

FROM THE JAY TREATY COMMISSIONS TOWARDS A MULTILATERAL INVESTMENT COURT:
ADDRESSING THE ENFORCEMENT DILEMMA

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Abstract

The proposed turn from settling investment disputes through arbitration to establishing a multilateral investment court system is a remarkable step. The EU Commission's proposal, coupled with UNCITRAL's recent reform initiative, could bring about a significant change in the area of investor-State dispute settlement. Yet, as this article explains, one of the major benefits of the current system of investment arbitration is its strong enforcement mechanism. Even though the EU Commission's proposal for the investment court system in CETA and the EU-Vietnam Free Trade Agreement strives to also employ this mechanism for the enforcement of investment court decisions, the authors raise concerns as to the outcome of this approach. This article therefore addresses the enforcement dilemma which the establishment of a multilateral investment court or other improvements of the system could entail. The authors conclude that, in case the way forward for investment dispute settlement will indeed be the establishment of a multilateral court, its decisions could best be enforced through a provision similar to the ICSID Convention's Article 54. For this, such a court must attract a sufficiently large number of member States, as enforcement in third States that do not participate in the project is impossible without additional agreements.

I. Introduction

Years and years ago, arbitral tribunals replaced the industrial States' "gunboat diplomacy"¹ for the settlement of international investment disputes. Today, the settlement of investment disputes by way of arbitration itself is under fire. First within the EU, and then on the other side of the Atlantic, non-governmental organizations, the media, and subsequently also politicians opposed the inclusion of investment arbitration mechanisms in the Transatlantic Trade and Investment Partnership ["TTIP"] and the EU-Canada Comprehensive Economic and Trade Agreement ["CETA"]. A fear of undemocratic decision-making, a 'pro-investor bias' influencing the conduct of the proceedings behind closed doors, and the alleged phenomenon of a 'regulatory chill' are driving the debates. Decisions regarding the balancing of public interest against the interests of private companies, the critics demanded, should not take place before 'private' tribunals – and in particular not behind closed doors.² The reasons for which States have established this dispute settlement mechanism were either disregarded or ignored.

Influenced by this debate and in light of ever strengthening public opposition to ISDS in Europe, the European Commission put forward a new proposal, first in the TTIP negotiations but shortly

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¹ For a discussion of this "gunboat diplomacy", see, e.g., O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The evolution of modern international investment law*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 649, 651-653 (Karl P. Sauvant ed., 2012); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 9-10 (2009); Stephen C. Neff, *A Short History of International Law*, in INTERNATIONAL LAW 19, 21 (Malcolm D. Evans ed., 3d ed. 2010).

² See, e.g., PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE, <https://corporateeurope.org/international-trade/2012/11/profitting-injustice> (last visited Aug. 3, 2017).

thereafter also in CETA: the establishment of a permanent investment court – or rather the establishment of several bilateral investment courts. In a blog post on May 5, 2015, EU Commissioner *Malmström* explained her motivation for this proposal as follows:

*“My assessment of the traditional ISDS system has been clear – it is not fit for purpose in the 21st century. I want the rule of law, not the rule of lawyers. I want to ensure fair treatment for EU investors abroad, but not at the expense of governments’ right to regulate. Our new approach ensures that a state can never be forced to change legislation, only to pay fair compensation in cases where the investor is deemed to have been treated unfairly (suffered discrimination or expropriation, for example).”*³

For Commissioner Malmström, the conclusion was simply:

*“We need a robust and serious reform of investment dispute resolution, because it’s an important part of global investment policy. Europe is the biggest investor and recipient of foreign investments in the world. It only makes sense that we lead the way to reform, and set out our vision for better rules on a global scale.”*⁴

The EU Commission has by now already achieved the inclusion of its proposed investment court system [“ICS” or “ICS Model⁵”] in the CETA text, notably during the *legal scrubbing* period. Further, the ICS Model has found its way into the not so hotly debated EU-Vietnam Free Trade Agreement as well.⁶ These two texts, however, provide for the establishment of individual investment courts for the respective treaties, with the perspective of the establishment of a multilateral investment court in the future.⁷ As part of a new initiative, the EU Commission has now begun its work on a proposal for this multilateral forum.⁸ At the same time, Gabrielle Kaufmann-Kohler and Michele Potestà have authored a report for the United Nations Commission on International Trade Law [“UNCITRAL”], using the Mauritius Convention⁹ as a model for the potential multilateralization of investment dispute settlement [“CIDS Study”]¹⁰. At its fiftieth annual session in early July this year,

³ Cecilia Malmström, *Investments in TTIP and beyond - towards an International Investment Court*, EUROPEAN COMMISSION (May 5, 2015), https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en (last visited Aug. 3, 2017).

⁴ *Id.*

⁵ The actual nature of the system will be discussed further below. The terminology used in this respect is the EU Commission’s own.

⁶ See Cecilia Malmström, *Done Deal with Vietnam* (Dec 2, 2015), https://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam_en (last visited Aug. 3, 2017); the last available text of CETA (Sept. 14, 2016) will hereinafter be referred to as “CETA”, the last published version of the investment chapter [Chapter 8] of the EU-Vietnam FTA (Feb. 1, 2016) as “Draft EU-Vietnam FTA” and the EU Commission’s last published investment chapter [Chapter 2] for the TTIP (Nov. 12, 2015) as the “TTIP-Proposal”. The TTIP Proposal is available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (last visited Aug. 3, 2017), CETA is available at <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf> (last visited Aug. 3, 2017), and the Draft EU-Vietnam FTA is available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (last visited Aug. 3, 2017).

⁷ CETA, art. 8.29; Draft EU-Vietnam FTA, Section 3, art. 15.

⁸ See EU Commission, *The Multilateral Investment Court project* (Dec. 21, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> (last visited Aug. 3, 2017).

⁹ G.A. Res. 69/116, 2014, annex, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Dec. 10, 2014).

¹⁰ 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*

UNCITRAL decided to entrust its Working Group III with a broad mandate of working on potential reform of investor-State dispute settlement. The Working Group is asked to identify concerns regarding ISDS and consider whether reform is desirable.¹¹

The proposed turn from settling investment disputes by means of arbitration to negotiating the establishment of a multilateral court system is a remarkable step, especially in light of the fact that investment disputes have, ever since they were settled judicially,¹² always been settled by arbitration (or arbitration-like mixed claims commissions¹³). Arbitration, in general international law, can also look back on a longer tradition than institutionalized adjudication.¹⁴ This is very well illustrated by the outcome of the Hague Conferences of 1899 and 1907: The attempt to establish the first international court failed.¹⁵ Instead, the participating States decided to establish the Permanent Court of Arbitration [“PCA”]¹⁶ to facilitate the peaceful settlement of what were back then purely inter-State disputes. From the Hague Conferences until today, arbitration has always remained one of the preferred means for the settlement of international disputes. The EU Commission’s proposal could thus bring about a significant change in the area of investor-State dispute settlement.¹⁷

This article, hence, seeks to briefly describe the historical development of international arbitration in general (section II), and the evolution of today’s investment arbitration system in particular (section III). This description will conclude with a short section on the effects investment arbitration has had on the individual’s status under international law. Subsequently, we discuss the EU Commission’s

(Geneva Ctr. for Int’l Disp. Settlement (CIDS) Research Paper, June 3, 2016), http://www.uncitral.org/pdf/english/commissionssessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf (last visited Aug. 3, 2017).

¹¹ Press Release, United Nations Information Service, UNCITRAL to consider possible reform of investor-State dispute settlement, UNIS/L/250 (July 14, 2017), <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html> (last visited Aug. 3, 2017).

¹² With regard to the terminology used, as pointed out by Pellet, “[s]ome authorities put both arbitration and the settlement of disputes by permanent international courts and tribunals together under the denomination ‘judicial settlement’. Others limit the definition of judicial settlement to the settlement of disputes by permanent international courts and tribunals. The very fact that Art. 33 UN Charter distinctively mentions ‘arbitration’ on the one hand and ‘judicial settlement’ on the other hand justifies that they be dealt with separately; however, they indisputably offer some common traits”, Alain Pellet, *Judicial Settlement of International Disputes*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (Online Edition, Rüdiger Wolfrum ed., 2013). For the purposes of this article, references to judicial settlement of disputes or the term ‘judicial’ are meant to include both settlement of disputes by courts and through arbitration.

¹³ See on these, Rudolf Dolzer, *Mixed Claims Commissions*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Online Edition, Rüdiger Wolfrum ed., 2011).

¹⁴ On this, see Sebastian Wuschka, *Investitionsschiedsverfahren: Individualrechtsschutz oder “anti-demokratische Herrschaft der Konzerne”?*, in FREIHANDEL VS. DEMOKRATIE 15, 16-20 (Sinthiou Buszewski et al. eds., 2016); see also ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 39 *et seq.* (2013).

¹⁵ For a more detailed account, see ROSENNE’S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 3-5 (Terry D. Gill ed., 6th ed. 2003); see also Kolb, *supra* note 14, at 41 *et seq.*, who emphasizes that a clear terminological distinction between arbitration and adjudication through courts was not too much in use up until the creation of the PCIJ (*cf.* at 45) and that the aim of the Hague Peace Conferences was rather to move arbitration by specific agreement to obligatory arbitration.

¹⁶ For a detailed account on the PCA, see MANUEL INDLEKOFER, INTERNATIONAL ARBITRATION AND THE PERMANENT COURT OF ARBITRATION (2013); see also Tjaco T. van den Hout, *Resolution of International Disputes: The Role of the Permanent Court of Arbitration – Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes*, 21 (3) LEIDEN J. INT’L L. 643-661 (2008).

¹⁷ Catharine Titi, *The European Union’s Proposal for an International Investment Court, Significance, Innovations and Challenges Ahead*, 14 (1) TRANSNAT’L DISP. MGMT. 3 (Jan. 2017).

proposal and evaluate it with a focus on the question of enforcement (section IV). Thereafter, we elaborate on the key consequences of this analysis that should be taken into account in the establishment of a multilateral investment court or during other improvements to the system (section V).

II. The Development of Investor-State Dispute Settlement in Modern International Law

Until the Hague Peace Conferences of 1899 and 1907, the protection of what we today understand by the term foreign investment was often ensured through recourse to the use of (military) force.¹⁸ In the nineteenth century, for example, during the so-called Don Pacifico affair, the British Foreign Minister Lord Palmerston sent military ships into the Aegean Sea to seize Greek property to the value which a British citizen had previously called for in vain as compensation from Greece.¹⁹ Ultimately, the British Navy even established a blockade of the port of Piraeus. Similar rowdy forms of diplomatic protection also led to several naval blocks against Venezuela – such as the ones by Germany, Great Britain and Italy from 1902 to 1903.²⁰ The United Kingdom alone intervened about 40 times in Latin America between 1820 and 1914 to safeguard the financial interests and the property of its nationals abroad.²¹

The Second Hague Conference slowly brought this “gunboat diplomacy” to an end when the participating States agreed to refrain from using force to recover debts if the debtor State engaged in arbitration and complied with its result.²² The practice of enforcing the protection of a State’s national by virtue of ‘judicialized’ diplomatic protection before arbitral tribunals, the Permanent Court of International Justice [“PCIJ”], and later also the International Court of Justice [“ICJ”] developed. In parallel, first through the Briand-Kellogg-Pact²³ and subsequently through Article 2 (4) of the UN-Charter, the prohibition of the use of force between States gained strength. It was no longer conditional upon the compliance with the requirement of arbitration.

The development of modern international arbitration dates even further back. Its origin was the Jay Treaty²⁴ of 1794,²⁵ which was concluded to settle disputes between the United States and Great

¹⁸ For a more detailed account on this “*form of the threat or use of force by these States designed to ensure that the rights of injured nationals were fully vindicated*”, see Johnson & Gimblett, *supra* note 1, at 651-653.

¹⁹ See also on this affair, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 15-17 (2005); Johnson & Gimblett, *supra* note 1, at 652.

²⁰ Regarding this and further examples, see Johnson & Gimblett, *supra* note 1, at 652-653; WILHELM G. GREWE, EPOCHEN DER VÖLKERRECHTSGESCHICHTE 616 *et seq.* (1984); Neff, *supra* note 1, at 19.

²¹ NEWCOMBE & PARADELL, *supra* note 1, at 9.

²² See The Hague Convention (II) Respecting Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, 187 C.T.S. 250, art. 1:

“*The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.*

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award.”

²³ General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57.

²⁴ Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the United States of America, Nov. 19, 1794, 52 C.T.S. 243 [*hereinafter* “Jay Treaty”].

²⁵ See also WILLIAM E. DARBY, INTERNATIONAL ARBITRATION - INTERNATIONAL TRIBUNALS 769 (1904); JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 191 (1929); Dolzer considers the Jay Treaty in particular also as the starting point of the tradition of mixed claims commissions, *cf.* Dolzer, *supra* note 13, ¶ 6.

Britain that resulted from the American War of Independence. The Jay Treaty established the so-called Jay Commissions. These dealt with border disputes²⁶, claims for compensation by British creditors for debts preceding the War of Independence²⁷, as well as the treatment of the American commercial fleet and the support of commerce raiders by the United States.²⁸ Already two out of three of these Commissions consequently dealt with direct claims by British and American nationals.²⁹

A next milestone in the development of international arbitration – and indeed also for the establishment of the PCIJ and the ICJ³⁰ – was the *Alabama Arbitration* (1869-1872).³¹ This arbitration dealt with the American claim that Great Britain had violated its duty of neutrality towards the parties of the American Civil War. In particular, the US advanced the claim that Britain had secretly built commerce raiders and delivered them to the Confederate States' Navy. The most prominent one of these ships was the *CSS Alabama*, which ultimately gave the arbitration its name.³²

The *Alabama Arbitration* illustrated that judicial settlement of international disputes was capable of keeping States from waging war. A general openness to peaceful means of settling disputes greatly influenced the following Hague Peace Conferences.³³ The intention not to solve disputes through the use of force anymore was *the* guiding idea for the States' negotiations.³⁴ At the same time, many States were reluctant to agree to a compulsory judicial dispute settlement mechanism.³⁵ As a consequence, no international court (which would have been the first of its kind) or compulsory arbitration system was established.³⁶ The participating States, however, concluded the 1899 and 1907 Hague Conventions³⁷ as part of which the PCA was established in 1899.³⁸

Article 16 and Article 38 (1) of the 1899 and 1907 Conventions respectively read:

“*In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.*”³⁹

²⁶ Article V of the Jay Treaty dealt with border disputes; for a detailed discussion on this, see Richard B. Lillich, *The Jay Treaty Commissions*, 37(2) ST. JOHN'S L. REV. 260, 265-268 (1963).

²⁷ Jay Treaty, arts. VII & VIII; for a detailed discussion on this, see Lillich, *supra* note 26, at 276-280.

²⁸ Jay Treaty, art. VI; for a detail discussion, see Lillich, *supra* note 26, at 268-276.

²⁹ On the discussion regarding the requirements to prove standing in these days, see Lillich, *supra* note 26, at 273 *et seq.*

³⁰ Cf. Tom Bingham, *The Alabama Claims Arbitration*, 54 INT'L & COMP. L. Q. 1, 24 (2005).

³¹ RALSTON, *supra* note 25, at 197-202, describes the *Alabama Arbitration* as “by far the greatest of all”.

³² For a more detailed account, see Bingham, *supra* note 30, at 3-9; Tom Bingham, *Alabama Arbitration*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 1-6 (Online Edition, Rüdiger Wolfrum ed., 2006).

³³ Bingham, *supra* note 30, at 24.

³⁴ See also PAULSSON, *supra* note 19, at 17-18.

³⁵ Gill, *supra* note 15, at 4.

³⁶ For further details, see *id.* at 3-5.

³⁷ Convention for the Pacific Settlement of International Disputes, July 29, 1899, 1 A.J.I.L. 103 (1907) [*hereinafter* “1899 Hague Convention”] & Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 2 A.J.I.L. Supp. 43 (1908) [*hereinafter* “1907 Hague Convention”].

³⁸ Cf. 1899 Hague Convention, ch. II, pt. IV.

³⁹ Emphasis added.

Before any institutionalized court system came into existence, international arbitration had gained predominant importance. Even though the PCIJ and ICJ assumed their roles in the early to mid twentieth century, arbitration as a mode to settle disputes – or variations of it – did not lose its relevance. Especially to resolve disputes in the aftermath of military conflicts between States, mixed claims commissions were used.⁴⁰ Notably, these, in many cases, also allowed private persons to file direct claims against the relevant States.⁴¹

III. Today's Investment Arbitration and the Improved International Position of the Individual

The inter-play between this possibility of direct dispute settlement between States and individuals and the development of substantive investment protection rules within bilateral investment treaties led to another step in the development of investor-State dispute settlement: The current system of investor-State arbitration does not only serve the purpose of overcoming the consequences of inter-State conflicts. It also provides a permanent protection, substantively and procedurally, under international law for investors against State actions that directly result in harm to the investor. Investment arbitration, as often recalled, “depoliticizes” a dispute by removing it from the inter-State and political level to the level of the real disputing parties.⁴² It contributes to the peaceful settlement of disputes by preventing commercial disputes from rising to the sphere of inter-State crises.

During the last twenty years, investment arbitration developed rapidly. Even though Germany and Pakistan concluded the first ever BIT in 1959 (which, contrary to a popular misconception, did not include a direct investor-State dispute settlement clause⁴³) and the International Centre for Settlement of Investment Disputes [“ICSID”] was established in 1966 by the Washington Convention⁴⁴, its first case, *Holiday Inns et al v. Morocco*⁴⁵, was only registered in 1972. The benchmark of ten new ICSID cases registered in one year was only reached in 2001. Up until today, however, ICSID has registered nearly 650 cases.⁴⁶ Also taking into account all non-ICSID investment

⁴⁰ See Dolzer, *supra* note 13, ¶¶ 6-7.

⁴¹ *Id.*

⁴² Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1(1) ICSID REV. 327 (1986); see also Marc Bungenberg et al., *General Introduction to International Investment Law*, in INTERNATIONAL INVESTMENT LAW – A HANDBOOK 1, 3 ¶ 6 (Marc Bungenberg et al. eds., 2015); NEWCOMBE & PARADELL, *supra* note 1, at 27-28.

⁴³ According to Brown, the first BIT to include an investor-State dispute settlement clause – even though only providing for qualified consent to arbitration – was the Indonesia-Netherlands BIT of 1968, whereas the Italy-Chad BIT of 1969 was the first one to provide for unqualified consent, cf. Chester Brown, *International Investment Agreements – History, Approaches, Schools*, in INTERNATIONAL INVESTMENT LAW – A HANDBOOK 153, 180 ¶ 67 (Marc Bungenberg et al. eds., 2015).

⁴⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

⁴⁵ *Holiday Inns et al. v. Morocco*, ICSID Case No. ARB/72/1; see also Pierre Lalive, *The First 'World Bank' Arbitration*, 51 BRIT. Y.B. INT'L L. 123 (1980).

⁴⁶ ICSID maintains a comprehensive online database of all pending and concluded arbitrations under the ICSID Arbitration Rules as well as the ICSID Additional Facility Rules. As of the registration of any given case, its (core) details are available at <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx> (last visited Aug. 3, 2017).

arbitrations and potentially unknown cases, the current overall case count should be around 800.⁴⁷

The basis of every arbitration is the parties' consent. While the ICSID system was primarily designed for arbitration under dispute settlement clauses in State contracts,⁴⁸ the move to "arbitration without privity"⁴⁹ led to a significant increase in ICSID's caseload. In *SPP v. Egypt*⁵⁰, an ICSID tribunal first accepted claims based on a host State's investment law. In *AAPL v. Sri Lanka*⁵¹, another ICSID tribunal was the first to base its jurisdiction on an investor-State dispute settlement clause in a BIT.⁵² Ever since then, the incorporation of arbitration provisions in investment laws and arbitration clauses in BITs has been accepted as a State's 'standing offer' to arbitrate, which investors accept when filing their request for arbitration.

International investment law, by means of arbitration, hence provides a solid mechanism for individuals and juridical persons to uphold their rights. Investors have the possibility to initiate a judicial process before a neutral adjudicatory body themselves. In case of success, they not only receive a declaratory judgment, but also an award that – if complied with by the host State or enforced against it – will directly make the investor whole.

Dispute settlement by means of arbitration, in this way, has significantly strengthened the individual's rights on the international plane. Without going into details of the academic debate about the nature of their rights,⁵³ investors have been freed from their prior dependency on their home State, in particular these home States' political interests. Thereby, investment arbitration filled a gap in terms of procedural protection.⁵⁴ Indeed, States are not always willing to safeguard their nationals' interests by means of diplomatic protection. Legally, they are by no means obliged to do so. They have, rather, a broad, unlimited discretion. As the ICJ succinctly summarized in the *Barcelona Traction* case:

⁴⁷ In its 2016 annual review of investor-State arbitrations of May 2017, UNCTAD states that the cumulative number of known investor-State dispute settlement cases was 767 at the end of 2016, see UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2016*, IIA ISSUES NOTE, ISSUE 1, May 2017 at 2, http://investmentpolicyhub.unctad.org/Upload/Documents/diaepcb2017d1_en.pdf (last visited Aug. 3, 2017).

⁴⁸ Cf. Int'l Bank for Reconstruction & Development [IBRD], *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ¶ 24 (Mar. 18, 1965).

⁴⁹ Coined as a term by the title of an article by Jan Paulsson, *Arbitration without Privity*, 10(2) ICSID REV. 232 (1995).

⁵⁰ *Southern Pacific Properties (Middle East) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3.

⁵¹ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

⁵² For a more detailed account on dispute settlement clauses in investment treaties, see LARS MARKERT, *STREITSCHLICHTUNGSKLAUSELN IN INVESTITIONSSCHUTZABKOMMEN* (2010).

⁵³ See on this, Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 (1) BRIT. Y.B. INT'L L. 151-289 (2004); Anastasios Gourgourinis, *Investors' Rights qua Human Rights? Revisiting the 'Direct'/'Derivative' Rights Debate*, in *THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 147-182 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012); Martins Paporinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24(2) EUR. J. INT'L L. 617-647 (2013); Tillmann R. Braun, *Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law*, 15(1-2) J. WORLD INV. & TRADE 73-116 (2014); cf. also RICHARD HAPP, *SCHIEDSVERFAHREN ZWISCHEN STAATEN UND INVESTOREN NACH ARTIKEL 26 ENERGIECHARTAVERTRAG* (2000), concluding that investors are "functional subjects" of international law due to their role ("Die völkerrechtliche Stellung setzt allein an seiner Funktion im System an: Investoren haben investiert und werden deshalb geschützt.").

⁵⁴ For a detailed discussion on this, see HAPP, *supra* note 53, at 72-74.

*“The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.”*⁵⁵

Yet, not only with regard to the individual’s option to bring a direct claim against the host State of their investments, has the current system of investment arbitration created a strong legal protection. Also at the level of enforcement of any decisions by investment tribunals, the ICSID Convention and, in cases administered by other institutions, the New York Convention of 1958⁵⁶ provide for a solid enforcement mechanism, a unique and potentially the strongest feature of arbitral awards compared to other judicial and quasi-judicial decisions. Public international law dispute settlement is thereby combined with private (international) law enforcement systems.

Any alteration of the current system of investor-State dispute settlement should hence strive to secure the above illustrated features of neutral and direct dispute settlement as well as the enforceability of the process’ outcome. With this as a starting point, we will now turn to the specifics of the ICS Model the EU Commission has already proposed and discuss whether or not they are fit for the establishment of a permanent, multilateral investment court. In doing so, we want to focus on the just identified important feature of enforcement.

IV. The ICS under CETA, EU-Vietnam FTA, and EU’s TTIP-Proposal

A. The ICS’ Set-Up

As already alluded to above, the EU Commission has so far managed to agree with Canada as well as with Vietnam on the inclusion of its ICS Model in their free trade and investment agreements.⁵⁷ Each of these two treaties, however, provides for its own ICS, which are potentially to be consolidated at a later stage.⁵⁸ For these and also for the ICS Model the EU Commission used for its negotiations for the TTIP, the future of which is unforeseeable at best right now, the EU has drawn upon already existing structures in the field of investment dispute settlement.

According to the ICS Model, when investors intend to file a claim, they can choose to institute proceedings, depending also on their applicability, in accordance with the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules.⁵⁹ As an additional option, the parties to the specific dispute can also agree on a special set of rules.⁶⁰ From the perspective of these sets of rules, the provisions of the ICS Model are intended to operate as part of the arbitration agreement.⁶¹ The ICS Model thereby complements the different arbitration regimes in that it adopts

⁵⁵ *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgment, I.C.J. Rep. 3, ¶ 79 (Feb. 5, 1970).

⁵⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (June 10, 1958), 330 U.N.T.S. 38.

⁵⁷ While CETA has been signed and is – except for the majority of the investment provisions – provisionally applied, the status of the EU-Vietnam FTA is less clear.

⁵⁸ CETA, art. 8.29; Draft EU-Vietnam FTA, Section 3, art. 15.

⁵⁹ *Cf.* TTIP-Proposal, Section 3, art. 6(2) lit. (a)–(c); CETA, art. 8.23(2) lit. (a)–(c); Draft EU-Vietnam FTA, Section 3, art. 7(2) lit. (a)–(c).

⁶⁰ *Cf.* TTIP-Proposal, Section 3, art. 6(2) lit. (d); CETA, art. 8.23(2) lit. (d); Draft EU-Vietnam FTA, Section 3, art. 7(2) lit. (d).

⁶¹ *See* CETA, arts. 8.22(1) lit. (a) & art. 8.25(1), which establish that both the claimants as well as the respondent State consent “to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section”.

the freedom they give to the parties. As we will show, however, it also exceeds the outer limits these rules set for such party agreements.

Within 90 days from the initiation of the proceedings, the President of the Tribunal (i.e. the first instance of the investment court) nominates (the) three individuals that will decide the dispute.⁶² These individuals, who are called “Judges” in the Commission’s TTIP-Proposal but “Members of the Tribunal” in the other two texts,⁶³ are appointed by the Joint Committees or Trade Commissions under the respective treaties.⁶⁴ In case of the TTIP-Proposal and CETA, their number is 15,⁶⁵ whereas only 9 Members are to be appointed for the EU-Vietnam Tribunal.⁶⁶ The Tribunal, in turn, is supposed to render its (as the model calls it) “*provisional award*” within 18 months from the initiation of the proceedings.⁶⁷ The losing party can challenge this provisional award within 90 days from its issuance.⁶⁸ Otherwise, it becomes binding and a “*final award*” in the model’s terminology.⁶⁹

In case of a challenge of the provisional award, the “Appeal Tribunal” (or “Appellate Tribunal” in the CETA text’s wording), the members of which are also nominated through the same mechanism but in smaller numbers than for the Tribunal,⁷⁰ shall not exceed 180 days, in no case 270 days, to render its decision.⁷¹ In case the Appeal Tribunal upholds the provisional award, it becomes a final award.⁷² In case the Appeal Tribunal accepts the challenge, the provisional award is referred back to the Tribunal, which must decide the case anew and within 90 days in accordance with the Appeal Tribunal’s legal reasoning.⁷³

Under the relevant provisions of the ICS Model in its three variations, final awards are binding on the State parties to the respective instrument.⁷⁴ Further, to ensure their effect in the territories of other States, the feature we want to focus on, they are also deemed to be enforceable under the ICSID Convention’s Article 54⁷⁵ and the New York Convention’s enforcement procedure⁷⁶ – a mechanism that will be further commented on below.

⁶² TTIP-Proposal, Section 3, art. 9(7); CETA art. 8.27(7); Draft EU-Vietnam FTA, Section 3, art. 12(7).

⁶³ Cf., e.g., TTIP-Proposal, Section 3, art. 9(2); CETA art. 8.27(2); Draft EU-Vietnam FTA, Section 3, art. 12(2).

⁶⁴ TTIP-Proposal, Section 3, art. 9(2); CETA, art. 8.27(2); Draft EU-Vietnam FTA, Section 3, art. 12(2).

⁶⁵ TTIP-Proposal, Section 3, art. 9(2); CETA, art. 8.27(2).

⁶⁶ Draft EU-Vietnam FTA, Section 3, art. 12(2).

⁶⁷ TTIP-Proposal, Section 3, art. 28(6), 1st sentence; Draft EU-Vietnam FTA, Section 3, art. 27(6); this time limit can be extended in exceptional circumstances, see TTIP-Proposal, Section 3, art. 28(6), 2nd sentence; Draft EU-Vietnam FTA, Section 3, art. 27(6), 2nd sentence; art. 8.39(7) CETA provides for a general time limit of 24 months.

⁶⁸ TTIP-Proposal, Section 3, art. 28(6), 3rd sentence; CETA, art. 8.28(9) lit. (c) sublit. i); Draft EU-Vietnam FTA, Section 3, art. 27(7).

⁶⁹ *Id.*

⁷⁰ TTIP-Proposal, Section 3, art. 10(3); CETA, art. 8.28(3); Draft EU-Vietnam FTA, Section 3, art. 13(3).

⁷¹ TTIP-Proposal, Section 3, art. 29(3); Draft EU-Vietnam FTA, Section 3, art. 28(5); CETA does not provide for a fixed time limit in this regard.

⁷² TTIP-Proposal, Section 3, art. 29(2); CETA, art. 8.28(9) lit. (c) sublit. ii); Draft EU-Vietnam-FTA, Section 3, art. 29(2).

⁷³ TTIP-Proposal, Section 3, art. 28(7), 5th sentence; Draft EU-Vietnam FTA, Section 3, art. 29(4), 3rd sentence; CETA again, does not provide for any such time limit.

⁷⁴ TTIP-Proposal, Section 3, art. 30(1) & 30(2); CETA, art. 8.41; Draft EU-Vietnam FTA, Section 3, art. 31(1).

⁷⁵ TTIP-Proposal, Section 3, art. 30(6); CETA, art. 8.41(6); Draft EU-Vietnam FTA, Section 3, art. 31(6).

⁷⁶ TTIP-Proposal, Section 3, art. 30(5); CETA, art. 8.41(5); Draft EU-Vietnam FTA, Section 3, art. 31(5).

B. Shortcomings of the ICS Model: The Issue of Enforcement

The EU Commission undertook a herculean task when creating the ICS almost overnight in the autumn of 2015. In fact, it had no other choice but to present such a proposal after the European Parliament had indicated that it was not willing to accept any TTIP deal with the US providing for investment arbitration in July that year.⁷⁷ As not to be expected otherwise in such a case, the ICS Model has certain shortcomings. These relate to, *inter alia*, the selection of the individuals to serve on the ICS,⁷⁸ the treatment of conflicts of interest, the increasing potential of issue conflicts,⁷⁹ as well as the problematic approach of the ICS Model not to establish its own set of rules (which we would argue it should have) but to rely on the ICSID and UNCITRAL rules.⁸⁰ Unfortunately, one of the major shortcomings relates to the main advantage of investment arbitration as just illustrated and identified above, namely the enforcement scheme for the ICS' final awards.

To ensure enforcement, the ICS Model seeks to rely on the already established enforcement mechanism for ICSID awards under Article 54 of the ICSID Convention and for all other investment arbitration awards, on the New York Convention, depending on which rules – ICSID or UNCITRAL – have been chosen for a particular dispute. Indeed, as affirmed elsewhere, the lack of legal effect of these two clauses towards third States according to the *res inter alios acta* principle “*is so obvious that the inclusion of these last two paragraphs in the EU proposal is astonishing.*”⁸¹

i. Obstacles to Enforcement under the ICSID Convention

Article 54 of the ICSID Convention is regularly described as the most far-reaching enforcement provision for arbitral awards.⁸² The first sentence of its section 1 provides:

⁷⁷ Cf. Titi, *supra* note 17, at 2; Sebastian Wuschka, *Ein Investitionsgerichtshof – Der große Wurf der EU-Kommission?*, 19(2) ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 153, 156-167 (2016).

⁷⁸ Cf. Freya Baetens, *The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges*, 43(4) LEGAL ISSUES OF ECON. INTEGRATION 367, 371-373 (2016). In this regard, the argument has also been raised that the ICS' system would lead to a shift towards a “pro-state bias” of the individuals deciding the dispute; see, e.g., Stephen M. Schwebel, *The outlook for the continued vitality, or lack thereof, of investor-State arbitration*, 32(1) ARB. INT'L 1, 10 *et seq.* (2016). This argument seems to forget, however, that the States appointing the individuals will most likely also take into account the interests of their nationals potentially filing an investment claim at some point.

⁷⁹ Cf. Baetens, *supra* note 78, at 370-371; Wuschka, *supra* note 77, at 163-167.

⁸⁰ Cf. Baetens, *supra* note 78, at 369; Schwebel, *supra* note 78, at 10; Wuschka, *supra* note 77, at 168-169; see also August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L. 761, 768-771 (2016).

⁸¹ Titi, *supra* note 17, at 27; similarly Baetens, *supra* note 78, at 281-282; for a more detailed discussion on this question, see Wuschka, *supra* note 77, at 167-174.

⁸² See CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY art. 54, ¶ 3 (2d ed., 2009). “*This enforcement provision is a distinctive feature of the ICSID Convention. Most other instruments governing international dispute settlement do not cover enforcement but leave this issue to domestic laws or applicable treaties. These domestic laws or treaties typically provide for some review of arbitral awards at the enforcement stage.*” (footnotes omitted); see also Maritime International Nominees Establishment (MINE) v. Republic of Guinea, ICSID Case No. ARB/84/4, Ad Hoc Committee Decision (Dec. 22, 1989), ¶ 4.02: “*It appears [...] that the Convention excludes any attack on the award in national courts. The award is final in that sense.*” For an early account of the application of ICSID's enforcement mechanism, see Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23(1) J. INT'L ARB. 1 (2006).

“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”

The ICS Model, in turn, suggests that its final awards “shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention”.⁸³ Thereby, the ICS Model aims for the application of the just quoted provision of the ICSID Convention to the extent that ICS awards would be enforced in third States as if they were ICSID awards.

Be that as it may, this provision will be without legal force for third States due to the modifications the ICS Model contains with regard to the ICSID arbitration procedure. Obviously, the EU, its member States, and their contracting parties can enter into inter-se agreements with regard to the ICSID Convention as they please and as far as Article 41 of the Vienna Convention on the Law of Treaties [“VCLT”] allows. Leaving aside the question of whether the ICS’ modifications to the ICSID Convention could be valid *inter-se* agreements between the parties to the ICS under Article 41 (1) VCLT,⁸⁴ any effect on third parties is precluded.⁸⁵

This is, first of all, illustrated by the wording of Article 41 (1) of the VCLT that, in case of an inter-se agreement, “[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves *alone*”⁸⁶.

Secondly, it is true that the enforcement of an award against one State in the territory of another State, at first glance, only seems to put a burden on the State against which enforcement is sought. However, by agreeing to an enforcement procedure such as the one under Article 54 of the ICSID Convention, States give away their sovereign right of review of the relevant award, especially against their *ordre public*.⁸⁷ Any obligation to enforce an international decision must be covered by the respective State’s consent, as mandated by Article 34 of the VCLT. This article, codifying the *res inter alios acta* principle, provides that a treaty does not create either obligations or rights for a third State without its consent. The obligation of enforcement under Article 54 of the ICSID Convention can only exist to the extent that the award which is sought to be enforced has come into existence in the very way the instrument that contains the relevant enforcement procedure the State has agreed to, here the ICSID Convention, prescribes it. Any modification of the way in which awards are

⁸³ CETA, art. 8.41; cf. TTIP-Proposal, Section 3, art. 30(6); Draft EU-Vietnam FTA, Section 3, art. 31(6).

⁸⁴ Wuschka, *supra* note 77, at 169-170; For an analysis of the establishment of an appeals mechanism as a valid *inter-se* agreement between member States of the ICSID Convention, see Brian McGarry & Josef Ostránský, *Modifying the ICSID Convention under the Law of Treaties*, EJIL: TALK! (May 11, 2017), <https://www.ejiltalk.org/modifying-the-icsid-convention-under-the-law-of-treaties> (last visited Aug. 3, 2017).

⁸⁵ See Kaufmann-Kohler & Potestà, *supra* note 10, at ¶ 141 & 200 (on this question in the context of the models the CIDS Study discusses).

⁸⁶ Emphasis added.

⁸⁷ Cf. SCHREUER ET AL., *supra* note 82, art. 54, ¶ 85: “The Convention’s drafting history shows that domestic authorities charged with recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the *ordre public* (public policy) of the forum may furnish a ground for refusal. The finality of awards would also exclude any examination of their compliance with international public policy or international law in general. The observance of international law is the task of the arbitral tribunal in application of Art. 42 of the Convention subject to a possible control by an *ad hoc* committee [...]” (footnotes omitted).

rendered under the ICSID Convention would require the State where enforcement is sought to enforce the outcome of a process to which it has never agreed.⁸⁸

ii. Obstacles to Enforcement under the New York Convention

Non-ICSID awards, including potential ICS awards based on arbitration rules other than ICSID's, need to be enforced under the framework of the New York Convention. For the New York Convention to be applicable, the decisive element will be whether the ICS' final awards can be considered "arbitral awards" in the sense of its Article 1 (1).⁸⁹

In this regard, it is to be noted that Article 30 (5) of the TTIP-Proposal and the parallel provisions in CETA and the Draft EU-Vietnam FTA provide:

"For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction."

For the discussion of enforceability, we should assume that any of the treaties that contain the ICS Model would also become applicable as law within the territory of its contracting parties, e.g. in the case of CETA, Canada, the EU and its member States. Within their territories, these provisions will then bind national courts and the ICS' final awards indeed will be enforceable under the New York Convention.⁹⁰

If enforcement of a final award is sought in a third State, however, things become more complicated. The determination of whether or not the ICS' final awards will be considered arbitral awards and, hence, enforced under the New York Convention will always remain within the powers of the local courts before which enforcement is sought.⁹¹ As illustrated above with regard to the ICSID Convention, the CETA, the TTIP-Proposal, and the Draft EU-Vietnam FTA (if all of these would enter into effect) also cannot bind any third State not party to it in light of Article 34 of the VCLT. Additionally, the New York Convention puts substance over form – whether a decision is an award or a court judgment does not depend on its denomination.⁹² The EU, its member States, and their contracting partners thus cannot prescribe the result of the review of an ICS award by a third party court in an agreement between themselves – similar to arbitrators who also cannot ensure the enforcement of their awards by labelling them as such.⁹³

The New York Convention itself does not contain a definition of what is to be considered an arbitral award or arbitration in general. Looking into the drafting history of the Convention, one notes that the Austrian delegate during the negotiations of the text held the view that this determination was to be made under the law of the State where enforcement was sought, the *lex fori*.⁹⁴ This is hardly authoritative. In practice, courts have so far applied the *lex arbitri* and the *lex fori*, as well as a mixture of the two, all of which has also been suggested by scholars.⁹⁵ Additionally and

⁸⁸ Wuschka, *supra* note 77, at 170. It should in particular be recalled that Article 53(1), 1st sentence of the ICSID Convention prescribes: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."

presumably most importantly, the approach to determine whether or not a decision was an arbitral award by having recourse to an autonomous international standard under the Convention and in light of its object and purpose has been advanced.⁹⁶

One clarification that the New York Convention offers can be found in its Article 1 (2):

“The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”

An “arbitral award” thus may also exist if the arbitrators were not appointed specifically for that case but – in contrast to that – for a number of cases, e.g. where arbitrators could only be selected from a list of arbitrators.⁹⁷ What is clear from this formulation, if not already self-evident from the convention’s title, is that enforcement under the convention is limited to awards rendered by arbitrators or permanent arbitral bodies. What is not clear, however, is whether the parties must still be able to select the arbitrators, even if from a general list, or whether the institution can appoint them. International practice is not consistent.⁹⁸

⁸⁹ “*This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.*” For a succinct analysis of the further element to be considered at the enforcement stage, namely whether the arbitration leading to the award was based on an arbitration agreement in writing, see Kaufmann-Kohler & Potestà, *supra* note 10, at ¶¶ 158-160.

⁹⁰ Comparable provisions also exists in the Energy Charter Treaty, Dec. 17, 1991, 2080 U.N.T.S. 95, art. 26(5)(a) & (b).

⁹¹ Reinisch, *supra* note 80, at 783; Wuschka, *supra* note 77, at 171.

⁹² Cf. Blackwater Security Consulting LLC et al. v. Richard P. Nordan, [2011] WL 237840 (E.D.N.C., 2011); Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice] enero 26, 1999, Merck & Co Inc. et al. v. Tecnoquimicas S.A., E-7474, fn. 103 (Colom.); Publicis Communication v. Publicis S.A., True North Communications Inc., 206 F.3d 725 (7th Cir. 2000); see also Bernd Ehle, *Article 1 [Scope of Application]*, in NEW YORK CONVENTION ¶¶ 24-25 (Reinmar Wolff ed., 2012).

⁹³ Cf. Ehle, *supra* note 92, ¶¶ 24-27.

⁹⁴ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux préparatoires – Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards*, Annex I, Comments by Governments, 10, U.N. Doc. E/2822 (Jan. 31, 1956).

⁹⁵ For a more detailed discussion on this issue, see Ehle, *supra* note 92, at ¶¶ 14-19.

⁹⁶ BGH NJW 1982, 1224, 1225; Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice] enero 26, 1999, Merck & Co Inc. et al. v. Tecnoquimicas S.A., E-7474 (Colom.); PHILIPPE FOUCHARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 735-780 (Emmanuel Gaillard & John Savage eds., 1999); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 49 (1981); Gino Lörcher, *Enforceability of Agreed Awards in Foreign Jurisdictions*, 17(3) *ARB. INT’L* 275, 280 (2001).

⁹⁷ This provision was originally introduced to accommodate the wishes of socialist States with foreign trade arbitration tribunals.

⁹⁸ In international commercial arbitration today, it is still far from unusual that, for instance, the chairman or presiding arbitrator is appointed by an arbitral institution (e.g. ICC, ICDR and LCIA). Other institutions, such as ICSID and CIETAC, prescribe that arbitrators may, under certain circumstances, only be selected from a roster of arbitrators. There is also a growing opinion in academic literature that party appointments should be abolished in favour of appointment of the full tribunal by an arbitral institution. Those who advance this opinion do not consider that this would endanger the nature of the proceedings as arbitration, see, e.g., Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 821-843 (Mahnoush H. Arsanjani et al. eds., 2011); see also Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) *ICSID REV.* 339-355 (2010); Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed*

Nevertheless, the distinction between arbitration and adjudication in the strict sense, namely proceedings before institutionalized courts, has already been at issue almost 100 years ago – the last time when a court, the PCIJ, was to succeed a long-established tradition of arbitration. According to the definition of the Advisory Committee of Jurists that assisted in the establishment of the PCIJ,

*“arbitration is distinguished from judicial procedure in the strict sense of the word by three features: the nomination of the arbitrators by the parties concerned, the selection by the parties of the principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction.”*⁹⁹

As it is commonly accepted under the New York Convention,

*“[a]n arbitral tribunal is a private panel of one or more arbitrators appointed to resolve a dispute by way of arbitration instead of state court proceedings, deriving its authority from an agreement between the parties, and which is supposed to offer sufficient guarantees of independence and impartiality.”*¹⁰⁰

These two definitions show that the three essential criteria for both the inter-State and public international law as well as for the private international law arena that define arbitration are: (i) an arbitration agreement between the parties as the source of authority of the tribunal, (ii) the nomination of arbitrators by the parties, and (iii) its voluntary nature.¹⁰¹ In the following, we will show that the ICS Model used by the EU Commission is neither your plain vanilla arbitral tribunal nor a plain vanilla international court.

First, with regard to the arbitration agreement between the parties, this exists for the ICS, as for investment arbitrations, in the State’s offer to arbitrate contained in the treaty establishing the ICS combined with the investor’s acceptance of this offer through the request for arbitration. This is however, not a difference from, for instance, the ICJ where ‘matching’ consent to jurisdiction, hence a jurisdictional agreement, is also necessary.¹⁰² We will address this more in detail below with regard to the voluntary part of this consent.

Another issue that is included in the arbitration agreement by virtue of the determination of the powers of the tribunal is how far the decisions of the adjudicators are final. Regarding the finality of arbitral awards, the ICS Model’s appeal procedure moves away from the traditional concept of arbitration.¹⁰³ Yet, the jurisdictional agreement between the claimant and respondent before the ICS

Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded, 29(7) *ARB. INT’L* 7-44 (2013); Albert Jan van den Berg, *Charles Brower’s Problem with 100 Per Cent – Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, 31(3) *ARB. INT’L* 381-391 (2015).

⁹⁹ Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice, League of Nations Advisory Committee of Jurists LN Doc. C.166.M.66.1929.V (1920).

¹⁰⁰ Ehle, *supra* note 92, ¶ 28 (with further references).

¹⁰¹ For the purposes of this analysis, we will rely on these criteria. We are nevertheless aware that there are a multitude of other definitions of what constitutes an international court or/and (international) arbitral tribunal; *see* CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* 10 (2007) (with further references).

¹⁰² *Cf.* Statute of the International Court of Justice [*hereinafter* “ICJ Statute”], Apr. 18, 1946, 557 U.N.T.S. 143, art. 36.

¹⁰³ The authors acknowledge that under certain arbitration rules, there might be appeal mechanisms. Also, some national laws such as the UK Arbitration Act of 1996 offer limited appeal possibilities. However, we consider those to be the exception to the rule.

entails the agreement on both sides to settle the dispute before the ICS.¹⁰⁴ It thereby also encompasses the submission to the appeals mechanism. The possibility to appeal a decision therefore neither makes the ICS more of a court nor less of an arbitral tribunal.

Secondly, with regard to the selection of “Judges” or “Members of the Tribunal”, this element is taken out of the hands of the parties to a particular dispute and laid in the hands of the respective treaty’s joint committee,¹⁰⁵ an assembly of representatives of the EU and the relevant other State.¹⁰⁶ The adjudicators are preselected by these treaty bodies and their allocation to sit on a particular dispute is undertaken by the President of the respective section of the ICS.¹⁰⁷ The disputing parties have no say in appointing them. This could – again – still be justified by arguing that the investors make use of their party autonomy when they accept the State’s (or EU’s) offer to submit to international arbitration under specific restrictions.¹⁰⁸ One may also not forget that the principle of party appointment in investment arbitration has been severely attacked in recent years.¹⁰⁹ Nevertheless, the procedure is much like how even the selection of judges at the ICJ is regulated. In their case, the election is made for renewable nine-year terms by the United Nations General Assembly and the Security Council,¹¹⁰ which are organs of the United Nations¹¹¹ and legally, despite their acknowledged importance, are first and foremost assemblies of State representatives with certain powers established by a treaty. The allocation of certain ICJ judges to chambers, in case the court hears a case in such a division,¹¹² is not even made by the ICJ’s president but by a ballot procedure.¹¹³ Hence, in terms of selection of adjudicators, the ICS Model is structured in a way an international court would be.

Thirdly, advocates for the position that the ICS could nevertheless be considered an ‘enlarged’ arbitral tribunal usually have recourse to the example of the Iran-US Claims Tribunal.¹¹⁴ In what can be considered diverse international jurisprudence on the matter, one indeed finds support for the proposition that this dispute settlement body is to be considered a “permanent arbitral body” under

¹⁰⁴ See *supra* Section IV.A.

¹⁰⁵ Cf. for the “Judges” and “Members of the Tribunal”, TTIP-Proposal, Section 3, art. 9(2); CETA, art. 8.27; Draft EU-Vietnam FTA, Section 3, art. 12(2); for the Members of the Appeal Tribunal or Appellate Tribunal cf. TTIP-Proposal, Section 3, art. 10(3), CETA art. 8.28(3), and Draft EU-Vietnam FTA, Section 3, art. 13(3).

¹⁰⁶ See, e.g., CETA, art. 26.1, for the CETA Joint Committee.

¹⁰⁷ See for the Tribunal TTIP-Proposal, Section 3, art. 9(7), CETA, art. 8.27, and Draft EU-Vietnam FTA, Section 3, art. 12(7); for the Appeal Tribunal, see TTIP-Proposal, Section 3, art. 10(9), and Draft EU-Vietnam FTA, Section 3, art. 13(9); for CETA, art. 8.28(5) does not specify who is in charge of the random allocation of the Members of the Appellate Tribunal to its divisions.

¹⁰⁸ CETA, art. 8.25(1) clearly says: “The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section.” This incorporates the full section into the offer to arbitrate. As only that offer can be accepted, it becomes part of the arbitration agreement.

¹⁰⁹ See literature referenced *supra* note 98.

¹¹⁰ Cf. ICJ Statute, Apr. 18, 1946, 557 U.N.T.S. 143, arts. 4 & 13.

¹¹¹ U.N. Charter, art. 7(1).

¹¹² International Court of Justice, Rules of the Court, Apr. 14, 1978, arts. 15-18.

¹¹³ *Id.* art. 18(1).

¹¹⁴ See Reinisch, *supra* note 80, at 767.

Article I (2) of the New York Convention.¹¹⁵ However, the opposite view has also been advanced.¹¹⁶ It seems, thus, untenable to base an argument on such a comparison.¹¹⁷

Nevertheless, the argument goes further. For the ICS' qualification as an arbitral tribunal or rather a permanent arbitral body, it essentially is that, even though the selection of the adjudicators does not follow the usual practice in arbitration, this deviation from the usual practice was compensated for by the criterion of voluntary acceptance of jurisdiction.¹¹⁸ Having recourse to the *travaux préparatoires* of the New York Convention, this position argues that the voluntary nature of arbitration was the crucial element when determining whether or not a judicial body is a permanent arbitral body.¹¹⁹ The argument concludes with the assumption that “*even where the parties may not be able to appoint ‘their’ arbitrators, they must still be able to freely consent to such dispute settlement. Otherwise, it would lose its character as arbitration.*”¹²⁰ From that perspective, as long as the investor is free to accept the States' standing offer to arbitrate investment dispute in the treaties providing for the ICS, “*even a semi-permanent dispute settlement institution with panel members that have been appointed by states and not by the parties to a specific dispute can qualify as arbitration.*”¹²¹

This position, however, loses strength if one looks into the different force and importance that consent to arbitration has in arbitrations, on the one hand, involving only private parties, and those, on the other hand, involving also State parties. For private parties, it seems fit to assume that voluntary consent to arbitration is one, if not the cornerstone of what constitutes arbitration. In that case, voluntary consent serves the purpose of excluding the jurisdiction of State courts in favour of the jurisdiction of an arbitral tribunal. As a default, however, the jurisdiction of State courts with judges that have a neutral attitude towards the dispute is given in any event. It is, therefore, only logical that courts have accepted the ICC International Court of Arbitration¹²², the Singapore International Arbitration Centre¹²³, or the Ukrainian Chambers of Commerce and Industry¹²⁴ as permanent arbitral bodies under Article 1 (2) of the New York Convention.

The situation is different with States. States are sovereign. The State's consent through its standing offer to arbitrate is only the element that enables the investor to have recourse to a neutral forum

¹¹⁵ See *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, 887 F.2d 1357 (9th Cir. 1989).

¹¹⁶ See *Dallal v. Bank Mellat*, [1986] 1 All E.R. 239 (Eng.).

¹¹⁷ On the nature of the Iran-US Claims Tribunal, see also STEPHEN J. TOOPE, *MIXED INTERNATIONAL ARBITRATION* 283-293 (1990). One aspect that might underline the special nature of the tribunal and further that, for this institution, enforcement through the New York Convention was not necessarily intended is the fact that a fund was established out of which payment for the successful US claimants, but also only for them, is made; cf. JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW* 82-83 (2009); JOHN G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 121 (2017).

¹¹⁸ Reinisch, *supra* note 80, at 767.

¹¹⁹ *Id.*; see also Kaufmann-Kohler & Potestà, *supra* note 10, ¶ 152.

¹²⁰ Reinisch, *supra* note 80, at 767; see also Kaufmann-Kohler & Potestà, *supra* note 10, ¶ 154, “*What matters – as it clearly results also from the travaux – is the consensual basis of the adjudicator’s jurisdiction, which would be clearly met*”.

¹²¹ Reinisch, *supra* note 80, at 768.

¹²² *FG Hemisphere Associates LLC v Democratic Republic of Congo*, [2010] NSWSC 1394 (Austl.).

¹²³ *Transpac Capital Pte Ltd v Buntoro* [2008] NSWSC 671 (Austl.).

¹²⁴ Higher Regional Court of Brandenburg (Germany), Decision of Sept. 2, 1999, 8 Sch. 01/99, XXIX YB COMM. ARB. 697 (2004), at 698.

and file an international claim against the State that otherwise enjoys jurisdictional immunity. In that respect, investor-State arbitration is conceptually not different from, for instance, ICJ dispute settlement and thereby court proceedings. Also in that forum, voluntary acceptance of jurisdiction, in one of the ways Article 36 of the ICJ Statute provides for, is a prerequisite. That is not to say that the New York Convention was generally not applicable to the enforcement of investment arbitral awards. It is merely to say that voluntary consent to dispute settlement does not turn an international court into an international arbitral tribunal.

In evaluating the different factors, we consider that the ICS is more comparable to an international court such as the ICJ than to an arbitral institution. The other view is arguable, but requires considerable efforts to justify the exceptions to the rule.

We do not ignore that the contracting parties to CETA and comparable treaties designate the ICS as an arbitration mechanism.¹²⁵ Nonetheless, as with the determination of whether a certain decision is an award or not, with regard to the question of whether or not an institution will be considered a permanent arbitral body, the actual content prevails over its denomination. In particular, in the light of the EU Commission's initial statements that it wanted to establish a court system, the textual changes in CETA seem to reflect the EU Commission's desire to overwrite the weaknesses its ICS Model still has by borrowing strong and necessary elements from the very system it intended to abolish. The labelling of the adjudicators as "Members of the Tribunal" in the later versions of the model, instead of "Judges" as in the TTIP-Proposal, appears to be part of this idea.¹²⁶

V. Moving Forward: How to Ensure Enforcement of Decisions while Further Improving the System or Establishing a Multilateral Investment Court

As we have shown, the ICS' structure neither allows for the enforcement of (what the model calls) its "final awards" under the New York Convention nor under the ICSID Convention. On the basis of this, we proceed to the question of how this problem can be dealt with, as the system of investor-State dispute resolution will undoubtedly be further modified in the near future.

A. An Investment Court or Appeal Tribunal on the Basis of an Opt-In Convention

As the EU Commission's plans explained during the public consultations in March this year have shown, there does not exist a clear path, yet, how the further multilateralization of international

¹²⁵ It is noteworthy, however, that also the German Government, in response to parliamentary inquiry, stated the following: "The Federal Government regards the Investment Court as an international court. The Investment Court in CETA differs in its organization and structure significantly from an arbitral tribunal. An arbitral tribunal is based on the principle of party autonomy: arbitrators are appointed by the parties for the individual dispute. It cannot be ruled out that an attorney acts as arbitrator in one proceeding and, in parallel, as counsel for an investor in another proceeding. By contrast, the Judges of the Investment Court are appointed by the CETA Contracting Parties for a term of office of five years (exception: seven of the 15 Judges appointed directly after the entry into force of CETA are appointed for a term of office of six years; cf. CETA, art. 8.27 (5)). The cases are allocated to the judges according to the rotation principle. A parallel activity of attorneys as judge and counsel in investment protection disputes is excluded according to CETA: after their appointment, Judges may no longer act as counsel or expert witnesses in other international investment protection disputes [...].", Response by the Federal Government to the Minor Interpellation by Members of German Parliament, Klaus Ernst, Susanna Karawanskij et al., German Bundestag, printed matter 18/8175 (Apr. 20, 2016), at 3 (translation by the authors).

¹²⁶ As Reinisch puts it, the texts "appear to be intentionally ambiguous", see Reinisch, *supra* note 80, at 765.

investment law¹²⁷ will be undertaken. Yet, having regard to the CIDS Study for UNCITRAL that takes the debate decisively further than the EU Commission's initiatives have so far, there are two main options: One is the establishment of a multilateral court (or, in the words of the CIDS Study, an "International Tribunal for Investment") from scratch. This also seems to be the idea of the EU Commission. The other option would be to modify the existing system by adding elements such as an appeals mechanism to it. As for the implementation of both options, the CIDS Study suggests what it calls an "opt-in convention". This convention, modelled after the way the Mauritius Convention was designed to ensure the application of the UNCITRAL Transparency Rules¹²⁸ in disputes based on pre-existing treaties, – "*would be the instrument by which the Parties to ILAs express their consent to submit disputes arising under their existing ILAs to the new dispute resolution bodies.*"¹²⁹

B. Enforcement of Investment Court Decisions or Decisions after Review by an Appeal Tribunal

On the basis of the foregoing¹³⁰, both the implementation of an appeal mechanism only between a small (but maybe growing) number of member States to the ICSID Convention through an opt-in convention as well as the establishment of a multilateral investment court on the same basis will render enforcement under Article 54 of the ICSID Convention unavailable. Any such modification of today's arbitral process can only bind the parties that agree to such a modification *inter se* but no third States. This is also acknowledged by the CIDS Study.¹³¹

Under the New York Convention, the decisions of a multilateral investment court established under an opt-in convention will similarly be unenforceable. The arguments we have advanced above with regard to the ICS apply *mutatis mutandis* to any permanent court. The question that remains is whether a decision which has been rendered by an arbitral tribunal and then undergoes a review by an appeal tribunal can still be enforced under the New York Convention.

This is the scenario in which, potentially as a first step towards further modification, only an appeals mechanism would be established through an opt-in convention and not a fully-fledged court. Only in this instance, it seems plausible to assume that enforcement under the New York Convention will still be available. As outlined in the CIDS Study, it has been accepted by domestic courts as well as certain arbitration laws, and is supported by the convention's *travaux* that two-tiered dispute settlement systems can also be considered arbitration in the New York Convention's sense.¹³² The question that remains though is whether this can also be accepted for appeals mechanisms that are composed of pre-selected judges. It may be argued that this will be covered by the parties' consent to such a mechanism.

¹²⁷ Conceptually, on the genuinely multilateral nature of international investment law despite its foundations in bilateral treaty relations, see STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

¹²⁸ G.A. Res. 68/109, 2013, annex, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Dec. 16, 2013).

¹²⁹ Kaufmann-Kohler & Potestà, *supra* note 10, ¶ 285.

¹³⁰ See *supra* section IV.B.i.

¹³¹ Kaufmann-Kohler & Potestà, *supra* note 10, ¶ 141 (for the International Tribunal for Investment) and ¶ 200 (for the situation of an appeals mechanism).

¹³² *Id.* ¶¶ 161-164; cf. Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 18, 1990, III ZR 269/88 (Ger.).

If one were, however, to endeavour to find a way by which the purpose of an appeals mechanism, fostering consistency of investment law jurisprudence, could be combined with greater freedom for the parties to select the decision makers, another option is at least worthy of discussion. Instead of relying on the decision makers to ensure a *jurisprudence constante*, one could also find inspiration in the system of the EU Courts. In the European Court of Justice [“ECJ”], the judges are assisted by eight advocates-general.¹³³ Their function is explained in Article 252 (2) of the Treaty on the Functioning of the European Union:

“It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.”

The opinions of the Advocates-General are advisory and do not bind the ECJ. Nonetheless, the ECJ regularly follows them.¹³⁴ Differently from the ECJ’s practice, an investment appeals mechanism could involve an institution like an advocate-general not only to give an opinion if the case raises a new point of law,¹³⁵ but generally. Thereby, advocates-general before an investment appeals mechanism could provide an objective assessment of the case on appeal, based on their assessment of the applicable treaties and, in observance of the law of treaties, in line with previous decisions.

C. Consequences of this Analysis

i. Enforcement of a Multilateral Investment Court’s Decision in the Territory of its Member States can be Ensured even without Recourse to the New York Convention

As a first consequence of this analysis, we suggest that the decisions of an institutionalized multilateral investment court cannot be considered awards under the New York Convention. Their enforcement is, even more clearly, also not possible under the ICSID Convention’s Article 54.

What remains is, first, the possibility of enforcement of the court’s decision in the territory of its member States. The opt-in convention for the establishment of such a court – or any other instrument on which it would be based – should, hence, contain a clause similar to Article 54 of the ICSID Convention that applies to the court’s decisions.

Secondly, a possibility to enforce the court’s decisions outside of the territory of the court’s member States, in third States, could be established through agreements the member States conclude collectively with any such third State.¹³⁶ Unlike the EU’s ICS Model, third-party enforcement of the multilateral investment court’s decisions does not appear to be a crucial issue. The goal for such a system should be that – sooner or later – it is as successful and accepted as ICSID is now (if it does

¹³³ Cf. Treaty on the Functioning of the European Union, art. 252(1), 2008 O.J. (C 115) 47.

¹³⁴ See Carlos A. Arrebola et al., *An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union*, 5(1) CAMBRIDGE J. COMP. & INT’L L. 82-112 (2016).

¹³⁵ Cf. Statute of the Court of Justice of the European Union, art. 20(5), https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf (last visited Aug. 3, 2017).

¹³⁶ This has been proposed to overcome the enforcement problems of the ICS Model by Baetens, *supra* note 78, at 382.

not succeed ICSID institutionally). In such a case, the court's enforcement system would encompass a similarly large group of States as the one under Article 54 of the ICSID Convention does today.

ii. *The Establishment of an Appeal Tribunal would be in Line with the New York Convention's Concept of Arbitration*

This must be seen differently for an appeals mechanism. Obviously the more States that join it, the better an enforcement clause, similar to Article 54 of the ICSID Convention in the appeal mechanism's founding instrument would ensure enforcement of the appeal mechanism's decision. Enforcement under the New York Convention would, in any event, most likely be available. The only problem that arises in this scenario is that the revision by the courts in which enforcement is sought under the New York Convention's Article V cannot be excluded, and neither can set-aside proceedings. Thereby, the parties are allowed a second or even third bite at the cherry.

VI. Conclusion

As we have outlined in this article, the enforcement mechanism for investment arbitral awards is one of the most important and valuable features of the current regime. The EU Commission's ICS Model has so far only insufficiently addressed this issue. The CIDS Study, by contrast, has devoted the required attention to this topic. Nevertheless, a clear path as to how to address this issue still needs to be found.

To us, it seems apparent that the ICSID Convention and its Article 54 can never serve as a basis for the enforcement of any award that is a result of a modified ICSID procedure – as long as this modification is not undertaken through a modification of the entire convention to which all its parties agree. Any bilateral or multilateral change to the convention's regime can only take effect between the parties agreeing to it. Yet, in case the way forward for investment dispute settlement will indeed be the establishment of a multilateral investment court, enforcement of decisions in third States will not be crucial. As long as such a court attracts a sufficient number of member States, its decision could be enforced through a provision similar to the ICSID Convention's Article 54.

Whether such decisions could simultaneously also be enforceable under the New York Convention seems highly doubtful. No matter what the institution will be called, domestic judges are likely to know a court when they see it – and the multilateral investment court, based on the proposals so far, looks much like one. Some Western judges might pay deference to the wording of treaties such as CETA and take a pro-enforcement view because of that.¹³⁷ This can nevertheless not be predicted or even assumed.

The situation should be different, however, for the establishment of an appeals mechanism as a smaller or first change to the existing system. Arbitral awards that have undergone such a review are most likely still enforceable under the New York Convention. They will, however, unavoidably also be subject to another review – at the stage of enforcement or set-side proceedings.

¹³⁷ See Kaufmann-Kohler & Potestà, *supra* note 10, ¶ 160, who, with regard to a different clarification assume that such “qualifications would not in itself be decisive in third states, they would arguably provide useful indications of the drafters’ intent and are thus likely to be taken into account”.