa: ### judges

Latin America and the Caribbean: ### judges Western Europe and others: ### judges

Eastern Europe: ### judge

In addition to the judges elected under paragraph 4 above, each regional group will be allotted a quota of judges out of the remaining nine MIC judges who shall be elected as provided under Article 12(1 - 4) of this Statute and subject to any amendment under Article 9(4). The number of judges which can be elected by a regional group will be commensurate with the number of MIC Members present in the regional group as a share of the total number of MIC Members.

Each Member of the MIC has one vote, which may be exercised in the election process for the judges of the MIC. Legal entities that are Members of the MIC can exercise their right to vote having a number of votes equal to the number of votes of their members which are Members of the MIC. Based on the number of votes received and the quota allotted to the regional group, the persons who receive the highest number of votes in a particular regional group will be selected as judges of the MIC.

The appointed judges will take an Oath of Office before the Plenary Body before the commencement of their tenure.

Article 13 Conditions of Service of Judges

All persons serving as judges at the MIC shall be available at all times and on short notice.

Judges of the MIC shall receive an annual salary. The President and the Vice-President shall receive a special annual allowance. These salaries, allowances, and compensation shall be fixed by the Plenary Body. They may not be decreased during the term of office.

The judges of the MIC shall be impartial and independent. They shall not take instructions from any organization or government with regard to matters related to any dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their impartiality and independence. Each judge shall declare to the President of the MIC any such activity which will be disclosed to the disputing parties of each case.

No judge of the MIC may act as agent, counsel, or advocate in any investment dispute for a period of two years after retirement or resignation as a judge of the MIC. No judge of the MIC may participate in the adjudication of any case in which he or she has previously taken part as agent, counsel, or expert for one of the parties, or as a member of a national or international court, or in any other capacity. Any doubt concerning a direct or indirect conflict of interest shall be settled by decision of plenary of the judges of the MIC by an

absolute majority of the judges. Where any such question concerns individual judges, these judges shall not take part in the decision.

Article 14 Duration of Appointment

The judges of the MIC shall be elected for a period of nine years without the possibility of re-election. Of the judges elected at the first election, the terms of eight judges shall expire at the end of three years and the terms of eight more judges shall expire at the end of six years. The judges whose terms are to expire at the end of three and six years shall be determined through a draw of lots to be conducted by the Chairperson of the Plenary Body immediately after the end of the first election.

The judges shall continue to hold office until they are replaced. They will, however, continue in office to complete any disputes that were under their consideration prior to their replacement unless they have been removed in accordance with Article 15(1) below.

Article 15 Resignation, Removal, and Replacement of Judges

A judge of the MIC may be removed from office in case of substantial misconduct or failure to perform his or her duties by an unanimous decision of all judges of the MIC except the judge under scrutiny.

A judge of the MIC may resign from his or her position through a letter addressed to the President of the MIC. A resignation of the President should be addressed to the most-senior Vice-President of

Part III The Judges, Court of First Instance, and the Appellate Court

the MIC as determined by age. The resignation shall become effective on the date of receipt by the President or the Vice-President.

In case of a judicial vacancy, the process of reappointment of judges will be conducted in the manner specified in Article 12 above, subject to the modification that only the group which elected the outgoing judge will be able to vote and elect a replacement in a special ad-hoc election.

A judge who has been appointed as a replacement of another judge under this Article shall remain in office for a duration of nine years except for judges who are appointed as replacements for judges elected with a shorter period of three years or six years after the first election. Judges who are appointed as a replacement for a judge with a shorter term period as provided under Article 14(1) will be eligible for re-election for a full term.

Article 16 President of the MIC

The judges of the MIC shall elect a President of the MIC by a confidential internal voting procedure with each judge having one vote.

The President of the MIC shall be elected for a term of three years with the possibility of one re- election.

The President of the MIC shall not be eligible to nominate himself or herself as a judge of the Appellate Court but may serve in this capacity when nominated after the completion of his or her term as a President of the MIC. Judges appointed to the Appellate Court will be ineligible to be simultaneously elected as President of the MIC, but they will retain the power to participate and vote in the election process of the President of the MIC.

The President of the MIC shall chair all sessions of the plenary of the judges of the MIC, supervise the functioning of the Director-General and the Secretariat, assign individual judges to the chambers of the MIC and its Appellate Court, assign disputes to the chambers of the MIC and its Appellate Court, supervise administrative functions of the MIC, and represent the MIC in its external relations.

The assignment of judges to the chambers of the MIC and its Appellate Court and the assignment of disputes to the judges shall be governed by Rules of Procedure to be drafted by the Director-General with the assistance of the Secretariat and adopted by the Plenary Body. The President will consider criteria such as gender and regional diversity as well as diversity of expertise of legal systems and subject area in addition to the guidelines provided under the Rules of Procedure adopted by the Plenary Body while assigning the judges to the chambers of the MIC and the Appellate Court.

The senior-most Vice-President of the MIC will perform the duties of the President until his or her re-election or when he or she is unable to do so.

Article 17 Chambers, Grand-Chambers, and Vice-Presidents of the MIC

The judges of the MIC shall be appointed to chambers with an odd number of judges to perform their judicial functions.

The President of the MIC shall assign disputes to a particular chamber while taking into consideration that disputes which have a particular Member or claimants that are nationals of a particular Member as a party shall not be referred to a chamber that has a judge having the nationality of the same Member or that the judge was originally nominated by.

Chambers with three or more judges shall select presiding judges of the chambers who shall also be Vice-Presidents of the MIC. The Vice-Presidents of particular chambers shall cease to perform that

Part IV Jurisdiction

function when their chambers are reassigned, but may be eligible to be elected as Vice-Presidents of new chambers.

The President and the Vice-Presidents of the MIC will form the Grand Chamber of the MIC. A Vice- President who may no longer be holding the position due to a reassignment

of chambers will remain a part of the Grand Chamber for all disputes which were commenced when he or she was a member of the Grand Chamber.

Upon determination by the Grand Chamber, all the judges of the Court of the First Instance may sit as a plenary to decide on disputes of substantial importance.

Article 18 Appellate Court

The President of the MIC shall appoint nine judges of the MIC to the Appellate Court of the MIC.

Judges appointed to the Appellate Court will remain judges of the Appellate Court for the remainder of their terms.

The judges of the Appellate Court will be appointed to chambers with an odd number of judges. Chambers with three or more judges will select a presiding judge of the chamber who will also be a Vice-President of the MIC. The Vice-President of a particular chamber will cease to perform that function when his or her chamber is reassigned, but may be eligible to be elected as a Vice-President of the new chamber.

The judges of the Appellate Court may sit in chambers or as a plenary body to decide on specific disputes assigned by the President of the MIC. One of the judges may be elected as an ad-hoc President of the plenary body of judges of the Appellate Court for the particular dispute through a secret vote of the judges of the plenary.

The ad-hoc President of the plenary of the Appellate Court shall chair the proceedings of the plenary of the Appellate Court and perform any administrative functions as required.

PART IV JURISDICTION

Article 19 Scope of Jurisdiction

The jurisdiction of the MIC comprises all disputes arising directly out of an investment of a national of a Member in the territory of another Member, which the parties to the dispute refer to the MIC through consent in writing. When the parties have given their consent, no party may withdraw its consent unilaterally.

For the purpose of this Statute a ‘national of another Member’ means:

1. (a) any natural person who had the nationality of a Member other than the Member which is a party to the dispute on the date on which the parties consented to submit such dispute to the MIC as well as on the date on which the request was registered pursuant to Article 44(2); and
2. (b) any juridical person which had the nationality of a Member other than the Member which is a party to the dispute on the date on which the parties consented to submit such dispute to the MIC as well as on the date on which the request was registered pursuant to Article 44(2).

3. (c) For the purposes of this Statute, a juridical person with the nationality of a Member shall be

Part IV Jurisdiction

- i. an enterprise that is constituted or organised under the laws of that Member and has substantial business activities in the territory of that Member, or
- ii. an enterprise that is constituted or organised under the laws of that Member and is directly or indirectly owned or controlled by a natural person of that Member or by an enterprise mentioned under paragraph (i).

Article 20 Consent Requirement

A Member may express its consent to the jurisdiction of the MIC as required under Article 19(1) by communicating such consent in writing at the time of accession, acceptance or approval of this Statute. Unless otherwise stated, such consent shall extend to the dispute settlement provisions of the Agreements listed in Annexes X of this Statute, including future International Investment Agreements of Members to the MIC. The Agreements included in Annexes X shall form an integral part of this Statute and are binding on the respective parties to the Agreements.

A national of a Member may express its consent to the jurisdiction of the MIC by lodging a written request to initiate proceedings pursuant to Article 40.

Article 21 Jurisdiction over Investment Contracts

A Member and a national of another Member may consent in writing to submit to the jurisdiction of the MIC disputes arising out of an investment contract.

Article 22 State-to-State Disputes

Any legal disputes between Members of the MIC regarding the interpretation or application of the Agreements listed under Annexes of this Statute may be resolved through recourse to the MIC.

The applicable law for the resolution of any legal disputes arising under paragraph 1 shall be determined under the specific International Investment Agreement between the disputing Members.

Upon the parties' consent to the jurisdiction of the MIC pursuant to paragraph 1, such jurisdiction shall be exercised to the exclusion of any other remedy provided for in the specific International Investment Agreement between the disputing Members.

Article 23 Exclusivity of Jurisdiction

Consent of the parties to the jurisdiction of the MIC shall be deemed consent to the exclusion of any other remedy. A Member may require the exhaustion of local

administrative or judicial remedies as a condition to its consent to jurisdiction of the MIC under this Statute.

The MIC will have the exclusive jurisdiction to adjudicate any dispute arising out of an investment agreement between two States that are both Members of the MIC. Where any investment agreement between two Members of the MIC calls for recourse to Investor-State Arbitration, the Members agree to regard it as prescribing recourse to the MIC.

Part V Procedure

Article 24 Transitional Clauses

Any dispute settlement proceedings which would fall under the exclusive jurisdiction of the MIC, but have already commenced prior to the establishment of the MIC may be continued.

No dispute may be brought before the MIC if such dispute is already pending before another dispute resolution mechanism.

Article 25 Prohibition of Diplomatic Protection

No Member shall give diplomatic protection, or bring an international claim, in respect of a dispute to which one of its nationals and another Member have consented to submit or have submitted to the MIC under this Statute, unless such other Member has failed to abide by and comply with the decision rendered in the dispute.

Article 26 Jurisdiction *Ratione Temporis*

The MIC shall have jurisdiction over investment disputes arising after the entry into force of this Statute, unless a Member has consented in writing to jurisdiction over disputes, which arose prior to the entry into force of this Statute.

Article 27 Additional Jurisdictional Requirements

The MIC does not have jurisdiction over disputes where the national of the other Member does not qualify as an investor as defined in the underlying International Investment Agreement, has not made an investment as defined in the underlying International Investment Agreement between the disputing parties, or does not fulfil other jurisdictional requirements of the underlying International Investment Agreement.

PART V PROCEDURE

Article 28 General Principles

The MIC establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Members in accordance with the principle of reciprocity and due process before an independent and impartial adjudicator. By performing their duties, the judges of the MIC shall:

1. (a) adhere to the Rule of Law;
2. (b) promote the transparency of the proceedings through application of the rules, *inter alia* on transparency, ethics and conduct which govern them;

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- (c) ensure that the proceedings are carried out efficiently and expeditiously;
4. (d) secure uniform and consistent interpretation of the law, taking into consideration previous decisions without establishing a doctrine of precedent, particularly where there exists sufficient uniformity in previous case law; and
5. (e) take into account the Members' right to regulate.

The proceedings and functioning of all the organs of the MIC will adhere to the highest standards of the rule of law, transparency, and good governance. All proceedings shall be conducted in accordance with the provisions of this Part and, except as the parties otherwise agree, in accordance with the Rules of Procedure adopted by the Plenary Body in effect on the date of the proceedings.

Section 1 General Rules

Article 29 Use of Languages

The official language of the MIC shall be English.

All communications by and with the disputing parties or their representatives, including oral and written submissions, shall be conducted in the official language of the MIC.

Should the underlying investment agreement provide a different language for the conduct of dispute settlement or the disputing parties so agree, the presiding judge of the chamber may authorise the use of a different language.

If such authorisation is granted, the Secretariat shall make the necessary arrangements for the interpretation and translation into English of the parties' oral and written submissions, in full or in part, where the presiding judge of the chamber considers it to be in the interests of the proper conduct of the proceedings.

Any witness, expert or other person appearing before the MIC may use another language if he or she does not have sufficient knowledge of the official language. In that event, the Secretariat shall make the necessary arrangements for interpretation and translation.

The extra costs for interpretation and translation will be allocated by the MIC to the disputing parties.

Article 30 Competence-Competence

The MIC shall be the judge of its own competence.

Any objection by a disputing party that a dispute is not within the jurisdiction of the MIC shall be considered and decided by the judges at any stage of the dispute. A plea that the MIC does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to (a counterclaim or) an additional claim, in the reply to the (counterclaim or to the) additional claim. A plea that the MIC is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings. The MIC may, in either case, admit a later plea if it considers the delay justified.

Part V Procedure

Article 31 Applicable Law

The MIC shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the MIC shall apply such rules of international law as may be applicable.

The MIC may not submit a finding of *non liquet* on the ground of silence or obscurity of the law. The provisions of paragraphs 1 and 2 shall not prejudice the power of the MIC to decide a dispute *ex aequo et bono* if the parties so agree. In such case, no recourse to the Appellate Court is available.

Section 2 Powers and Functions of the MIC

Article 32 Powers of the Judges

Judges may, if they deem it necessary at any stage of the proceedings:

- (a) call upon the parties to produce documents or other evidence; and
- (b) visit the scene connected with the dispute and conduct such inquiries there as it may deem appropriate.

Article 33 Default Decision

Failure of a party to appear or to present its case shall not be deemed an admission of the other party's assertions.

If a party fails to appear or to present its case at any stage of the proceedings, the other party may request the MIC to deal with the questions submitted to it and to render a decision. The MIC must satisfy itself, not only that it has jurisdiction, but also that the claim is well founded in fact and law. Before rendering a decision, the MIC shall notify and grant a period of grace to the party failing to appear or to present its case, unless it is satisfied or informed that that party does not intend to do so.

Article 34 Additional Claims and Counterclaims

Except as the parties otherwise agree, the MIC shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute.

Article 35 Provisional Measures

The MIC may, if it considers that the circumstances so require, order any provisional measures necessary to preserve the respective rights of either party.

Part V Procedure

Article 36 Proceedings under another International Agreement

Where a claim is simultaneously brought pursuant to this Statute and under another international agreement and:

1. (a) there is a potential for overlapping compensation; or
2. (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Statute,

the MIC may, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision or order.

Article 37 Consolidation

When two or more claims that have been submitted separately to the MIC concern a common question of law or fact and arise out of the same events or circumstances, a disputing party or the disputing parties, jointly, may seek the establishment of a separate chamber of the MIC pursuant to this Article and request that such chamber issues a consolidation order ('request for consolidation').

The disputing party seeking a consolidation order shall first deliver a notice to all the disputing parties it seeks to be covered by this order.

If the disputing parties notified pursuant to paragraph 2 have reached an agreement on the consolidation order to be sought, they may make a joint request for the establishment of a separate chamber of the MIC and a consolidation order pursuant to this Article. If the disputing parties notified pursuant to paragraph 2 have not reached agreement on the consolidation order to be sought within 30 days of the notice, a disputing party may make a request for the establishment of a separate chamber of the Court of First Instance and a consolidation order pursuant to this Article.

The request shall be delivered, in writing, to the President of the MIC and to all the disputing parties sought to be covered by the order, and shall specify:

- (a) the names and addresses of the disputing parties sought to be covered by the order; (b) the claims, or parts thereof, sought to be covered by the order; and
- (c) the grounds for the order sought.

A request for consolidation involving more than one respondent shall require the agreement of all such respondents.

The President of the MIC shall, after receipt of a consolidation request, constitute a new chamber ('consolidating chamber') of the MIC which shall have jurisdiction over some or all of the claims, in whole or in part, which are the subject of the joint consolidation request.

If, after hearing the disputing parties, a consolidating chamber is satisfied that claims submitted concern a common question of law or fact and arise out of the same events or circumstances, and consolidation would best serve the interests of fair and efficient resolution of the claims including the interest of consistency of decisions, the consolidating chamber of the MIC may, by order, assume jurisdiction over some or all of the claims, in whole or in part.

If a consolidating chamber of the MIC has assumed jurisdiction pursuant to paragraph 7, a claimant that has submitted a claim to the MIC and whose claim has not been consolidated may make a written request to the MIC that it be included in such order provided that the request complies with the requirements set out in paragraph 4. The consolidating chamber of the MIC shall grant such order

Part V Procedure

where it is satisfied that the conditions of paragraph 7 are met and that granting such a request would not unduly burden or unfairly prejudice the disputing parties or unduly disrupt the proceedings. Before the consolidating chamber of the MIC issues that order, it shall consult with the disputing parties.

On application of a disputing party, a consolidating chamber of the MIC established under this Article, pending its decision under paragraph 7, may order that the proceedings of unconsolidated chambers of the MIC addressed by the request of consolidation be stayed unless the former chamber has already adjourned its proceedings.

The unconsolidated chamber of the MIC shall cede jurisdiction in relation to the claims, or parts thereof, over which a consolidating chamber of the MIC established under this Article has assumed jurisdiction.

The decision of a consolidating chamber of the MIC established under this Article in relation to those claims, or parts thereof, over which it has assumed jurisdiction is binding on the unconsolidated chambers of the MIC as regards those claims, or parts thereof.

A claimant may withdraw a claim under this Section that is subject to consolidation and such claim shall not be resubmitted. If it does so no later than 15 days after receipt of the

notice of consolidation, its earlier submission of the claim shall not prevent the claimant's recourse to dispute settlement other than under this Statute.

At the request of a claimant, a consolidating chamber of the MIC may take such measures as it sees fit in order to preserve the confidential or protected information of that claimant in relation to other claimants. Those measures may include the submission of redacted versions of documents containing confidential or protected information to the other claimants or arrangements to hold parts of the hearing in private. The consolidating chamber may adopt appropriate procedures for the consideration and transmission of such confidential information.

Article 38 Discontinuance

If, following the submission of a claim under this Statute, the claimant fails to take any steps in the proceeding during 180 consecutive days or such period as the disputing parties may agree, the claimant is deemed to have withdrawn its claim and to have discontinued the proceeding. The MIC shall, at the request of the respondent, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered, the authority of the MIC shall lapse.

Article 39 Withdrawal of a Claim

The parties may mutually decide or the claimant may unilaterally withdraw a claim at any stage of the proceedings before the Court of First Instance or the Appellate Court.

Any decisions which were under appeal before the Appellate Court will become final after withdrawal of the appeal as provided under Article 49 of this Statute.

The Court of First Instance or the Appellate Court may issue a decision of costs against the parties in case of a mutual withdrawal or against the claimant or appellant in case of a unilateral withdrawal.

Part V Procedure

Section 3 First Instance Proceedings

Article 40 Request to Initiate Proceedings

Any Member or any national of a Member wishing to institute proceedings at the MIC shall address a request to that effect in writing to the Secretariat which shall send a copy of the request to the other party.

The request shall contain information concerning the issues in dispute, the identity of the parties, and their consent to the jurisdiction of the MIC in accordance with the Rules of Procedure.

If a dispute resolution clause in the underlying International Investment Agreement provides for the completion of certain requirements before filing the request to initiate proceedings such as the observance of consultation periods, exhaustion of local remedies, or other similar procedures, the claimant must prove adherence to those requirements.

Upon receipt of the request to initiate proceedings, the Secretariat will inform the President of the MIC about the receipt of the claim and request an allocation of the claim. The President will then allocate the claim to a chamber while taking into account the guidelines prescribed regarding allocation of claims under this Statute and the rules framed under it.

Article 41 Inadmissibility of a Claim

A claim by an investor is inadmissible if the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

Article 42 Time-Limits for Submission of a Claim

Claims have to be submitted to the MIC within one year of the dispute having arisen or, in case of recourse to local remedies, within one year of completion of any domestic legal or administrative proceedings regarding the dispute.

Except for any special agreements between the Members, no claims should be accepted by the MIC beyond a 10 year period after the alleged violation had taken place.

Article 43 Time-Limits for Court of First Instance

In order to make the procedures more efficient, the period in which the Court of First Instance shall conduct its proceedings, shall, as a general rule, not exceed six months.

When the Court of First Instance considers that it cannot issue its decision within six months, it shall inform the parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. The period from the constitution of the chamber of the Court of First Instance to the issuance of the decision should not exceed nine months.

Part V Procedure

Article 44 Decision of First Instance and Formalities

The Court of First Instance shall generally hear disputes in chambers consisting of three judges.

Within 90 days of the assignment of a dispute by the President to a chamber, such chamber will decide whether the claim submitted is inadmissible, manifestly ill-founded or if there is a manifest lack of jurisdiction. If the chamber determines that these criteria are fulfilled, it will dismiss the claim immediately. Otherwise, it will be registered and the proceedings will be commenced in the same chamber.

First Instance chambers shall decide questions by a majority of judges.

Notwithstanding paragraph 1, the disputing parties may agree that a dispute be heard by a sole judge to be appointed at random, unless such judge has the same nationality as one of the disputing parties or was nominated to the MIC by a Member who is also a disputing party. The respondent shall give consideration to a request from the claimant to have the dispute heard by a sole judge, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made to the President of the MIC at the time of submission of the claim through the Secretariat.

Decisions of the First Instance chambers shall be in writing and shall be signed by the judges who voted for it.

Decisions shall deal with every question submitted to the Court of First Instance and shall state the reasons upon which they are based.

Any judges of a First Instance chamber may attach their individual or joint dissenting or separate opinions or statements of dissent to the decision.

Article 45 Notification Decision of First Instance

The Secretariat shall promptly dispatch certified copies of the decision to the parties. The decision shall be deemed to have been rendered on the date on which the certified copies were dispatched.

The Court of First Instance, upon the request of a party made within 45 days after the date on which the decision was rendered, may after notice to the other party decide any question which it had omitted to deal with in the decision, and shall rectify any clerical, arithmetical or similar error in the decision. Its subsequent decision shall become part of the original decision and shall be notified to the parties in the same manner as the original decision.

Section 4 Appellate Mechanism

Article 46 Grounds for Appeal

Either party may appeal the decision of a Chamber, Grand Chamber, or Plenary of the First Instance by an application in writing addressed to the Secretariat on one or more of the following grounds:

- (a) that the MIC does not have jurisdiction to hear the dispute or that a claim is not admissible;
- (b) that the First Instance has manifestly exceeded its powers;
- (c) that there was corruption on the part of a judge of the First Instance;
- (d) that there has been a serious departure from a fundamental rule of procedure;

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5. (e) that the decision has failed to state the reasons on which it is based;
6. (f) that there are grave errors in the application or interpretation of applicable law;
or
7. (g) that there are manifest errors in the appreciation of the facts, including the appreciation of the relevant domestic law.

Article 47 Appeal Procedure

The reasoned appeal must be submitted within 90 days after the date on which the decision was rendered. When appeal is submitted on the ground of corruption such application shall be made within 90 days after discovery of the corruption and in any event within three years after the date on which the decision was rendered.

The chamber of the Appellate Court constituted to hear the appeal shall generally consist of three judges randomly assigned by the President (Article 16(4 and 5)). Larger chambers or a plenary of Appellate Court judges may be called upon to decide on specific disputes which are deemed to be of high importance.

The Appellate Court may uphold, modify or reverse the decision of first instance or any part thereof.

The Appellate Court may, if it considers that the circumstances so require, stay the enforcement of the First Instance decision pending the appeal's decision. If a party requests a stay of enforcement of the First Instance decision in its application, enforcement shall be stayed provisionally until the Appellate Court rules on such request.

Article 48

Time-Limits for the Appellate Court

As a general rule, the proceedings at the Appellate Court shall not exceed 90 days from the date a party submits its appeal to the date the Appellate Court renders its decision. When the Appellate Court considers that it cannot provide its decision within 90 days, it shall inform the parties in writing of the reasons for the delay together with an estimate of the period within which it will submit its decision. The proceedings shall not exceed 120 days.

Section 5 Final Decision

Article 49 Final Decision

A decision rendered pursuant to previous sections shall not be considered final and no action for enforcement of a decision may be brought until either:

1. (a) 90 days from the issuance of the decision by the First Instance has elapsed and no appeal has been filed;
2. (b) an initiated appeal has been rejected or withdrawn; or
3. (c) the disputing parties are notified of the decision of the Appellate Court.

A final decision of the MIC has binding force between the parties and in respect of that particular case. It shall not be subject to any other remedy except those provided for in this Statute. Each party shall abide by and comply with the terms of the decision except to the extent that enforcement has been stayed pursuant to the relevant provisions of this Statute.

Part V Procedure

Section 6 Revision of a Decision

Article 50 Revision

Either party may request revision of a final decision by an application in writing addressed to the Secretariat on the ground of discovery of a fact of such a nature that decisively affects the decision, provided that the fact was unknown to the MIC and to the applicant when the decision was rendered and that the applicant's ignorance of that fact was not wilful or due to negligence.

The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the decision was rendered.

The MIC may, if it considers that the circumstances so require, stay enforcement of its original decision pending its revised decision. If the applicant requests a stay of enforcement of a decision in its application, enforcement shall be stayed provisionally until the MIC rules on such request within three months.

Section 7 Challenge of Judges

Article 51

Procedure for Challenge of Judges

If a disputing party considers that a judge has a conflict of interest, it may submit a notice of challenge to the President of the MIC. Any notice of challenge shall be sent to the President of the MIC within 15 days of the date on which the names of the judges adjudicating the particular dispute have been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at an earlier stage. The notice of challenge shall state the grounds for the challenge.

If, within 15 days from the date of the notice of challenge, the challenged judge has elected not to step down from the particular dispute, after receiving submissions from the disputing parties and after providing the challenged judge an opportunity to submit any observations, the plenary of judges excluding the challenged judge will rule on the challenge by absolute majority in a reasoned decision.

Section 8 Other Provisions on Procedure

Article 52 Third Party Funding

In the event of third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the MIC the name and address of the third party funder.

The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

Part VI Enforcement

Article 53 Determination of Appropriate Respondent

The judges of the MIC will consider any internal arrangements made by international organizations which represent multiple Members regarding the allocation of responsibility arising from a claim against a Member State of the organization or the organization itself.

The judges of the MIC may seek an opinion from an international organization regarding the allocation of responsibility between the organization and its members in respect of a claim. The final decision passed by the chambers of the Court of First Instance or the Appellate Court will reflect the arrangement made by the Member State and the international organization regarding the distribution of responsibilities.

If no arrangement is made by the international organization and its Member States within the specified period of time, then the First Instance or Appellate Court may choose to issue a decision requiring the international organization assume responsibility under the decision.

Article 54 Determination of Costs

The charges payable by the disputing parties for the use of the facilities of the MIC shall be determined by the MIC, according to the Regulations on Costs established by the Plenary Body.

Article 55 Experts and Third Parties

The Court of First Instance and the Appellate Court may consult experts to deal with questions regarding specialised areas.

After consultation with the disputing parties, the Court of First Instance may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the Court in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant or public interest in the proceedings. Each submission shall identify the author, disclose any affiliation, direct or indirect, with any disputing party, and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in the language of the arbitration and comply with any page limits and deadlines set by the tribunal. The Court shall provide the disputing parties with an opportunity to respond to such submissions and

it shall ensure that the submissions do not disrupt or unduly burden the proceedings, or unfairly prejudice any disputing party.

PART VI ENFORCEMENT

Article 56 Enforcement within MIC Members

Each Member of the MIC shall recognise a decision rendered pursuant to this Statute as binding and enforce the pecuniary obligations imposed by that decision within its territories as if it were a final

Part VII Final Provisions

judgment of a court in that State or international entity. A Member of the MIC with a federal constitution may choose to enforce such a decision in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent State or international entity.

A party seeking recognition or enforcement in the territories of a Member of the MIC shall furnish to a competent court or other authority which such Member shall have designated for this purpose a copy of the decision certified by the Director-General. Each Member of the MIC shall notify the Director-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

Execution of a decision shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Third States which are not Parties to this Statute may commit themselves to recognise and enforce decisions rendered by the MIC in accordance with the rules set out in this Statute. The declaration of commitment may be made at any time to the Secretariat of the MIC.

Article 57 Enforcement in Non-MIC Members

The enforcement of MIC decisions in non-MIC Members will be governed by a separate treaty. The MIC Members are working towards the creation of such a treaty and are seeking to encourage the accession of third parties to that treaty in their international relations.

Article 58 Enforcement Fund

A fund for the enforcement of MIC decisions ('the Fund') is hereby established. The Fund shall be governed by administrative regulations to be adopted by the Plenary Body.

Upon accession to the MIC, MIC Members are obliged to contribute to the Fund. The minimum contribution will be determined by the Plenary Body.

In accordance with the administrative regulations governing the Fund, the Fund shall satisfy an MIC Member's obligation under an MIC decision by payment to a successful

claimant up to a sum of XXX USD per case upon request, if the claimant can demonstrate need for urgency of immediate payment of an awarded sum.

Upon satisfying or agreeing to satisfy a Member's obligation under an MIC decision by payment to the benefitting claimant, the MIC shall be subrogated to such rights or claims related to the respective decision as the holder of the decision may have had against the Member and other obligors. The subrogation shall be effected in the form of assignment.

PART VII FINAL PROVISIONS

Article 59 Signature

This Statute shall be open for signature on behalf of the entities mentioned in Article 4 and in accordance with the procedure thereunder.

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Article 60 Ratification and Accession

This Statute shall be subject to ratification or accession by the entities referred to in Article 4 in accordance with their respective constitutional procedures. The instruments of ratification or accession shall be deposited with the Depository who shall transmit certified copies to all Members.

Article 61 Entry into Force

This Statute shall enter into force ### months after the date of deposit of the fortieth instrument of ratification.

For each Member acceding to this Statute after the deposit of the fortieth instrument of ratification or accession, the Statute shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession.

Upon its entry into force, each Member shall take such legislative or other measures as may be necessary for making the provisions of this Statute effective in their relations with other Members.

Article 62 Relation to other International Agreements

This Statute shall not alter the rights and obligations of Members which arise from other agreements compatible with this Statute and which do not affect the enjoyment by other Members of their rights or the performance of their obligations under this Statute.

Article 63 Amendment of the Statute

A Member may propose amendments to this Statute and request their consideration in the Plenary Body by written communication addressed to the Director-General, who shall promptly circulate such communication to all other Members.

If a majority of the Members reply favorably to the request within three months from the date of the circulation of the communication, the proposal shall be deliberated in the Plenary Body.

The Plenary Body should make every effort to reach agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted. The adoption of an amendment on which consensus cannot be reached shall require a two-thirds majority of Members in the Plenary Body.

Article 64 Entry into Force of Amendments

Each amendment shall enter into force 30 days after its adoption by the Plenary Body.

A Member which becomes a Party to this Statute after the entry into force of an amendment in accordance with paragraph 1 shall be considered as a Party to this Statute as so amended.

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No amendment shall affect the rights and obligations under this Statute of any Member or of any of its constituent subdivisions or agencies, or of any national of such Member arising out of consent to the jurisdiction of the MIC given before the date of entry into force of the amendment.

Article 65 Review of the Statute

10 years after the entry into force of this Statute, the Chairperson shall convene a conference, hereinafter referred to as Review Conference, to consider any amendments to this Statute.

At any time thereafter, at the request of a Member and for the purposes set out in paragraph 1, the Chairperson shall, upon approval by a majority of the Plenary Body, convene a Review Conference.

The provisions of Articles 63 and 64 shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 66 Denunciation

A Member may, by written notification addressed to the Depositary, denounce this Statute and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

A Member shall not be discharged by reason of the denunciation from the financial and contractual obligations which accrued while it was a party to this Statute.

Denunciation of this Statute shall not affect any rights or obligations of that Member created through the execution of this Statute prior to its termination for that Member.

Article 67 Status of Annexes

The Annexes form an integral part of this Statute and, unless expressly provided otherwise, a reference to this Statute or to one of its Parts includes a reference to the Annexes relating thereto.

Article 68 Depositary

The Director-General shall be the depositary of this Statute and of the instruments of ratifications or accessions and amendments thereto. In exercise of his or her functions as a depositary, the Director- General shall:

1. (a) notify the Members of the date on which this Statute enters into force in accordance with Article 61;
2. (b) register this Statute with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly;
3. (c) notify the Members of signatures and deposits of instruments of ratifications and accessions to this Statute in accordance with Articles 59 and 60 respectively;

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4. (d) circulate amendments adopted in accordance with this Statute to Members for ratification or accession in accordance with Article 63;
5. (e) notify the Members of the date on which any amendment of this Statute enters into force in accordance with Article 64; and
6. (f) notify the Members of any denunciations of this Statute in accordance with Article 66.

Article 69 Authentic Texts

The original of this Statute, of which the _____ texts are equally authentic, shall remain deposited with the Director-General, who shall send certified copies thereof to all Members.

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