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**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*

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## EXECUTIVE SUMMARY

This research paper seeks to analyze whether the Mauritius Convention on Transparency could provide a useful model for broader reform of the investor-State arbitration framework. To this end, it proposes a possible roadmap that could be followed if States were to decide to pursue a reform initiative aimed at replacing or supplementing the existing investor-State arbitration regime in international investment agreements (IIAs) with a permanent investment tribunal and/or an appeal mechanism for investor-State arbitral awards.

The reform plan is developed on three main blocks:

1. The design of an International Tribunal for Investments (ITI);
2. The design of an Appeal Mechanism (AM) for investor-State arbitral awards;
3. The establishment of a multilateral instrument (the Opt-in Convention) to extend those new dispute resolution options to States' existing IIAs.

The main pillars of the reform initiative reviewed in this paper are the following. First, what is envisaged is a truly multilateral dispute settlement system, resulting in the creation of one single ITI potentially competent to resolve investment disputes concerning as many States as would opt into it, and/or in the creation of one single AM potentially competent to serve as appellate tribunal for investor-State arbitral awards across all States' IIAs. Second, the reform initiative is directed at one discrete issue of IIA reform, i.e. the treaties' investor-State arbitration provisions, and avoids possible controversies on the reform of substantive protection standards for which consensus may be more difficult to achieve. Third, the mechanism of the Opt-in Convention effectively releases States from the burden of pursuing the potentially complex and long amendment procedures set out in the existing 3,000 IIAs.

Against this backdrop, the paper first analyzes the main challenges that would be faced when designing the ITI and the AM respectively and sets out the principal architectural and institutional options available to States when setting up those dispute settlement bodies. These include the options available in relation to the determination of the law governing the proceedings before the new dispute settlement bodies, their composition and structure, the systems of control over their awards and decisions, and questions of enforcement.

The paper then addresses the legal issues to be considered in drafting the Opt-in Convention, which would be the instrument by which the Parties to IIAs express their consent to submit disputes arising under their existing IIAs to the ITI/AM. While the Opt-in Convention would be primarily aimed at the existing IIA network, it would be without prejudice to the possibility that future investment treaties may refer to the new dispute resolution options, as States may deem appropriate.

The research paper concludes that the challenges involved in broader reforms of the investor-State arbitration regime are substantially more complex than the introduction of a transparency standard in investment treaties. At the same time, the paper also shows that the Mauritius Convention could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level.

## I. INTRODUCTION

1. This research paper is prepared for the United Nations Commission on International Trade Law (UNCITRAL) within the framework of a project of the Geneva Center of International Dispute Settlement (CIDS), a joint research center of the Graduate Institute of International and Development Studies and the University of Geneva.<sup>1</sup>

2. The purpose of this paper is to analyze whether the model of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the U.N. General Assembly on 10 December 2014 and opened for signature on 17 March 2015 (the “Mauritius Convention”),<sup>2</sup> can be used for the purposes of broader reform on procedural aspects of the investor-State arbitration framework. More specifically, the paper will examine whether an instrument similar to the Mauritius Convention, alone or in combination with other instruments, could establish a framework for (1) a permanent dispute settlement body (“International Tribunal for Investments” or ITI) intended to replace or complement investor-State arbitration provisions in existing and future international investment agreements (IIAs or “investment treaties”) (the “ITI scenario”); and/or (2) an appeal mechanism (AM) for investor-State arbitral awards under existing or future IIAs (the “AM scenario”).

3. Prior to discussing these two scenarios, this paper sets out the background to the present project, i.e. the criticism that has developed over the last years towards investor-State arbitration (section II) and the existing reform proposals (section III). It will then review the operation of the Mauritius Convention with a view to examining to what extent it can serve as a model for reforms in connection with the introduction of an ITI and/or an AM (section IV). If States wish to pursue this reform initiative on a multilateral basis, then this paper suggests a possible roadmap for further consideration. In the proposed constellation, the work would result in drawing up two instruments creating the ITI and the AM respectively (the “ITI Statute” and the “AM Statute”), in combination with an opt-in instrument (similar to the Mauritius Convention) which would aim at extending the application of those permanent bodies to IIAs (the “Opt-in Convention”) (section IV.B).

4. This paper will then analyze the main challenges and legal issues which States would face in the design of the ITI (section V) and of the AM (section VI). Section VII

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<sup>1</sup> See UN (2015), *Report of the United Nations Commission on International Trade Law Forty-eighth session* (29 June-16 July 2015), Official Records of the General Assembly, Seventieth Session, Supplement No. 17, UN Doc. A/70/17, para. 268. The authors of this paper thank Clément Bachmann, CIDS researcher and teaching assistant at Geneva University, for his major contribution to research and editorial work, and Professor Robert Kolb, University of Geneva, for his comments on the law of treaties issues addressed in this paper. The authors are also grateful to CIDS researchers Sean McCarthy and Blerina Xheraj for research assistance, and to Erika Hasler, Lévy Kaufmann-Kohler, for continuous support in locating bibliographic resources.

<sup>2</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted on 10 December 2014, opened for signature on 17 March 2015). See also UN (2014a), *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, General Assembly, 69<sup>th</sup> session, Resolution A/69/116 (18 December 2014).

finally reviews the modalities of the extension of the ITI/AM dispute resolution mechanisms to existing IIAs by way of the Opt-in Convention. The paper will close with a summary of the main conclusions and the recapitulation of the options in the event that the reform initiative is pursued (section VIII).

## II. THE BACKGROUND: CRITICISM OF THE INVESTOR-STATE ARBITRATION SYSTEM

### A. INTRODUCTION

5. The international investment law regime is composed of around 3000 IIAs, including bilateral investment treaties (BITs) and broader bilateral or multilateral free trade agreements (“FTAs”) containing a chapter on investment protection. Although IIAs are not identical to, and indeed show differences from, one another, they generally follow similar patterns with regard to their structure and are centered around a number of core recurrent principles. The broad similarities between IIAs make it possible to speak of a “regime” of international investment protection, which is essentially based on two elements.

6. First, IIAs provide substantive guarantees to investors in the form of international obligations placed upon Contracting States, whereby States undertake to respect certain standards of investment protection vis-à-vis foreign investors and their investments (such as fair and equitable treatment, protection from expropriation, and non-discrimination).

7. Second, most IIAs allow foreign investors to enforce those substantive protections through a procedural mechanism, commonly referred to as investor-State arbitration.<sup>3</sup> While investor-State arbitration provisions show variations across the different IIAs, they normally provide for the following features: (i) the claimant-investor may bring a claim directly against the host State; (ii) the dispute is heard by an arbitral tribunal constituted *ad hoc*<sup>4</sup> to hear that particular dispute; (iii) both disputing parties, including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal. A further dispute settlement mechanism, i.e. State-to-State arbitration, is normally provided in IIAs alongside investor-State arbitration. The presence of those two dispute settlement mechanisms may pose coordination problems,<sup>5</sup> although in practice recourse to investor-State arbitration under IIAs has been by far more significant than its State-to-State counterpart.

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<sup>3</sup> Sometimes, investor-State arbitration is also referred to as “investor-State dispute settlement” or ISDS. As the new permanent investment tribunal mechanism would also qualify as (a new form of) investor-State dispute settlement, in order to avoid confusion this paper will generally avoid referring to ISDS in relation to investor-State arbitration.

<sup>4</sup> Unless otherwise indicated, this paper uses the term “*ad hoc*” to mean that the dispute is not brought before a permanent body, but before a tribunal (whether or not under the auspices of an arbitral institution) constituted to hear that particular dispute (with no mandate beyond that dispute). It is not used in the different sense of non-institutional arbitration.

<sup>5</sup> Michele Potestà (2015), *Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?*, in Shaheez Lalani & Rodrigo Polanco (eds.), *The Role of*

## B. THE IIA – INVESTOR-STATE ARBITRATION REGIME AND ITS CONTRIBUTION TO THE RULE OF LAW

8. Opinions diverge on the merits and demerits of the foreign investment protection regime and in particular investor-State arbitration.

9. Supporters of the system normally highlight that the foreign investment protection regime has generally proven beneficial and positively contributed to the promotion of the rule of law at the international level, the functioning of the global market, the increase of foreign investment flows, the economic growth and the human development in capital-exporting as well as capital-importing States.<sup>6</sup>

10. Proponents also stress the novelty of the investor-State arbitration system, which allows a private subject (whether individual or company) to bring an international claim directly against a sovereign State, in a significant break from traditional mechanisms for the settlement of disputes at the inter-State level. The previous regime was essentially founded on the institution of diplomatic protection (or diplomatic espousal), which consists, according to one authoritative definition, in the “invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility”.<sup>7</sup> Where a State refused to embrace the claims of its nationals (for reasons often not linked to the merits of the claims), no remedy was generally available to that national other than action in the courts of the respondent-State, which were often perceived as lacking objectivity.<sup>8</sup> A number of governmental takings which occurred before the entry into force of the first IIAs reportedly were never adequately compensated.<sup>9</sup>

11. The development of investor-State arbitration was part of an initiative to create an institutionalized and formalized procedure on the international plane, within a broader initiative which saw IIAs (including their provisions on dispute settlement) as instruments to foster the confidence in the stability of the investment environment of

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*the State in Investor-State Arbitration*, Brill | Nijhoff, pp. 249–273; Anthea Roberts (2014), *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, Harvard International Law Journal, Vol. 55(1), pp. 1–70.

<sup>6</sup> See Stephan W. Schill (2011), *Enhancing the Legitimacy of International Investment Law: Conceptual and Methodological Foundations of a New Public Law Approach*, Virginia Journal of International Law, Vol. 52(1), pp. 57–102, 61 f.

<sup>7</sup> International Law Commission (ILC) (2006a), *Articles on Diplomatic Protection*, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc. A/61/10, Article 1.

<sup>8</sup> Christoph H. Schreuer (2014), *Investment Arbitration*, in Cesare P. R. Romano, Karen J. Alter & Yuval Shany (eds.), *Oxford Handbook of International Adjudication*, Oxford University Press, pp. 295–315, 296.

<sup>9</sup> Christian Tietje & Freya Baetens (2014), *The Impact of Investor State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, Study prepared for the Ministry of Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, p. 21.

developing countries<sup>10</sup> and thus “facilitate wealth-creating cross-border capital flows”.<sup>11</sup> This would “allow [...] developing countries to develop local industries and receive funds from foreign investors to improve the country's infrastructure”<sup>12</sup> and bring “net gains for both host state and foreign investor[s]”.<sup>13</sup>

12. For those who view the foreign investment regime with positive eyes, IIAs contributed to the creation of “global governance regimes, constituted by legal rules and institutions to enhance compliance with them”,<sup>14</sup> or, in other words, to the strengthening of the rule of law at the international level.<sup>15</sup> Importantly, investor-State arbitration also led to a “de-politicization” of investment disputes and drastically reduced the risk that they escalated into inter-State conflicts.<sup>16</sup>

13. In the eyes of proponents of the current IIA regime, investor-State arbitration has thus become a “useful tool of good governance to create longer-term interests in the stewardship of economic, human and natural resources”.<sup>17</sup>

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<sup>10</sup> Susan Franck (2005), *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, Fordham Law Review, Vol. 73(4), pp. 1521–1625, 1525 f. See also Christoph H. Schreuer (2015), *Do we need Investment Arbitration?*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System*, Brill | Nijhoff, pp. 879–889, 879.

<sup>11</sup> Franck (2005), p. 1524.

<sup>12</sup> Franck (2005), p. 1524.

<sup>13</sup> Guillermo A. Alvarez & William W. Park (2003), *The New Face of Investment Arbitration: NAFTA Chapter 11*, Yale Journal of International Law, Vol. 28(2), pp. 365–407, 366; Schreuer (2014), p. 296.

<sup>14</sup> Thomas W. Wälde (2007), *The Specific Nature of Investment Arbitration*, in Philippe Kahn & Thomas W. Wälde (eds.), *New Aspects of International Investment Law / Les aspects nouveaux du droit des investissements internationaux*, Brill | Nijhoff, pp. 43–120, 70; Benedict Kingsbury & Stephan Schill (2010), *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, in Albert Jan van den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series 14, Kluwer Law International, pp. 5–68.

<sup>15</sup> Thomas W. Wälde (2006), *Investment Arbitration and Sustainable Development: Good Intentions - or Effective Results?*, Transnational Dispute Management, Vol. 3(5), p. 2.

<sup>16</sup> Ibrahim F.I. Shihata (1986), *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, ICSID Review – Foreign Investment Law Journal, Vol. 1(1), pp. 1–25; Wälde (2007), p. 117; Schreuer (2015), p. 880; Schreuer (2014), p. 296.

<sup>17</sup> Wälde (2006), p. 7. See also for instance Charles H. Brower & Stefan W. Schill (2009), *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, Chicago Journal of International Law, Vol. 9(2), pp. 471–498, 476; Devashish Krishan (2011), *Thinking About Bits And Bit Arbitration: The Legitimacy Crisis That Never Was*, in Todd Weiler & Freya Baetens (eds.), *New Directions in International Economic Law: In Memoriam Thomas Wälde*, Brill | Nijhoff, pp. 107–150; Scott Miller & Gregory N. Hicks (2015), *Investor-State Dispute Settlement, A Reality Check*, Report of the CSIS Scholl Chair in International Business, Rowman & Littlefield; Schreuer (2015); Stephen M. Schwebel (2009), *The Overwhelming Merits of Bilateral Investment Treaties*, Suffolk Transnational Law Review, Vol. 32(2), pp. 263–269; Stephen M. Schwebel (2015), *Keynote Address: In Defense of Bilateral Investment Treaties*, in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18, Kluwer Law International, pp. 1–11; Stephen M. Schwebel (2016), *The outlook for the continued vitality, or lack thereof, of investor-State arbitration*, Arbitration International, Vol. 32, pp. 1–15; José E. Alvarez et al. (2015), *An open letter about investor-state dispute settlement*, Letter undersigned by 50 professors and scholars of international law, arbitration, and dispute settlement sent to congressional leaders and the U.S. Representative for Trade on

14. Numerous empirical analyses have been conducted with a view to assessing the effective impact of IIAs on foreign direct investments.<sup>18</sup> Those studies have come to diverging conclusions. According to a report of the United Nations Conference on Trade and Development (UNCTAD), the majority of those studies concluded that there was indeed a positive correlation between investment treaties and foreign direct investment.<sup>19</sup> Others were more nuanced, and showed that this impact was dependent on the content of the treaties.<sup>20</sup> Finally, some researchers found no or insignificant investment increases due to IIAs.<sup>21</sup>

### C. THE “BACKLASH” AGAINST INVESTOR-STATE ARBITRATION

15. Despite these positive voices, the IIA regime has also attracted growing critical attention. Criticism first appeared with the rise of the anti-globalization movements in the mid-1990s and was fueled by specific events, such as the failure of negotiations for a Multilateral Agreement on Investment (“MAI”) conducted within the Organisation for Economic Co-operation and Development (OECD), the initiation of the first cases against the United States and Canada under the North American Free Trade Agreement (NAFTA),<sup>22</sup> and, more recently, the negotiations of major transcontinental FTAs. Overall, the discussion has often focused on a few controversial cases, which are not necessarily representative of the regime as a whole.

16. What began as a rather academic or at least discrete controversy has recently gained substantial media interest and public scrutiny and, in some instances, has

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20 April 2015, available at <https://www.mcgill.ca/fortier-chair/isds-open-letter> (last consulted on 29 April 2016).

<sup>18</sup> UNCTAD (2014a), *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014*, International Investment Agreement Issues Note, Working draft (September 2014).

<sup>19</sup> UNCTAD (2014a), pp. 1 f.; see for instance Peter Egger & Michael Pfaffermayr (2004), *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, Journal of Comparative Economics, Vol. 32(4), pp. 788–804; Arjan Lejour & Maria Salfi (2015), *The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment*, CPB Netherlands Bureau for Economic Policy Analysis, Discussion Paper No. 298; Eric Neumayer & Laura Spess (2005), *Do bilateral investment treaties increase foreign direct investment to developing countries?*, World Development, Vol. 33(10), pp. 1567–1585.

<sup>20</sup> See for instance Axel Berger, Matthias Busse, Peter Nunnenkamp & Martin Roy (2010), *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, World Trade Organization, Economic Research and Statistics Division, Working Paper, also published, under the same title, by Kiel Institute for the World Economy, as Working Paper No. 1647.

<sup>21</sup> See for instance Mary Hallward-Driemeier (2003), *Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite*, World Bank, Policy Research Paper WPS 3121; Jeswald W. Salacuse & Nicholas P. Sullivan (2005), *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol. 46(1), pp. 67–130; Jennifer Tobin & Susan Rose-Ackerman (2005), *Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties*, Yale Law School Center for Law, Economics and Public Policy, Research Paper No. 293.

<sup>22</sup> Daniel Behn (2015), *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, Georgetown Journal of International Law, Vol. 46(2), pp. 363–415, p. 366.

spilled over into general politics. Over the last decade, leading newspapers around the world have turned their attention to investor-State arbitration<sup>23</sup> with headings speaking of “obscure tribunals”,<sup>24</sup> “secret trade courts”,<sup>25</sup> entailing a “real threat to the national interest from the rich and powerful”.<sup>26</sup> Commentators have thus started to speak of a “backlash” against investment arbitration.<sup>27</sup> A few States have either denounced or declared their intention to denounce the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”)<sup>28</sup> and some of their IIAs.<sup>29</sup> Other States have revised their model agreements, while some have altogether dispensed with the inclusion of investor-State arbitration in the investment chapters of their FTAs.<sup>30</sup>

17. Whereas the relevance, accuracy and possible consequences of this criticism are highly disputed, it is undeniable that, nowadays, investment arbitration is largely perceived as lacking legitimacy.<sup>31</sup>

#### D. OVERVIEW OF THE MAIN AREAS OF CRITICISM OF THE IIA REGIME

18. Criticism towards the investment regime has barely left any area of it unaffected and has included disapproval of both the substantive IIAs standards and their procedural complement, investor-State arbitration. With regard to the former, it is often

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<sup>23</sup> See for instance The Economist, *The arbitration game*, 11 October 2014; Sonya Faure, *Le traité transatlantique crée-t-il une justice qui court-circuite les Etats ?*, Libération, 16 May 2014; Frédéric Viale & Marion Lagailarde, *Traité transatlantique : un système d'arbitrage toujours aussi 'anti-démocratique'*, Le Monde, 22 October 2015.

<sup>24</sup> Anthony De Palma, *Nafta's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, New York Times, 11 March 2001.

<sup>25</sup> New York Times, *The Secret Trade Courts*, Editorial, 27 September 2004.

<sup>26</sup> George Monbiot, *The Real Threat to the National Interest From the Rich and Powerful*, The Guardian, 15 October 2013.

<sup>27</sup> Claire Balchin, Liz Kyo-Hwa Chung, Asha Kaushal & Michael Waibel (eds.) (2010), *The Backlash Against Investment Arbitration: Perceptions And Reality*, Kluwer Law International; Asha Kaushal (2009), *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, Harvard International Law Journal, Vol. 50(2), pp. 491–534; Olivia Chung (2007), *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, Virginia Journal of International Law, Vol. 47(4), pp. 953–976, p. 975.

<sup>28</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532. The following States have denounced the ICSID Convention: Bolivia (2007); Ecuador (2009) and Venezuela (2012).

<sup>29</sup> The following States have denounced some of their IIAs: Ecuador terminated nine BITs in 2008; Venezuela terminated one BIT in 2008; Indonesia terminated seventeen BITs since 2014; South Africa terminated nine BITs since 2012 (source: <http://investmentpolicyhub.unctad.org/> and others).

<sup>30</sup> See for instance U.S.-Australia FTA (2004), Article 11.16.

<sup>31</sup> As summarized by European Commissioner for Trade Cecilia Malmström, “there is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model. This has significantly affected the public’s acceptance of ISDS and of companies bringing such cases”. See Cecilia Malmström, *Proposing an Investment Court System*, Blog Post, 16 September 2015 available at: [https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system\\_en](https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en) (last consulted on 2 May 2016).

alleged that substantive treaty standards are formulated in vague and overly broad terms,<sup>32</sup> resulting in the grant of excessive discretion to arbitrators called to interpret and apply those standards.<sup>33</sup> This paper is focused on the possible reform of investor-State arbitration. Thus, it will not describe in detail the problems usually identified with regard to the treaties' substantive obligations, except for noting that there has been a significant effort by States in recent years to "re-balance" their IIAs, by drafting more precise treaty standards and strengthening the right to regulate.<sup>34</sup>

19. Although the areas of criticisms towards investor-State arbitration are numerous and inter-connected, it is possible to group existing criticism into two main categories.

20. A first type of criticism focuses on the decision-makers in the investor-State arbitration system, i.e. the arbitrators (and, to a lesser extent, the arbitral institutions which administer investor-State arbitrations). Here, the criticism has mainly focused on the arbitrators' alleged lack of sufficient guarantees of independence and impartiality.<sup>35</sup>

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<sup>32</sup> Sarah Anderson & Sara Grusky (2007), *Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties Have Unleashed a New Era Of Corporate Power and What to Do About It*, Food & Water Watch, Institute for Policy Studies, available at [http://www.ipsdc.org/reports/challenging\\_corporate\\_investor\\_rule](http://www.ipsdc.org/reports/challenging_corporate_investor_rule) (last consulted on 3 February 2016), p. 4; Vicki Been & Joel C. Beauvais (2003), *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, New York University Law Review, Vol. 78(1), pp. 30–143, 55; Chung (2007), p. 959; Luis González García (2015), *Making Impossible Investor-State Reform Possible*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century*, Brill | Nijhoff, pp. 424–436, 347 et seq.; Gus van Harten (2007), *Investment Treaty Arbitration and Public Law*, Oxford University Press, pp. 122 et seq.; Muthucumaraswamy Sornarajah (1997), *Power and Justice in Foreign Investment Arbitration*, Journal of International Arbitration, Vol. 14(3), pp. 103–140, generally; Marc R. Poirier (2003), *The NAFTA Chapter 11 Expropriation Debate through the Eyes of a Property Theorist*, Environmental Law, Vol. 33(4), pp. 851–928, 904 f.

<sup>33</sup> Been & Beauvais (2003), see for instance pp. 55 and 59 et seq.; Julia Hueckel (2012), *Rebalancing Legitimacy and Sovereignty In International Investment Agreements*, Emory Law Journal Vol. 61(3), pp. 601–640, 605 f.; Suzanne A. Spears (2010), *The Quest for Policy Space in a New Generation of International Investment Agreements*, Journal of International Economic Law, Vol. 13(4), pp. 1037–1075, 1071; and generally, Anthea Roberts (2010), *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, American Journal of International Law, Vol. 104(2), pp. 179–225, *inter alia* 179 f.

<sup>34</sup> José E. Alvarez (2011), *The Return of the State*, Minnesota Journal of International Law, Vol. 20(2), pp. 223–264, 234 f.; UNCTAD (2016), *Taking Stock of IIA Reform*, International Investment Agreement Issues Note, No. 1 (March 2016), pp. 4 et seq.; UNCTAD (2014b), *World Investment Report 2014*, pp. 116 et seq., UNCTAD (2015), *World Investment Report 2015*, pp. 108 et seq., esp. 118; Kathryn Gordon & Joachim Pohl (2015), *Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment 2015/02, OECD Publishing, pp. 23 et seq.; Joachim Pohl, Kekeletso Mashigo & Alexis Nohen (2012), *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment, 2012/02, pp. 40 et seq.; Caroline Henckels (2016), *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, Journal of International Economic Law, Vol. 19(1), pp. 27–50.

<sup>35</sup> Pia Eberhardt & Cecilia Olivet (2012), *Profiting from injustice*, Corporate Europe Observatory & Transnational Institute, pp. 8, 35 et seq. and 67 et seq.; Van Harten (2007), pp. 167 et seq.; Noah Rubins & Bernhard Lauterburg (2009), *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, in Christina Knahr, Christian Koller, Walter Rechberger & August

Because they are remunerated for their services, arbitrators would have a vested interest in perpetuating the regime. As investment arbitrations may only be initiated by investors,<sup>36</sup> arbitrators would depend on these for future appointments and, ultimately, for work. Arbitrators would in consequence be inclined to cater to the investors' interests.<sup>37</sup>

21. More generally, the system of party-appointment would negatively impact the impartiality of arbitral tribunals.<sup>38</sup> Also problematic would be the fact that some practitioners act both as counsel and arbitrator in different proceedings, with the possibility of ensuing conflicts of interest or so-called issue conflicts.<sup>39</sup> Criticism has also concerned appointing authorities and arbitral institutions for their own alleged lack of independence and impartiality.<sup>40</sup> As compared to tenured judges holding a public office, arbitrators would have an insufficient relationship to the States whose regulations they are called to scrutinize.<sup>41</sup> For some, it would simply be unacceptable that private individuals rule on the legality of decisions taken or regulations enacted by democratically elected officials.<sup>42</sup>

22. A second area of criticism involves the arbitral process, its outcome and its structural features. In this respect, the following concerns have been voiced:

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Reinisch (eds.), *Investment and Commercial Arbitration – Similarities and Divergences*, Eleven International Publishing, pp. 153–180, 171 et seq. and 175 et seq.; Sornarajah (1997), p. 118. See also UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, International Investment Agreement Issues Note, No. 2 (June 2013), p. 4.

<sup>36</sup> Claims by host States are extremely rare and the possibility for counterclaims is fairly limited. See Gustavo Laborde (2010), *The Case for Host State Claims in Investment Arbitration*, Journal of International Dispute Settlement, Vol. 1(1), pp. 97–122, 102 et seq.

<sup>37</sup> Eberhardt & Olivet (2012), pp. 7 and 49. See also Been & Beauvais (2003), pp. 30–143, 105 f.; Carlos G. Garcia (2004), *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, Florida Journal of International Law, Vol. 16(2), pp. 301–369, 352; Van Harten (2007), pp. 172 f.; Gus van Harten (2010), *Perceived Bias in Investment Treaty Arbitration*, in Claire Balchin, Liz Kyo-Hwa Chung, Asha Kaushal & Michael Waibel (eds.), *The Backlash Against Investment Arbitration: Perceptions And Reality*, Kluwer Law International, pp. 433–454, 441 and 445; Public Citizen's Global Trade Watch (2015), *Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges*, pp. 13 et seq.; Sornarajah (1997), p. 118.

<sup>38</sup> UNCTAD (2013), p. 4; Garcia (2004), pp. 352 f. See also Jan Paulsson (2010), *Moral Hazard in International Dispute Resolution*, ICSID Review – Foreign Investment Law Journal, Vol. 25(2), pp. 339–355.

<sup>39</sup> See for instance Anderson & Gursky (2007), pp. 8 f.; Garcia (2004), p. 353; Public Citizen's Global Trade Watch (2015), pp. 14 et seq.

<sup>40</sup> Van Harten (2010), pp. 441 et seq.; Anderson & Gursky (2007), pp. 4 f.; Van Harten (2010), pp. 441 et seq.; Gus van Harten (2008), *A Case for an International Investment Court, Inaugural Conference Paper*, Society of International Economic Law, pp. 17-18 (arguing that ICSID is excessively influenced by capital-exporting countries).

<sup>41</sup> Barnali Choudhury (2008), *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, Vanderbilt Journal of Transnational Law, Vol. 41(3), pp. 775–832, 819.

<sup>42</sup> Anderson & Gursky (2007), pp. 7 f. and 22; Van Harten (2007), pp. 96 et seq. and 152 f.; Van Harten (2010), pp. 451 f. See also Choudhury (2008), p. 782; Public Citizens Global Trade Watch (2005), *NAFTA's Threat to Sovereignty and Democracy; The Record of NAFTA Chapter 11 Investor-State Cases 1994–2005*.

- Lack of consistency. Awards issued by investment tribunals are inconsistent or sometimes even contradictory, and there is no appropriate mechanism in place to remedy or limit such inconsistencies.<sup>43</sup> For example, tribunals have reached inconsistent or conflicting conclusions on core matters such as the effect of so-called “umbrella clauses” or of “most-favored-nation clauses”.<sup>44</sup> This would be the consequence of the indeterminate formulation of the investors’ rights, the absence of a formal rule of precedent and the lack of a real control mechanism.<sup>45</sup> Another causal factor would be the difficulty of limiting multiple proceedings through procedural techniques (e.g. joinder or consolidation) in arbitration.<sup>46</sup> Inconsistency could negatively affect the reliability, effectiveness and predictability of the investment arbitration regime<sup>47</sup> and, in the long run, its credibility.<sup>48</sup>
- Length and cost. Monetary awards issued by arbitral tribunals,<sup>49</sup> but also legal fees and related costs incurred by parties in investment proceedings, would often be excessive.<sup>50</sup> As a consequence, governments would be constrained to spend significant amounts of money to defend legitimate public policies.<sup>51</sup> A too heavy burden would especially be imposed upon low-income countries, which

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<sup>43</sup> Tai-Heng Cheng (2005), *Power, Authority and International Investment Law*, American University International Law Review, Vol. 20(3), pp. 465-520, 516 f.; Franck (2005), pp. 1558 and 1582 f.; Garcia (2004), pp. 347 et seq.; Frank Spoorenberg & Jorge E. Viñuales (2009), *Conflicting Decisions in International Arbitration*, The Law and Practice of International Courts and Tribunals, Vol. 8(1), pp. 91–113, 91 f. See also UNCTAD (2013), pp. 3–4.

<sup>44</sup> Christoph H. Schreuer (2008), *Preliminary Rulings in Investment Arbitration*, in Karl Sauvant (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, pp. 207–212, 208.

<sup>45</sup> Gabrielle Kaufmann-Kohler (2004), *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there differences?*, in Emmanuel Gaillard & Yas Banifatemi (eds.), *Annulment of ICSID Awards: The Foundation of a New Investment Protection Regime in Treaty Arbitration*, IAI Series, No. 1, JurisNet, pp. 189–221, 220; Mara Valenti (2014), *Restricting the Scope of International Investment Agreements as a Means to Set Limits to the Extent of Arbitral Jurisdiction*, Transnational Dispute Management, Vol. 11(1); Spoorenberg & Viñuales (2009), p. 95.

<sup>46</sup> Spoorenberg & Viñuales (2009), pp. 100 and 110.

<sup>47</sup> Andreas Bucher (2010), *Is There a Need to Establish a Permanent Reviewing Body*, in Emmanuel Gaillard (ed.), *The Review of International Arbitral Awards*, IAI Series No. 6, JurisNet, pp. 285–296, 287; Jeffery P. Commission (2007), *Precedent in Investment Treaty Arbitration, A Citation Analysis of a Developing Jurisprudence*, Journal of International Arbitration, Vol. 24(2), pp. 129–158, 157; Rudolf Dolzer (2012), *Perspectives for Investment Arbitration: Consistency as a Policy Goal?*, Transnational Dispute Management, Vol. 9(3), pp. 5 et seq.; Gabrielle Kaufmann-Kohler (2007), *Arbitral Precedent: Dream, Necessity or Excuse?*, *The 2006 Freshfields Lecture*, Arbitration International, Vol. 23(3), pp. 357–378, 374 et seq. and 378; Kaufmann-Kohler (2004), p. 219; Spoorenberg & Viñuales (2009), p. 92;

<sup>48</sup> Kaufmann-Kohler (2007), p. 378.

<sup>49</sup> Cheng (2005), pp. 507 f.; Chung (2007), p. 965.

<sup>50</sup> Garcia (2004), pp. 352 and 355 f. See also UNCTAD (2013), p. 4.

<sup>51</sup> Public Citizen’s Global Trade Watch (2015), pp. 7 et seq.

would be unable to properly defend themselves against wealthy transnational corporations.<sup>52</sup> Arbitration proceedings would also be too lengthy.<sup>53</sup>

- Lack of appropriate control mechanisms. As already noted, existing control mechanisms would be weak and unsatisfactory.<sup>54</sup> The recourse to *ad hoc* annulment committees (in the ICSID system) would prevent the development of a doctrine of precedent, and thus of a consistent jurisprudence.<sup>55</sup> Moreover, the jurisdiction to review awards of both ICSID annulment committees and domestic courts at the seat (in case of non-ICSID awards) would be excessively limited.<sup>56</sup> The absence of a real appellate mechanism would indeed make it impossible to reverse incorrect decisions<sup>57</sup> and to sanction incompetent arbitrators.<sup>58</sup> As investment cases involve public interests and considerable amounts of money, such restrictions would be unacceptable.<sup>59</sup>
- Lack of transparency. Finally, the investor-State arbitration regime would lack transparency and offer insufficient possibilities for third parties to participate in proceedings.<sup>60</sup> As already noted, the concern over excessive confidentiality, of justice administered “behind closed door” in matters of public interest, has indeed been one of the first main criticisms raised against the system.

23. The present criticism of investor-State arbitration in essence reflects serious concerns about the democratic accountability and legitimacy of this dispute resolution process. While States themselves have established the mechanism and, therefore, their consent ensures its legitimacy under international law, this may not always be perceived as such by States and their constituencies. The power granted to individual arbitrators who are not part of a corps of judges is not well accepted in democracies, and the number of democratic States has increased significantly in the last decades,

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<sup>52</sup> David P. Riesenber (2011), *Fee Shifting In Investor-State Arbitration: Doctrine And Policy Justifying Application Of The English Rule*, Duke Law Journal, Vol. 60(4), pp. 977–1013, 1007 et seq. See also UNCTAD (2013), p. 4.

<sup>53</sup> Garcia (2004), pp. 355 f.

<sup>54</sup> Anderson & Grusky (2007), p. 27; Cheng (2005), p. 514 f.; Chung (2007), pp. 104 et seq.; Eberhardt & Olivet (2012), pp. 34 et seq.; Garcia (2004), pp. 341 f.; Hueckel (2012), p. 621; Public Citizen’s Global Trade Watch (2015), pp. 4 et seq. and 17; Poirier (2003), p. 924. See UNCTAD (2013) pp. 3 f.

<sup>55</sup> UNCTAD (2013), pp. 3 f.; Poirier (2013), p. 924.

<sup>56</sup> UNCTAD (2013), p. 4; Garcia (2004), pp. 342 et seq.

<sup>57</sup> Choudhury (2008), p. 818; Cheng (2005), p. 515; Garcia (2004), p. 342; Jacques Werner (2009), *Limits of Commercial Investor-State Arbitration: The Need for Appellate Review*, in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, pp. 115–117.

<sup>58</sup> Hueckel (2012), pp. 611 and 621.

<sup>59</sup> Chung (2007), pp. 967 f.

<sup>60</sup> UNCTAD (2013), p. 3; Anderson & Gursky (2007), p. 8; Lucas Bastin (2012), *The Amicus Curiae in Investor-State Arbitration*, Cambridge Journal of International and Comparative Law, Vol.(1)3, pp. 208–234, 224 and 227; Choudhury (2008), pp. 818 f.; Eberhardt & Olivet (2012), pp. 16, 49; Garcia (2004), pp. 354 f.; Gus van Harten et al. (2010), *Public Statement on the International Investment Regime*, 31 August 2010; Luke Eric Peterson (2001), *Challenges Under Bilateral Investment Treaties Give Weight to Calls for Multilateral Rules*, World Trade Agenda, pp. 12–14, 13; Poirier (2003), p. 926; Stephan W. Schill (2011), p. 66.

which may in part explain the surge of criticism. This deficiency in terms of accountability and legitimacy calls for remediation. At the same time, the remedies should avoid sacrificing the gains of investor-State arbitration, which do exist as well. Looking at the big picture, one can cite three. First, neutrality or, in other words, distance of the decision-makers from politics – the depoliticization for which investment arbitration was praised – and from business interests at the same time. Second, finality and enforceability of the award; the former saves time and costs and the latter ensures the ultimate effectiveness of the system. And, third, the manageability or workability of the process; it is “light” compared to “heavier” permanent adjudicatory bodies requiring significant resources, so for instance the World Trade Organization (WTO) Legal Affairs and Rules Divisions and Appellate Body (AB) Secretariat.

### III. EXISTING PROPOSALS FOR REFORM

#### A. OVERVIEW

24. The criticisms just identified have led some interest groups and scholars to fundamentally disagree with the regime in itself and to advocate for its dismantling or at least radically transforming it.<sup>61</sup> Other actors or stakeholders have instead suggested ways in which the system could be improved.<sup>62</sup> Suggestions for reforms of the investor-State arbitration system are in fact not new; they had already been advanced more than a decade ago.<sup>63</sup> Several possible innovations have thus been proposed or contemplated, with a view to specifically correcting the system’s perceived deficiencies, without tearing down the whole underlying structure, which would have proven its value.

25. Among the critical issues outlined above, one, i.e. the lack of transparency in the investor-State arbitration process, has been significantly remedied in the last decade. In fact, investor-State arbitration has been moving towards more “openness” thanks to significant steps which include (i) the amendment of arbitration rules (see, e.g., the 2006 amendments to the ICSID Rules);<sup>64</sup> (ii) the insertion of transparency provisions in IIAs;<sup>65</sup> and (iii) foremost and on a more global scale the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”) and of the Mauritius Convention (on which see *infra* section IV). As a consequence of these reforms, the investor-State arbitration system is more transparent than in its early days and is characterized by increased publication of

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<sup>61</sup> See for instance Anderson & Grusky (2007), esp. pp. 24 et seq.; Eberhardt & Olivet (2012), esp. pp. 72 f.; Van Harten (2010).

<sup>62</sup> See, for instance, UNCTAD (2013) and UNCTAD (2016).

<sup>63</sup> See, for a particularly “visionary” view, which would anticipate many of the changes, Wälde (2007).

<sup>64</sup> Aurélia Antonietti (2006), *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, ICSID Review – Foreign Investment Law Journal, Vol. 6(2), pp. 427–448; UNCTAD (2012), *Transparency, A sequel*, Series on Issues in International Investment Agreement II, pp. 43–47.

<sup>65</sup> UNCTAD (2012), pp. 36–41.

awards and disclosure of dispute documents, more publicity of hearings and enhanced participation of *amici curiae* in the proceedings. In contrast to these tangible achievements in respect of transparency, concrete and significant steps of reform have not yet been accomplished with regard to the other critical issues, despite a number of proposals and a few recent significant innovations.

26. Because this paper is concerned with the prospect of reforming the existing IIA regime through the introduction of a permanent investment tribunal or an appeals facility, it is necessary to briefly review past proposals in this respect.

## **B. THE DEBATE SURROUNDING THE CREATION OF PERMANENT BODIES: BENEFITS AND DRAWBACKS**

27. The last decade has witnessed lively debates and repeated calls for the creation of permanent bodies within the investment treaty regime, both in the form of an appeal mechanism<sup>66</sup> and in the more radical replacement of investor-State

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<sup>66</sup> See generally UNCTAD (2014c), *Investor-State Dispute Settlement, A sequel*, Series on Issues in International Investment Agreements II, pp. 192 et seq.; UNCTAD (2013), pp. 8 f.; Kristina Anđelic (2015), *Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 496–505; Anderson & Grusky (2007); Samantha Besson (2005), *La légitimité de l'arbitrage international d'investissement*, Jusletter, 25 July 2005, para. 46; Gabriel Bottini (2015), *Reform of the Investor-State Arbitration Regime: The Appeal Proposal*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 455–473; Choudhury (2008); Michael D. Goldhaber (2004), *Wanted: A World Investment Court*, *Transnational Dispute Management*, Vol. 1(3); Franck (2005), pp. 1606 et seq.; González García (2015); Hueckel (2012); Anna Joubin-Bret (2015), *Why we need a global appellate mechanism for international investment law*, *Columbia FDI Perspectives*, Perspectives on topical foreign direct investment issues, No. 146; Kaufmann-Kohler (2004), pp. 219 et seq.; Ian Laird & Rebecca Askew (2005), *Finality Versus Consistency: Does Investor-State Arbitration Need An Appellate System?*, *The Journal of Appellate Practice and Process*, Vol. 7(2), pp. 285–302; Jaemin Lee (2015), *Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 474–495; Barton Legum (2008), *Options to Establish an Appellate Mechanism for Investment Disputes*, in Karl P. Sauvant & Michael Chiswick-Patterson (eds.), *Appeals Mechanism in International Dispute Settlement*, Oxford University Press, pp. 231–239; Barton Legum (2015), *Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-U.S. FTA?*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 437–442; Yenkong Ngangjoh-Hodu & Collins C. Ajibo (2015), *ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration*, *Journal of International Dispute Settlement*, Vol. 6(2), pp. 308–331, 310; Eun Young Park (2015), *Appellate Review in Investor State Arbitration*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 443–454; Poirier (2003); Alain Pellet (2013), *Annulment Faute de Mieux Is There a Need for an Appeals Facility*, in N. Jansen Calamita, David Earnest & Markus Burgstaller (eds.), *The Future of ICSID and the Place of Investment Treaties in International Law*, *Investment Treaty Law Current Issues IV*, British Institute of International and Comparative Law, pp. 255–274; Karl P. Sauvant (2016), *The Evolving International Investment Law and Policy Regime: Ways Forward, Policy Options Paper*, E15 Initiative Task Force on Investment Policy, Think Piece, ICTSD & WEF, pp. 29 et seq.; Stephan W. Schill (2015a), *Reforming Investor-State Dispute Settlement (ISDS)*:

arbitration with a permanent investment court.<sup>67</sup> It has been argued that the creation of permanent bodies would entail a number of advantages.

28. First, both of these innovations would contribute to improving the consistency, predictability and legal correctness of investment awards.<sup>68</sup> Eventually, their presence would enhance the awards' authority<sup>69</sup> and restore the regime's credibility.<sup>70</sup> In other words, they would strengthen the regime's legitimacy.<sup>71</sup> While complete consistency in case law would require that the newly created bodies issue decisions with precedential value,<sup>72</sup> the creation of an appellate procedure would *per se* "achieve a measure of harmonization in the decisions of tribunals".<sup>73</sup> The institution of a standing body would

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*Conceptual Framework and Options for the Way Forward*, E15 Initiative Task Force on Investment Policy, Think Piece, ICTSD & WEF, pp. 8 f.; Debra P. Steger (2012), *Enhancing The Legitimacy Of International Investment Law By Establishing An Appellate Mechanism*, in Armand de Mestral & Céline Lévesque (eds.), *Improving International Investment Agreements*, Routledge, pp. 257–264; Christian J. Tams (2006), *An Appealing Option? The Debate about an ICSID Appellate Structure*, *Essays*, *Transnational Economic Law*, No. 57; Irene M. Ten Cate (2012), *International Arbitration and the Ends of Appellate Review*, *New York University Journal of International Law and Politics*, Vol. 44(4), pp. 1109–1204, 1181 et seq.; Thomas W. Wälde (2005), *Some Implications of an Investment Arbitration Appeals Facility*, *Transnational Dispute Management*, Vol. 2(1); Hugo Warner & Audley Sheppard (eds.) (2005), *Appeals And Challenges To Investment Treaty Awards: Is It Time For An International Appellate System?*, *Transnational Dispute Management*, Vol. 2(2).

<sup>67</sup> See generally UNCTAD (2014c), pp. 194 et seq.; UNCTAD (2013), p. 9; Besson (2005), paras 67 et seq.; Nigel Blackaby (2003), *Public Interest and Investment Treaty Arbitration*, in Albert Jan van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series No. 11, Kluwer Law International, pp. 355–365, 364; Choudhury (2008), p. 821; Franck (2005), pp. 1594 and 1600 f.; Omar E. García-Bolívar (2015), *Permanent Investment Tribunals: The Momentum is Building Up*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 394–402; Gantz (2006); González García (2015), pp. 424–442; Van Harten (2007), pp. 180 et seq.; Hueckel (2012), p. 631 et seq.; Daniel R. Lortz (2000), *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under NAFTA's Chapter 11*, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 22(4), pp. 533–551, 548 f.; Ngangjoh-Hodu & Ajibo (2015), pp. 308–331; W. Michael Reisman (1994), *Control Mechanisms in International Dispute Resolution*, *United States-Mexico Law Journal*, Vol. 2, pp. 129–137, pp. 136 f.; Sauvant (2016), pp. 29 et seq.; Schill (2015a), pp. 8 f.; Christoph H. Schreuer (2011), *The Future of Investment Arbitration*, in Mahnouch H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*. Brill | Nijhoff, pp. 786–803, 801 f.; Catherine Titi (2015), *The European Commission's Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court System - An overview of the European Commission's draft TTIP text of 16 September*, *Transnational Dispute Management*, Vol. 12(6), pp. 9 et seq.; Eduardo Zuleta (2015), *The Challenges of Creating a Standing International Investment Court*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 403–423.

<sup>68</sup> Bucher (2010), p. 289; Franck (2005), pp. 1607 and 1617 et seq.; Ngangjoh Hodu & Abijo (2015), p. 328; Karl P. Sauvant (2016), p. 29; Tams (2006), pp. 24 et seq.

<sup>69</sup> Tams (2006), pp. 30 et seq.

<sup>70</sup> Bucher (2010), p. 286; UNCTAD (2013), pp. 8 f.

<sup>71</sup> Bottini (2014), p. 8; Ngangjoh Hodu & Abijo (2015), p. 328.

<sup>72</sup> Bucher (2010), pp. 286 and 289; Laird & Askew (2005), p. 298; Sauvant (2016), p. 29.

<sup>73</sup> Schreuer (2008), p. 209.

especially contribute to the consistency of investment law, as *ad hoc* tribunals have a “natural tendency to diverge more than [...] standing tribunals with an in-built element of tradition and continuous collegiality”.<sup>74</sup>

29. Second, proponents of those innovations further submit that, subject to their method of appointment, tenured judges would offer better guarantees of impartiality and independence than arbitrators appointed on an *ad hoc* basis.<sup>75</sup> Permanent appointment would structurally ensure the independence of the adjudicators, who would be freed from incentives related to possible reappointments.<sup>76</sup> In other words, security of tenure would insulate decision-makers from “powerful private interest” and ensure that “no one can reasonably claim that a judge decided a dispute, or interpreted the law, in order to further his or her own career”.<sup>77</sup> It could therefore “dispel the outsider of these sorts of suspicions by removing the adjudicators from the adjudicative marketplace and by positioning them instead as participants in a public institution”.<sup>78</sup> This could prove especially favorable to “weaker parties”, both countries and claimants.<sup>79</sup>

30. Third, with more specific regard to the creation of an AM, such second level of adjudication would improve the correctness of decisions.<sup>80</sup>

31. The introduction of permanent bodies within the investment framework would, however, not come without drawbacks. It has been underlined that the unique core benefits of the existing investor-State arbitration mechanism, such as “flexibility, expert decision making, speed and enforceability would be lost”.<sup>81</sup> These elements may, in turn, have significant influence on the disputing parties’ perception of fairness.<sup>82</sup> Furthermore, the introduction of an appeal procedure would increase the costs and the length of proceedings,<sup>83</sup> which are already criticized as “overly slow and costly”.<sup>84</sup> The “delicate balance between the search for finality and the search for quality” could be disturbed by opening the door to appeals.<sup>85</sup> It has been further argued that the introduction of an AM would undermine one key advantage of arbitration, the finality of

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<sup>74</sup> Wälde (2007), p. 115.

<sup>75</sup> Van Harten (2008), in general, see in particular p. 30; UNCTAD (2013), p. 9.

<sup>76</sup> Van Harten (2007), pp. 175 et seq.

<sup>77</sup> Van Harten (2010), p. 445.

<sup>78</sup> Van Harten (2010), p. 446.

<sup>79</sup> Wälde (2007), p. 51.

<sup>80</sup> Tams (2006), p. 27.

<sup>81</sup> Franck (2005), pp. 1598 and 1606.

<sup>82</sup> Franck (2005), p. 1600.

<sup>83</sup> Sauvart (2016), p. 29. See also Bucher (2010), p. 290; Lee (2015), p. 483; Tams (2006), p. 15; UNCTAD (2013), p. 8.

<sup>84</sup> Sauvart (2016), p. 29; Bucher (2010), p. 290; Lee (2015), p. 483; Kaufmann-Kohler (2004), pp. 220 f.; Schreuer (2008), p. 212; Laird & Askew (2005), p. 298.

<sup>85</sup> Kaufmann-Kohler (2004), pp. 220 f.

awards, which “represents a guarantee that further unnecessary litigation and potential costs and delay and prolonged public exposure in state courts can be avoided”.<sup>86</sup>

32. Two further risks associated with the presence of an appeal procedure have been identified. First, if appeals were possible, they would soon become the rule,<sup>87</sup> as states and investors who have lost a case could not afford *not* to file an appeal, be it only for reasons of internal accountability.<sup>88</sup> Second, “[a]s ICSID experience with ad hoc annulment committees show, even corrective mechanisms intended to be severely restricted (indeed allowing no appeal even on points of law) have a tendency to duplicate the arbitral process itself in terms of duration, cost, complexity and - dare one say it? - decisions exposed to debate and criticism”.<sup>89</sup> This could prove especially detrimental for States and investors with limited resources.<sup>90</sup> It may even “affect the access of small and medium enterprises to arbitral proceedings”.<sup>91</sup> More generally, it is said that “[a]lthough both sides would face the increased logistical burden, respondent states, already struggling within the confinement of the budgetary constraints, are likely to find this increased burden more challenging”.<sup>92</sup>

33. Furthermore, it has been suggested that the abandonment of the institution of party-appointment, which is one of the features normally associated with arbitration, could entail undesirable consequences. This is because party-appointment is often seen as conferring legitimacy to arbitral tribunals.<sup>93</sup> Moreover, it normally ensures that individuals with experience, reputation and competence are selected to adjudicate these disputes,<sup>94</sup> which is also a guarantee of their independence.<sup>95</sup> Doubts have been advanced as to whether individuals with similar qualities could be appointed within a permanent structure.<sup>96</sup> The most recognized individuals may not be willing to devote the time needed for a permanent function.<sup>97</sup> Among other factors, pecuniary incentives might possibly be insufficient “to attract the best candidates”.<sup>98</sup>

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<sup>86</sup> Koorosh Ameli, Ilias Bantekas, Horia Ciurtin, Filippo Fontanelli, Nikos Lavranos, Mauro Rubino-Sammartano & Emma Spiteri Gonzi (2016), *Task Force Paper regarding the proposed International Court System (ICS)*, EFILA, Draft, 2 January 2016, p. 23.

<sup>87</sup> González García (2015), p. 430.

<sup>88</sup> Gabrielle Kaufmann-Kohler (2005), *In search of transparency and consistency: ICSID Reform proposal*, Transnational Dispute Management, Vol. 2(5), p. 6.

<sup>89</sup> Jan Paulsson (2008), *Avoiding Unintended Consequences*, in Karl P. Sauvant & Michael Chiswick-Patterson (eds.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, pp. 241–265, p. 260; along the same lines David A. Gantz (2006), *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, Vanderbilt Journal of Transnational Law, Volume 39(1), pp. 39–76, 59.

<sup>90</sup> Ameli et al. (2016), p. 57; Laird & Askew (2005), p. 298; Tams, p. 15.

<sup>91</sup> Ameli et al. (2016), p. 57.

<sup>92</sup> Lee (2015), p. 483.

<sup>93</sup> Wälde (2006), p. 6. See also Brower & Schill (2009), p. 494; Franck (2005), p. 1596; Paulsson (2008), p. 262.

<sup>94</sup> Ameli et al. (2016), p. 53; Franck (2005), p. 1597; Wälde (2006), p. 6.

<sup>95</sup> Franck (2005), p. 1597.

<sup>96</sup> Ameli et al. (2016), p. 53.

<sup>97</sup> Kaufmann-Kohler (2005), p. 6. See also Lee (2015), p. 481.

<sup>98</sup> Ameli et al. (2016), p. 56.

34. Finally, the appointment of tenured judges by States could raise issues of impartiality. There may be an inherent risk that only or mainly “pro-State” individuals be selected, especially if they were to be paid by the States alone.<sup>99</sup> It would be especially “troubling to rely upon the judgment of individuals who are accountable to the very Sovereigns whose conduct is being evaluated”.<sup>100</sup> Experience shows that political factors have been “important variables” in the election of judges in international courts.<sup>101</sup> Creating a permanent body could mean reintroducing politics into investor-State dispute settlement and would be contrary to the fundamental purpose of the regime,<sup>102</sup> which, in turn, may affect its legitimacy.<sup>103</sup>

### **C. EXISTING PROPOSALS AND ACHIEVEMENTS IN RESPECT OF PERMANENT BODIES AND APPEAL MECHANISMS**

35. Against the background of the discourse summarized in broad terms in the preceding pages, the creation of appellate mechanisms or permanent bodies tailored for investment disputes has been contemplated on several occasions during the last decade. The following paragraphs will provide a brief overview on the most significant of these proposals. They deal first with proposals for appeal mechanisms, specifically those put forward by ICSID and OECD, as well as the programmatic language contained in a number of IIAs (1). They address next the pioneering initiatives towards the creation of permanent investment bodies in recent IIAs concluded by the EU, in particular the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam FTA (2).

#### **1. Appeal mechanism proposals**

##### **a. The ICSID appeals facility**

36. In 2004, the ICSID Secretariat sought to address the concerns voiced about investment arbitration and to examine various proposals for reform. Its purpose was to “encourage discussion of such possible improvements”.<sup>104</sup>

37. The introduction of a comprehensive review of awards was one of the major changes considered at the time (alongside preliminary procedures, transparency, disclosure requirements and mediation). The Secretariat submitted a discussion paper, in which it supported the creation of an appeals facility, intended to “foster coherence and consistency in the case law emerging under investment treaties”,<sup>105</sup> and to

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<sup>99</sup> Ameli et al. (2016), p. 60; Tams (2006), pp. 36 and 47; Zuleta (2015), pp. 411 and 422; González García (2015), pp. 424–436.

<sup>100</sup> Franck (2005), p. 1608.

<sup>101</sup> Franck (2005), p. 1600; Zuleta, p. 422.

<sup>102</sup> Paulsson (2008), pp. 258 et seq. See also Kaufmann-Kohler (2005), p. 5.

<sup>103</sup> Paulsson (2008), pp. 258 et seq.

<sup>104</sup> ICSID Secretariat (2004), *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, p. 5.

<sup>105</sup> ICSID Secretariat (2004), pp. 14 f.

“enhance the acceptability of investor-to-State arbitration”.<sup>106</sup> Creating a facility under the ICSID framework could also have avoided the creation of “multiple mechanisms” and would therefore have best served objectives of efficiency, economy, coherence and consistency.<sup>107</sup> To this end, the new facility would have been designed so as to be compatible with any type of investment arbitration (under the ICSID Convention and Rules, the UNCITRAL Arbitration Rules or other rules).<sup>108</sup>

38. An appeal facility would have been established and operated under new rules to be adopted by the Administrative Council of ICSID. Its jurisdiction would have been affirmed through a new international treaty.<sup>109</sup> It would have remained possible for parties to agree to arbitration without appeal.<sup>110</sup> The feasibility of such process under the law of treaties was only briefly touched upon.<sup>111</sup>

39. The proposal envisaged an appeal panel of 15 individuals with different nationalities constituted by the Administrative Council of ICSID upon the nomination of the Secretary-General. Members of the panel would have served for terms of three or six years. Adjudicative panels of three members would have been appointed by the Secretary-General “after consultation with the parties as far as possible”.<sup>112</sup>

40. Awards could have been challenged for the grounds provided in Article 52 of the ICSID Convention, but also for “a clear error of law” or for “serious errors of fact”.<sup>113</sup> The appellate body could thus have reconsidered the merits of disputes and would have been empowered to uphold, modify, reverse or annul (in whole or in part) awards.<sup>114</sup> It could have remanded disputes to original arbitral tribunals or submitted them to new ones.<sup>115</sup>

41. The paper was made publicly available and interested parties were invited to comment.<sup>116</sup> This consultative process showed that many “doubted the wisdom of the suggestion” and that “most considered it premature at best”.<sup>117</sup> A year later, the Secretariat concluded that there was insufficient support for this initiative to be carried further.<sup>118</sup> The proposal was thus stayed, but the Secretariat indicated that it would

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<sup>106</sup> ICSID Secretariat (2004), p. 15.

<sup>107</sup> ICSID Secretariat (2004), pp. 15 f.

<sup>108</sup> ICSID Secretariat (2004), Annex, p. 1.

<sup>109</sup> ICSID Secretariat (2004), Annex, p. 1.

<sup>110</sup> ICSID Secretariat (2004), Annex, p. 2.

<sup>111</sup> ICSID Secretariat (2004), Annex, pp. 1 f.

<sup>112</sup> ICSID Secretariat (2004), Annex, pp. 3 f.

<sup>113</sup> ICSID Secretariat (2004), Annex, p. 4.

<sup>114</sup> ICSID Secretariat (2004), Annex, p. 5.

<sup>115</sup> ICSID Secretariat (2004), Annex, p. 6.

<sup>116</sup> Antonio R. Parra (2014), *Advancing Reform at ICSID*, Transnational Dispute Management, Vol. 11(1), p. 9.

<sup>117</sup> Parra (2014), p. 9.

<sup>118</sup> ICSID Secretariat (2005), *Suggested Changes to the ICSID Rules and Regulations*, Working Paper, p. 4

“continue to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism”.<sup>119</sup>

**b. The OECD initiative**

42. The OECD Investment Committee explored the feasibility and appropriateness of an appellate mechanism for investment disputes.<sup>120</sup> However, “[w]ith the exception of the NAFTA governments, the majority of the OECD members did not seem to consider the issue urgent enough to embark on a radical system change” and the discussion did not produce “any positive results”.<sup>121</sup>

**c. Programmatic language in bilateral and multilateral investment treaties**

43. Language referring to the possibility of creating appellate mechanisms has surfaced in recent bilateral and multilateral IIAs. The U.S., in particular, have contemplated the establishment of a single appellate body in IIAs since more than a decade.<sup>122</sup> The 2002 Trade Promotion Authority Act set as a trade negotiating objective the improvement of the investor-State arbitration regime “through [...] providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements”.<sup>123</sup>

44. Accordingly, virtually all investment treaties concluded by the U.S. since that date have referred to a possible appellate body through programmatic, non-binding language.<sup>124</sup> Article 28(10) of the 2012 U.S. Model BIT, for instance, reads as follows:

“In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.”<sup>125</sup>

45. In addition to the U.S. IIAs, treaties concluded by other countries, such as Canada, Australia and China, contain similar “declarations of intent” in favor of the

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<sup>119</sup> ICSID Secretariat (2005), p. 4

<sup>120</sup> Katia Yannaca-Small (2008), *Improving the System of Investor-State Dispute Settlement: The OECD Governments’ Perspective*, in Karl P. Sauvant & Michael Chiswick-Patterson (eds.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, pp. 223–228, 223 f.

<sup>121</sup> Yannaca-Small (2008), p. 226.

<sup>122</sup> Parra (2014), p. 4.

<sup>123</sup> Trade Promotion Authority Act (2002), P.L. 107-210, Section 2102(b)(3)(g)(iv), 19 U.S.C § 3802(b)(3)(G)(iv).

<sup>124</sup> Sauvant (2016), p. 30; see for instance Singapore-U.S. FTA (2003), Article 15.19(10); Chile-U.S. FTA (2004), Article 10.19(10); Dominican Republic-Central America-United States FTA (CAFTA-DR) (2004), Article 10.20(10); Uruguay-U.S. BIT (2005), Article 28(10) and Annex E.

<sup>125</sup> U.S. Model BIT (2004), Article 28(10), was similar.

establishment of an appeals mechanism. For example, the Canada-Korea FTA of 2014 contains the following provision:

“Annex 8-E: Possibility of a Bilateral Appellate Mechanism

Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered pursuant to Article 8.42 in arbitrations commenced after they establish the appellate body or similar mechanism.”<sup>126</sup>

46. Under all of these provisions, the Contracting States have merely undertaken to “consider” whether to establish or join a bilateral or multilateral appellate facility for the review of investor-State arbitral awards. So far these provisions have remained dead letter and no action has been taken towards the establishment of such bodies under any of those agreements.

**2. The permanent bodies provided in recent IIAs concluded by the EU: The examples of CETA and the EU-Vietnam FTA**

47. In contrast to the limited achievements with regard to the creation of appeal mechanisms, a remarkable acceleration has taken place over the last year as far as permanent investment courts are concerned. Groundbreaking innovations have been proposed by the European Commission in the negotiations of the FTAs with its trading partners. In particular, the Commission expressed its determination to replace the investor-State arbitration system with a dispute settlement mechanism centered around a permanent investment court within the context of the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the U.S.<sup>127</sup> In the meantime, in early 2016, the EU finalized the CETA with Canada and the EU-Vietnam FTA, which both include a permanent investment court system in lieu of the traditional investor-State arbitration system. Because the two latter treaties are now finalized (and are only missing approval and ratification), while the TTIP is at a less advanced stage of

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<sup>126</sup> Canada-Korea FTA (2014), Annex 8-E. See also TPP, Article 9.22(11); Australia-China FTA (2014), Article 9.23; Australia-Korea BIT (2014), Article 11.20.13 and Annex 11-E; Korea-New Zealand FTA (2015), Article 10.26.9.

<sup>127</sup> See Cecilia Malmström (2015), *Investment in TTIP and beyond – the path for reform, Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, Concept Paper, 5 May 2015; European Parliament (2015), *Resolution containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership*, 8 July 2015, P8\_TA(2015)0252; European Commission (2015a), *European Union’s proposal for Investment Protection and Resolution of Investment Disputes*, Press release, 12 November 2015. For details on the process leading to the EU commission’s proposal, see Malmström (2015), pp. 3 et seq.; European Parliament Committee on International Trade (2015), *Report containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, Rapporteur Bernd Lange, 1<sup>st</sup> June 2015, A8-0175/2015, pp. 88 et seq.; European Commission (2015c), *Report on the online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) commission Staff*, Commission Staff Working Document, 13 January 2015.

ongoing negotiations, this paper only presents, where relevant, the dispute resolution system provided in the CETA and the EU-Vietnam FTA.

48. The dispute settlement systems of the CETA and the EU-Vietnam FTA are broadly similar. They are centered on the establishment of a tribunal of first instance and a built-in appellate tribunal.<sup>128</sup> The first instance tribunal will be composed of permanent members elected by a joint committee.<sup>129</sup> One third of these members will be nationals of a Member State of the EU, one third will be nationals of Canada/Vietnam and one third will be nationals of third countries.<sup>130</sup> They will be appointed for a fixed term, of four or five years, which may be renewed once.<sup>131</sup> Cases will be heard in divisions of three members,<sup>132</sup> chaired by a third country national.<sup>133</sup> The assignment of cases to divisions occurs in a “random and unpredictable” way.<sup>134</sup> Members are paid a monthly retainer fee,<sup>135</sup> contributed by both contracting parties.<sup>136</sup> The amount of fees and expenses for the work performed in relation to a case will be determined pursuant to the rules applicable under the ICSID Convention and borne by the disputing parties.<sup>137</sup> The retainer fee, other fees and expenses could be transformed into a regular salary, in which case the member would serve on a full-time and exclusive basis.<sup>138</sup> Claims could be submitted to the tribunal under the ICSID Convention and Arbitration Rules, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other rules agreed by the disputing parties.<sup>139</sup> Under the CETA, the ICSID Secretariat will act as Secretariat for the permanent tribunal and provide it with appropriate support.<sup>140</sup> This implies that the CETA tribunal will have no autonomous structure.

49. A permanent built-in appeals tribunal is also established, which has appellate jurisdiction over awards issued by the first instance tribunal.<sup>141</sup> A decision of the CETA

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<sup>128</sup> CETA, Chapter 8 Section F; EU-Vietnam FTA, Chapter 8.II Section 3.

<sup>129</sup> See CETA, Article 8.27.2; EU-Vietnam FTA, Article 12(2) (of Chapter 8.II Section 3, which will not be systematically mentioned hereafter). Both the CETA and the EU-Vietnam FTA speak of “Members of the Tribunal” and “Members of the Appellate Tribunal”/ “Members of the Appeal Tribunal”, and avoid any reference to the term “judge” and “court”. See also with regard to appeal tribunals CETA, Article 8.28 and EU-Vietnam FTA, Article 13.

<sup>130</sup> CETA, Article 8.27.2; EU-Vietnam FTA, Article 12(2).

<sup>131</sup> CETA, Article 8.27.5; EU-Vietnam FTA, Article 12(5).

<sup>132</sup> CETA, Article 8.27.6; EU-Vietnam FTA, Article 12(6). The disputing parties may, however, agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. See CETA Article 8.27(9); EU-Vietnam FTA, Article 12(9).

<sup>133</sup> CETA, Article 8.27.6; EU-Vietnam FTA, Article 12(6).

<sup>134</sup> CETA, Article 8.27.7; EU-Vietnam FTA, Article 12(7).

<sup>135</sup> CETA, Article 8.27.12; EU-Vietnam FTA, Article 12(14).

<sup>136</sup> CETA, Article 8.27.13 (providing for the equal sharing of the fees); EU-Vietnam FTA, Article 12(15) (providing that they are to be paid by the Parties “taking into account their respective levels of development”).

<sup>137</sup> CETA, Article 8.27.14; EU-Vietnam FTA, Article 12(16).

<sup>138</sup> CETA, Article 8.27.15; EU-Vietnam FTA, Article 12(17).

<sup>139</sup> CETA, Article 8.23.2; EU-Vietnam FTA, Article 7(2).

<sup>140</sup> CETA, Article 8.27.16. The issue is still open in the EU-Vietnam FTA. See Article 12(18).

<sup>141</sup> CETA, Article 8.28.1; EU-Vietnam FTA, Article 13(1).

Parties' joint committee will establish the total number of members<sup>142</sup> while the EU-Vietnam FTA fixes such number at 6.<sup>143</sup> These will be appointed by the competent joint committees.<sup>144</sup> Appeals will be heard by divisions of three members.<sup>145</sup> Awards can be appealed on the grounds provided in Article 52 of the ICSID Convention as well as for errors in the application or interpretation of applicable law and for manifest errors in the establishment of the facts, including the establishment of relevant domestic law.<sup>146</sup> The appeal tribunal can uphold, modify, or reverse an award.<sup>147</sup> It can also "refer[] back issues to the Tribunal for adjustment of the award",<sup>148</sup> or "refer the matter back to the Tribunal" where it is not possible for it to "apply its own legal findings and conclusions [...] and render a final decision on the matter".<sup>149</sup>

50. The UNCITRAL Transparency Rules, as well as additional obligations of transparency, apply to proceedings before these tribunals.<sup>150</sup>

51. Members of the two tribunals are subject to a code of conduct intended to ensure their independence and impartiality.<sup>151</sup> They can be challenged in case of conflicts of interest.<sup>152</sup> They can also be removed if they do not comply with their duties, including those provided in the code of conduct.<sup>153</sup>

52. Further, both treaties contain rules on the enforcement of the awards/appellate decision and on the coordination with other review mechanisms under the ICSID Convention and at the seat in case of non-ICSID proceedings.<sup>154</sup> Under the CETA, an award rendered by a tribunal established pursuant to the ICSID Convention "shall qualify as an award under section 6 [of Chapter IV] of the ICSID Convention".<sup>155</sup> This means, in particular, that a Contracting Party to the CETA would be obliged to "enforce the pecuniary obligations imposed by that award within its territories as if it were a final

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<sup>142</sup> CETA, Articles 8.28.3 and 8.23(7)(f).

<sup>143</sup> EU-Vietnam FTA, Article 13(2).

<sup>144</sup> CETA, Article 8.28.3; EU-Vietnam FTA, Article 13(3).

<sup>145</sup> CETA, Article 8.28.5; EU-Vietnam FTA, Article 13(8).

<sup>146</sup> CETA, Article 8.28.2; EU-Vietnam FTA, Article 28(1).

<sup>147</sup> CETA, Article 8.28.2; EU-Vietnam FTA, Article 28(2)-(3).

<sup>148</sup> CETA, Article 8.28.7(b).

<sup>149</sup> EU-Vietnam FTA, Article 28(4).

<sup>150</sup> CETA, Article 8.36; EU-Vietnam FTA, Article 20.

<sup>151</sup> CETA, Articles 8.30.1 and 8.44.2; EU-Vietnam FTA, Article 14(1) and Annex II.

<sup>152</sup> CETA, Article 8.30.2-3; EU-Vietnam FTA, Article 14(2)-(4).

<sup>153</sup> CETA, Article 8.30.4; EU-Vietnam FTA, Article 14(5).

<sup>154</sup> Under the CETA, until the Appeal Tribunal is established, awards rendered by the First Instance Tribunal would be subject to annulment by an *ad hoc* committee at ICSID or to setting aside proceedings under domestic courts (depending on the arbitral rules chosen by the investor-claimant). See Articles 8.28.9(b) (*a contrario*) and 8.41.3. Once an Appeal Tribunal is established, appeal before such body will be the exclusive remedy. See Article 8.28.9(b), whereby "(b) a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this section". In the EU-Vietnam FTA, see in particular Article 10(3)(b) and Article 31(1)(b) and Article 31(3).

<sup>155</sup> CETA, Article 8.41.6.

judgment of a court in that State” (Article 54 ICSID Convention).<sup>156</sup> By contrast, a CETA award issued under different rules (ICSID Additional Facility Rules, UNCITRAL, and other rules agreed between the disputing parties) would be (at least for the CETA Contracting Parties) an “arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention”.<sup>157</sup>

53. Similar rules are set out in the EU-Vietnam FTA, but only after a transitional period of five years following the entry into force of the agreement.<sup>158</sup> During the initial five-year period, it would appear that all awards in respect of disputes where Vietnam is a respondent will be enforced under the New York Convention (NYC) regime (the Contracting Parties not being bound to enforce the pecuniary obligation stemming from such awards within their territory as if it were a final judgment of a court in that State).<sup>159</sup> Furthermore, during such transitional period, the awards in respect of disputes where Vietnam is a respondent would continue to be subject to appeal, review, set aside, annulment or any other remedy (apparently in addition to the built-in appeal procedure under the FTA).<sup>160</sup>

54. Significantly for present purposes, both the CETA and the EU-Vietnam FTA envisage the possibility that a future multilateral investment court and appeals tribunal be established. Under the CETA, the Contracting Parties “shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes”, and “[u]pon 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”.<sup>161</sup> Similarly, under the EU-Vietnam FTA, the Parties “shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement”, in which case the Parties could agree on the non-application of relevant parts of the dispute settlement section of the treaty.<sup>162</sup> Concretely, this would mean that the new multilateral body would have jurisdiction and replace the bilateral permanent body and/or the appellate tribunal in place under the two treaties.

55. Certain features of the new dispute settlement framework under these treaties will be addressed below to the extent helpful to analyze the legal issues which arise in

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<sup>156</sup> It is doubtful whether third States, parties to the ICSID Convention, would be subject to the same obligation, considering the fundamental alteration of the ICSID Convention system that the CETA envisages – for its Contracting Parties only – with regard to proceedings brought under the CETA pursuant to the ICSID Convention Rules.

<sup>157</sup> CETA, Article 8.41.5. Whether third States, parties to the NYC, would be obliged to treat this award as a NYC award is doubtful, and is discussed *infra* at V.E.

<sup>158</sup> See EU-Vietnam FTA, Article 31.

<sup>159</sup> EU-Vietnam FTA, Article 31(3)–(4).

<sup>160</sup> See EU-Vietnam FTA, Article 31(3) (excluding the application of Article 31(1)(b) and Article 10(3)(b)). See also Article 31(4).

<sup>161</sup> CETA, Article 8.29.

<sup>162</sup> EU-Vietnam FTA, Article 15.

respect of the ITI and the AM. In any event, it is undeniable that the introduction in these two treaties of a permanent court system constitutes a “significant break with the past” and a clear move away from the current investor-State arbitration system.<sup>163</sup>

#### IV. THE MAURITIUS CONVENTION AS A MODEL FOR BROADER INVESTMENT REFORM

56. Against the backdrop of these debates and incipient reforms, it can be asked whether the Mauritius Convention can serve as a model for international investment law reform in connection with the introduction of a *multilateral ITI* and a *multilateral AM*. This section will thus briefly set out the background against which the Mauritius Convention came into existence and its concrete functioning, as well as the advantages of the adoption of the “Mauritius Convention approach” in connection with the design of a multilateral ITI or AM (section IV.A). It then outlines a roadmap which could be considered if this approach is pursued (section IV.B), the details of which are discussed in the remaining three sections of this paper.

##### A. THE MAURITIUS CONVENTION AND ITS IMPACT ON EXISTING IIAS

57. In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (the “Transparency Rules”) together with a new Article 1(4) of the UNCITRAL Arbitration Rules (as revised in 2010).<sup>164</sup> The Transparency Rules introduced a significant degree of publicity of the arbitral proceedings, by providing, *inter alia*, for the public disclosure of awards and other key documents (Articles 2 and 3), open hearings (Article 6) and submissions by non disputing parties (Articles 4 and 5).<sup>165</sup> However, when UNCITRAL adopted the Transparency Rules, the concern was raised that their significance in practice could be limited. Indeed, the Transparency Rules apply automatically to arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to treaties concluded on or after 1 April 2014 (“subsequent” treaties), unless the parties to such treaty have agreed otherwise.<sup>166</sup> By contrast, they only apply to UNCITRAL arbitrations started pursuant to treaties concluded before 1 April 2014

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<sup>163</sup> European Commission (2016), *Investment provisions in the EU-Canada free trade agreement (CETA)*, February 2016, available at [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf) (last consulted on 2 May 2016).

<sup>164</sup> See UN (2013a), *Report of the UNCITRAL – Forty-sixth session*, Official Records of the General Assembly, 68<sup>th</sup> session, Supplement No. 17, UN Doc. A/68/17, Chapter III and Annexes I-II. See also UN (2013b), *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)*, General Assembly, 68<sup>th</sup> session, Resolution A/RES/68/109 (18 December 2013).

<sup>165</sup> Lise Johnson & Nathalie Bernasconi-Osterwalder (2013), *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps*, CIEL, IISD & Vale Columbia Center on Sustainable International Investment Policy Paper, p. 3; Shotaro Hamamoto (2016), *Le Règlement de la CNUDCI sur la transparence dans l'arbitrage entre investisseurs et Etats fondé sur des traités et la Convention de Maurice sur la transparence*, *Journal de Droit International*, No. 1, pp. 3–59.

<sup>166</sup> Transparency Rules, Article 1(1).

(“existing” treaties), provided that the parties to such treaty<sup>167</sup> or that the parties to the dispute<sup>168</sup> have agreed to their application.

58. Along this dividing line, it was feared that the outreach of the new transparency rules would be largely limited to subsequent investment treaties. As it was noted, “[a]ll claims arising under the existing universe of 3000 treaties [would] continue to be exempt from any transparency requirements unless the disputing parties [were to] agree otherwise or unless the treaties [were] proactively amended by their Contracting State parties to explicitly incorporate the new rules”.<sup>169</sup>

59. UNCITRAL therefore decided to draft a convention designed to facilitate the application of the Transparency Rules to the roughly 3000 treaties concluded before the adoption of the Transparency Rules. The purpose of this treaty was to “give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so”.<sup>170</sup> In other words, the treaty was to provide an efficient and flexible mechanism by which States could express their agreement according to Article 1(2) of the Transparency Rules.

60. The Mauritius Convention was adopted by the General Assembly of the United Nations on 10 December 2014.<sup>171</sup> The Convention is applicable to arbitrations between an investor and a State or a regional economic integration organization based on an investment treaty concluded *before 1 April 2014* (i.e. the date on which the Transparency Rules became effective).<sup>172</sup> It achieves the “extension” of the Transparency Rules to existing treaties through the interplay between the Convention’s Article 2 (on scope of application) and its Articles 3 and 4 (the admissible reservations to such application).

61. The Convention distinguishes situations where the investor’s home State and the respondent State have acceded to the Convention and situations where only the respondent State has done so. This mirrors the two hypotheses envisaged in Article 1(2) of the Transparency Rules, which the Convention implements. Hence, pursuant to the Mauritius Convention, the Transparency Rules apply to existing treaties where:

- a) the respondent and the home State of the investor are parties to the Mauritius Convention and have not made a relevant reservation (Articles 2(1) and 3(1)(a) and (b)) (the so-called “bilateral or multilateral application”);<sup>173</sup>

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<sup>167</sup> Transparency Rules, Article 1(2)(b). In presence of multilateral treaties, it is sufficient that the state of the claimant and the respondent state have reached an agreement to this avail. See *ibid.*

<sup>168</sup> Transparency Rules, Article 1(2)(a).

<sup>169</sup> UNCITRAL (2013a), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session*, Records of the UNCITRAL, 46<sup>th</sup> Session, UN Doc. A/CN.9/765 (13 February 2013), paras 75–78.

<sup>170</sup> UN (2013a), para. 127.

<sup>171</sup> UN (2014a), *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, General Assembly, 69<sup>th</sup> session, Resolution A/69/116 (18 December 2014).

<sup>172</sup> Transparency Rules, Article 1(1).

<sup>173</sup> In presence of multilateral investment treaties, not all Contracting States need also be parties to the Mauritius Convention. See Lise Johnson (2014), *The Mauritius Convention on*

- b) the respondent is a party to the Mauritius Convention, it has not made a relevant reservation, and the claimant agrees to the application of the Transparency Rules (Articles 2(2) and 3(1)(a), (b), and (c)) (so-called “unilateral offer of application”).

62. As a result of this second possibility, accession to the Convention will “amount to a general unilateral offer to investors to use the Rules on Transparency, even where that investor’s home State is not a Contracting Party to the transparency convention or where it has formulated a reservation”.<sup>174</sup> The Convention thus borrows the particular mode of consent-giving characteristic of the agreement to arbitrate under an investment treaty. The UNCITRAL Working Group on Arbitration indeed noted that “such unilateralism was the basis on which most offers to initiate an investor-State claim were made”.<sup>175</sup> The Convention, however, goes one step further, in that it provides that a Contracting State’s unilateral offer will be available to all investors in the position to bring an investment treaty arbitration against that State, and not only to those having the nationality of a Contracting State of the Mauritius Convention.

63. Under the new framework resulting from the combination of the provisions of the Transparency Rules and those with the Mauritius Convention, the Transparency Rules will thus apply to:

- a) Any investment arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty adopted on or after 1 April 2014, provided that the parties to the treaty have not agreed otherwise (Article 1(1) of the Transparency Rules).
- b) Any investment arbitration initiated pursuant to a treaty concluded before 1 April 2014, provided that the parties to such treaty have agreed to their application (Article 1(2)(b) of the Transparency Rules). One possibility to reach such agreement is for both the home and the host State to become parties to the Mauritius Convention (Article 2(1) of the Mauritius Convention).
- c) Any investment arbitration initiated pursuant to a treaty concluded before 1 April 2014, provided that the disputing parties agree to it (Article 1(2)(a) of the Rules). One way of reaching such agreement is for the respondent State to be a party to the Mauritius Convention and for a claimant-investor to accept the “general offer to use the Transparency Rules” (Article 2(2) of the Mauritius Convention).

64. As mentioned, the Mauritius Convention authorizes some reservations (Articles 3 and 4), according to which Contracting States may exclude the application of the Convention to:

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*Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration*, CCSI Policy Paper, p. 6.

<sup>174</sup> UNCITRAL (2013b), *Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration*, Note by the Secretariat, Records of the UNCITRAL, 60<sup>th</sup> session, UN Doc. A/CN.9/WG.II/WP.181 (27 November 2013), para. 21.

<sup>175</sup> UNCITRAL (2013c), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session*, Records of the UNCITRAL, 47<sup>th</sup> session, UN Doc. A/CN.9/794 (26 September 2013), para. 26.

- a) certain investment treaties (Article 3(1)(a));
- b) arbitrations in which they are respondent which are conducted under certain arbitrations rules other than the UNCITRAL Arbitration Rules (Article 3(1)(b));
- c) arbitrations in which the claimant is not a national of a Contracting State of the Convention (Article 3(1)(c)).

65. Contracting States may also carve out the application of a revised or amended version of the Rules on Transparency (Article 3(2)). No other reservations are admissible (Article 3(4)). The UNCITRAL Working Group which drafted the Convention unanimously agreed that a party could not “carve out the entire content of the transparency convention by use of the reservations”.<sup>176</sup>

66. Finally, according to Article 1(5) of the Mauritius Convention, the scope of application of the Transparency Rules may not be affected (i.e. whether extended or restricted) by a most favored nation clause. This provision was included in the Convention because arbitral practice is not uniform with regard to the application of such clauses to procedural matters.<sup>177</sup>

67. In conclusion, the main achievement of the Mauritius Convention is that, subject to ratification by a sufficiently large number of States and REIOs,<sup>178</sup> it extends the scope of application of the Transparency Rules, overcoming their *ratione temporis* restriction, to a potentially much broader network of IIAs. As discussed above, it allows the Transparency Rules to be applied to all existing bilateral, regional, and multilateral IIAs, 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-claimant accepts the unilateral offer to apply the Transparency Rules.

68. The Mauritius Convention approach, if one may call it such, thus imports transparency into the fragmented treaty-by-treaty regime by way of one single multilateral instrument. Moreover, it achieves this importation by sidestepping the need for amending the 3,000 existing IIAs. Furthermore, it envisages a system where the transparency regime will penetrate into an investment treaty even if only one of the Contracting States to that treaty (the respondent State) accedes to the Mauritius Convention, as the investor-national of the other IIA contracting party will be able to accept the offer to use the Transparency Rules through the mechanism of Article 2(2) of the Convention.

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<sup>176</sup> UNCITRAL (2013b), para. 26. Further to reservations in the Mauritius Convention, see *ibid*, paras 25-27 and 32-38. See also Hamamoto (2016), pp. 49 f. and 53 et seq.

<sup>177</sup> UNCITRAL (2013b), para. 23.

<sup>178</sup> To date the Convention has been signed by seventeen States (Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, The Netherlands, Sweden, Switzerland, Syria, the United Kingdom and the United States). Mauritius ratified the Convention on 5 June 2015 and is so far the only state party to the Convention. It will enter into force six months after the date of the third instrument of ratification or accession (Article 9(1)).

## **B. ADOPTING THE MAURITIUS CONVENTION APPROACH TO CREATE A MULTILATERAL INTERNATIONAL TRIBUNAL FOR INVESTMENTS OR AN APPEAL MECHANISM**

69. The adoption of the Mauritius Convention approach for the implementation of reforms to existing IIAs in respect of the ITI and AM scenarios identified above would present several advantages.

70. First, this approach releases States from the burden to pursue the potentially complex and long amendment procedures set forth in their existing IIAs. Indeed, the new multilateral instrument would render the innovations directly applicable to existing treaties for those States that wish to embrace such innovations. In other words, the new treaty will modify the dispute settlement provisions of numerous treaties at once.

71. Second, the Mauritius Convention approach would also allow to set up a true multilateral permanent dispute settlement system. In other words, it would lead to the creation of one single ITI potentially competent to resolve investment disputes concerning as many States as would opt into it, and/or to the creation of one single AM potentially competent to serve as appellate body for investor-State arbitral awards across all States' IIAs. This approach would avoid the drawbacks of a piecemeal, treaty-by-treaty approach, which could give no guarantee of consistency of interpretation, as separate treaty-specific permanent courts or appeal bodies could at most only strengthen the internal consistency in respect of the particular IIA under which they are created. Only a truly global ITI or AM could, by contrast, realistically counter the consistency problems that the current investor-State arbitration system faces.

72. In this sense, the reform initiative contemplated in this paper wishes to take up the “call for multilateral reform” contained in those treaties which envisage, through programmatic language, the possibility of moving from a bilateral to a multilateral architecture.<sup>179</sup>

73. Third, this reform initiative would focus on a discrete part of the IIAs critical issues, i.e. dispute settlement, and avoid engaging in the controversies surrounding the substantive standards. By so doing, it is more likely to be successful, as an attempt to unify substantive provisions may well lead to years of discussions and consensus may be more difficult to achieve in that respect, as the MAI failure has shown. In concrete terms, the outcome of this project would entail that the myriad of underlying IIAs will continue to deal with the substantive obligations, and the ITI/AM would have the mandate to apply these different underlying treaties. Admittedly, no absolute uniformity would be achieved, because the applicable law – the substantive treaty standards - would continue to be anchored in different treaties. However, consistency would be reached in the application of the same IIA and of different IIAs with identical or nearly identical wordings. And even when applying differently worded IIAs, it is to be expected

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<sup>179</sup> See CETA, Article 8.29; EU-Vietnam FTA, Article 15. See also TPP, Article 9.22(11); Australia-Korea BIT (2014), Article 11.20.13; Korea-New Zealand FTA (2015), Article 10.26.9; U.S. Model BIT (2012), Article 28(10).

that the ITI and AM will pursue consistency more than *ad hoc* bodies, because of the elements of tradition, continuity and collegiality which are inherent in permanent courts.

74. Finally, the opt-in mechanism would allow the initiative to start as a plurilateral one, with the possibility for States to join at a later stage, whenever they consider it appropriate.<sup>180</sup> This, too, would strengthen the project's chances of success.

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75. If this project is to be implemented, the authors of this report propose the following roadmap which UNCITRAL could consider with a view to coordinating States' efforts in pursuing this reform initiative. In line with the Mauritius Convention approach, the first task could consist in determining the "substantive" features of the two bodies in the ITI scenario and in the AM scenario. This would include devising the mandate, nature, structure, and the organization of the ITI/AM. This step would reflect what was done in respect of transparency, where the content of the new transparency provisions was first agreed in the Transparency Rules. The second, logically subsequent step, would consist in the drafting of an opt-in convention (as it was done with the Mauritius Convention) which would accomplish the extension of the new rules on the ITI and the AM to the existing IIAs.

76. It is clear that, like the Mauritius Convention, the opt-in instrument should be a treaty. We will refer to it as the "Opt-in Convention". By contrast, what should be the form of the instruments setting out the ITI and AM, which we will call the "ITI Statute" and the "AM Statute" is less evident. One possibility would envisage these instruments as "soft law", like the UNCITRAL Rules, to be drafted by UNCITRAL Working Group II, adopted by the Commission, and then "endorsed" by the U.N. General Assembly. The Opt-in Convention would then refer to the ITI/AM Statutes, and most likely include them as an Annex to the Treaty (in which case the ITI/AM Statutes would assume treaty status too). By becoming a party to the Opt-in Convention, a State would automatically be bound by the ITI/AM Statutes (with the possibility of tailoring the extent of its participation through appropriate reservations). The Opt-in Convention's primary aim would thus be to extend the ITI/AM Statutes to *existing* IIAs. Because the Statutes from the Opt-in Convention would be separate, however, States concluding IIAs in the future could incorporate the ITI/AM dispute settlement options in their new IIAs, by way of simple reference to the Statutes, irrespective of whether they are or intend to become parties to the Opt-in Convention. This would resemble references found in IIAs to arbitral rules, be they *ad hoc* (e.g., UNCITRAL) or institutional (e.g., Stockholm Chamber of Commerce).

77. Alternatively, the ITI/AM Statutes could be conceived of as treaties. Like for the ICSID Convention,<sup>181</sup> the ITI/AM Statutes would offer a regulatory and institutional

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<sup>180</sup> See also UNCTAD (2013), p. 9; Ameli et al. (2016), p. 54.

<sup>181</sup> See ICSID Convention, preamble ("no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration"); Article 25(1) ("consent in writing to submit to the Centre"). See generally Christoph H. Schreuer (2009), *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge University Press, pp. 9, 190-191.

framework for the settlement of disputes, but participation in those instruments would not, by itself, constitute a submission to those bodies' jurisdiction. A separate (offer of) consent would be given through the Opt-in Convention (for existing IIAs), or through future IIAs, contracts and national legislation on foreign investment, as States may deem appropriate. As mentioned, this approach would bear a resemblance to references found in investment treaties, contracts and national laws to the ICSID Convention.

78. While the option of a “soft law” approach to the Statutes may prove less heavy to pursue in practice, the treaty avenue may be deemed more appropriate, especially if one considers that the Statutes would entail the creation of entirely new institutions (with the related presence of an organizational structure, funding aspects, the possible negotiation of host country agreements, etc.).

79. The next three sections will thus discuss the possibilities and challenges involved in the implementation of the following:

- The *ITI scenario* (section V). This scenario would consider the creation of a permanent body composed of tenured (or semi-tenured) members, tasked with resolving investment disputes between foreign investors and host States. Such ITI could either be based on a two-tier adjudicative system and thus be provided with a built-in appeal or without one. The presence of a built-in appeal in the ITI scenario must not be confused with the AM scenario, which considers the creation of the AM for awards rendered in the traditional investor-State arbitration setting.
- The *AM scenario* (section VI). This scenario would consider the creation of an appellate mechanism for investor-State arbitral awards rendered under IIAs.
- The *Opt-in Convention* (section VII). Such Convention would primarily provide the mechanism through which the ITI/AM is integrated into existing treaties.

## **V. THE DESIGN OF THE INTERNATIONAL TRIBUNAL FOR INVESTMENTS (ITI)**

### **A. INTRODUCTION**

80. Building on the foregoing discussion, this section identifies the main legal issues and options that need to be considered in designing an ITI. It starts by asking the fundamental question of the legal nature of a future ITI: would it be in the nature of “arbitration” or of an “international court” (Section V.B)? The answer to this issue will impact on the determination of the law governing the proceedings before the ITI (Section V.C). Section V.D will then address the availability of systems of control in respect of ITI decisions/awards (to which, for purposes of brevity, we will refer as “ITI awards”), in particular annulment and appeal. In that context, the authors also review alternative options to an appeal, in particular preliminary rulings, *en banc* determinations and consultations mechanisms. Next, the paper will analyze the enforcement of ITI awards, which is essential to ensure the ultimate effectiveness of the system (Section V.E). The section will then consider questions linked to the

composition of the body (Section V.F), to the ITI's jurisdiction and the relationship with other dispute settlement mechanisms with which the ITI may interact (Section V.G).

## B. CHARACTERIZATION OF THE ITI: ARBITRATION OR INTERNATIONAL COURT?

81. A threshold question is whether the ITI is to be characterized as “arbitration” or whether it is in the nature of an international court. This is by no means a theoretical debate, as it is determinative of a number of important design features:

(i) The answer has an impact on the law governing the proceedings (discussed *infra* at V.C). The latter aspect, in turn, affects possible solutions in respect of annulment and appeal of ITI awards (discussed *infra* at V.D).

(ii) The answer is further of paramount significance for purposes of recognition and enforcement of ITI awards (discussed *infra* at V.E).

(iii) The answer can also be decisive, *inter alia*, in the following situations: (a) before arbitral tribunals or domestic courts faced with a defense of *res judicata* or *lis alibi pendens* in connection with an ITI award or pending ITI proceedings; (b) before domestic courts or arbitral tribunals seized with an action on the merits which may fall within the jurisdiction of the ITI; (c) before domestic courts called upon to rule on a request for interim measures related to a dispute falling within the jurisdiction of the ITI.

82. The ITI's characterization as arbitration or court is not straightforward, as the new dispute resolution body would represent a significant “break” from past models, including investor-State arbitration and State-to-State adjudication, and its place within traditional categories of international dispute settlement appears uncertain. Indeed, only very few existing mechanisms show similarity with the ITI, chiefly the Iran-U.S. Claims Tribunal<sup>182</sup> and, to a lesser extent, the Arab Investment Court established under the Unified Agreement for the Investment of Arab Capital in the Arab States.<sup>183</sup> What seems clear, however, is that the answer – arbitration or court proceedings – will mostly depend on the design of the ITI.

83. In this respect, the dispute settlement bodies contained in the CETA and in the EU-Vietnam FTA are instructive in that they showcase the existing tension between the two models, sharing features of both arbitration as well as of courts.

84. On the one hand, the two treaties avoid the terms “court” and “judges” and rather speak of “tribunals” and “members”, who issue “awards”.<sup>184</sup> They envisage that the procedure be governed by applicable arbitration rules (with choices spanning from

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<sup>182</sup> See General Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration, “GD”), 19 January 1981; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration, “CSD”), 19 January 1981.

<sup>183</sup> See Unified Agreement for the Investment of Arab Capital in the Arab States (“Unified Agreement”), 26 November 1980, Chapter IV, Articles 25 to 36.

<sup>184</sup> See, e.g., CETA, Article 8.27; EU-Vietnam FTA, Article 12.

the UNCITRAL Arbitration Rules to the ICSID Convention and Additional Facility Rules).<sup>185</sup> Furthermore, they provide that the respondent's consent to the submission of a claim under the treaty shall satisfy the requirements of Article II of the NYC for an "agreement in writing".<sup>186</sup> They further set out that the Transparency Rules (which by their own terms are intended to apply to "investor-State arbitrations")<sup>187</sup> apply to their proceedings.<sup>188</sup> Moreover, they rely on the existing rules on enforcement of arbitral awards contained in the ICSID and New York Conventions.<sup>189</sup> Finally, the system lacks a fixed structure, in the sense that no permanent secretariat or registry is created<sup>190</sup> and the costs of the individual disputes are mostly borne by the disputing parties.<sup>191</sup>

85. On the other hand, the dispute settlement mechanisms created under those treaties also have typical court-like features: importantly, the disputing parties have no role in the appointment of the individuals composing the panels and the tribunal is composed of tenured members, appointed by the Contracting States for a specific term, to whom disputes are assigned in a "random and unpredictable way".<sup>192</sup> Those members are paid a retainer fee, which may in the future be converted into a salary.<sup>193</sup>

86. What essential features would an ITI need in order to be characterized as either arbitration or an international court? The difficulty in this respect is that "there is no universally accepted definition of arbitration".<sup>194</sup> This said, reviewing the various definitions, it is possible to identify a number of features which distinguish arbitration from other mechanisms:<sup>195</sup> (i) it is a dispute settlement mechanism; (ii) it is based on the parties' voluntary submission; (iii) it is a private mechanism in the sense that the decision-maker is not part of the judiciary and arbitration is instituted in derogation from the State judicial system; (iv) the outcome is binding on the parties; furthermore, because of the consensual nature it is often considered that (v) the parties must play a role in the selection of the arbitrators. Moreover, the fact that the award is binding (with the same force as a court judgment) entails that impartiality of arbitrators and due process rights apply.

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<sup>185</sup> CETA, Article 8.23.2; EU-Vietnam FTA, Article 7(2).

<sup>186</sup> CETA, Article 8.25.2(b); EU-Vietnam FTA, Article 10(4)(b).

<sup>187</sup> See Transparency Rules, Preamble, Articles 1(2) and 1(9).

<sup>188</sup> CETA Article 8.36.1; EU-Vietnam FTA, Article 20(1).

<sup>189</sup> CETA Article 8.41.3-6; EU-Vietnam FTA, Article 31(3), (7) and (8).

<sup>190</sup> CETA Article 8.27.16; EU-Vietnam FTA, Article 12(18).

<sup>191</sup> CETA Article 8.39.5; EU-Vietnam FTA, Articles 27(4).

<sup>192</sup> CETA Article 8.27.7; EU-Vietnam FTA, Article 13(9).

<sup>193</sup> CETA Article 8.27.12-15; EU-Vietnam FTA, Article 13(14)–(17).

<sup>194</sup> Gabrielle Kaufmann-Kohler & Antonio Rigozzi (2015), *International Arbitration: Law and Practice in Switzerland*, 3<sup>rd</sup> ed., Oxford University Press, p. 6, para. 1.16.

<sup>195</sup> See, e.g., Gary Born (2014), *International Commercial Arbitration*, 2<sup>nd</sup> ed., Kluwer Law International, pp. 247 et seq. for a review of definitions of arbitration given by scholars and courts. See also for definitions identifying the features mentioned in the text: Charles Jarrosson (1987), *La notion d'arbitrage*, L.G.D.J., p. 372; John Savage & Emmanuel Gaillard (1999), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, p. 9; Andreas Bucher (1988), *Le nouvel arbitrage international en Suisse*, Helbing & Lichtenhahn, p. 22.

87. It is clear that (i) and (iv) would pose no problems in this context, as the ITI would clearly be a mechanism to settle disputes which leads to the issuance of a binding decision. The other elements warrant further discussion.

88. Element (ii) relates to the voluntary, consensual, non-mandatory character of arbitration. In the context of the ITI, the submission would be voluntary through the usual “without privity” mechanism. That is to say, the investor-claimant freely accepts the State’s standing offer to settle disputes contained in a treaty by starting the proceedings – similarly to what happens currently with investor-State arbitration based on IIAs or domestic laws. Unlike in domestic judicial proceedings, the national of a State party can choose to be a claimant before the ITI, but cannot be compelled to be a respondent, unless it has expressly consented for example in a contract with the State.<sup>196</sup> Furthermore, resort to the ITI is effectively an alternative to the default position, which is still recourse to domestic courts of the host State. In other words, the claimant-investor could freely choose between the host State’s domestic courts and the international forum.<sup>197</sup> For all these reasons, it seems clear that the ITI would not entail any “mandatory” or “compulsory” jurisdiction and could be assimilated to arbitration.<sup>198</sup>

89. The second definitional element that deserves attention is that of a private system of adjudication. This is normally understood to mean that an arbitral tribunal is neither “part of the state’s judicial apparatus”,<sup>199</sup> nor a “governmental decision-maker[]”,<sup>200</sup> nor “emanation of the state”,<sup>201</sup> nor a “national court judge acting as such”.<sup>202</sup> This characteristic thus relates to the adjudicator’s *status*, whereas the previous requirement – consent – relates to the source of his/her authority and jurisdiction.

90. It seems obvious that the ITI would not be part of a State judiciary. Is it therefore necessarily a private mechanism? The answer appears negative as, depending on its

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<sup>196</sup> This is without prejudice to the possibility that future treaties could provide for obligations of investors and host state claims against an investor’s breach of these obligations.

<sup>197</sup> See, e.g., Jean-François Poudret & Sébastien Besson (2007), *Comparative Law of International Arbitration*, 2<sup>nd</sup> ed., Sweet & Maxwell, p. 3 (“individuals [...] vested with the authority to rule in lieu of the state courts [...]”); ATF 130 III 66, Swiss Supreme Court, Decision of 21 November 2003, p. 70 cited in Born (2014), p. 249 (“agreement [...] to submit existing or future disputes to an arbitral tribunal, to the exclusion of the original competence of state courts [...]”).

<sup>198</sup> In the case law under the European Convention on Human Rights, arbitration is deemed voluntary where it has been “freely agreed upon by private parties”. By contrast, it is considered compulsory where it is “required by law”, that is if “the parties have no option but to refer their dispute to an arbitration”. See, e.g., *Bramelid & Malström v. Sweden*, ECHR, App. Nos. 8588/79 and 8589/79, Report of the Commission of 12 December 1983, para. 30, published in ECHR Decision and Reports, Vol. 38, pp. 19–29, 26.

<sup>199</sup> Kaufmann-Kohler & Rigozzi (2015), p. 6, para. 1.19; Poudret & Besson (2007), pp. 6 f. and 10.

<sup>200</sup> Gary B. Born (2013), *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 4th edition, Kluwer Law International, pp. 1–15, 2.

<sup>201</sup> Jarrosson (1987), pp. 103 f.

<sup>202</sup> Jean-Louis Devolvé, Jean Rouche & Gerald Pointon (2009), *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2<sup>nd</sup> ed., Kluwer Law International, para. 26 cited in Born (2014), p. 248.

design, it could also be considered an international court. The International Court of Justice (ICJ) or the European Court of Human Rights are not part of a State judicial apparatus and, yet, nobody would say that they dispense “private” justice. Hence, if the ITI process is intended to be regarded as arbitration, which essentially is helpful for enforcement purposes, its design will need to show some “private” element. Such an element is most likely to be found in the method of constitution or composition of the ITI. While it does not appear incompatible *per se* with a permanent body, a semi-permanent roster system may be more easily reconcilable with this element of arbitration.<sup>203</sup>

91. This leads us to the most controversial issue for present purposes, namely whether the parties’ participation in the selection of the arbitrators (point (v) above) is a defining feature of arbitration. The parties’ involvement in the selection of the arbitral tribunal contrasts markedly with the parties’ non-involvement in selecting judges to hear their dispute in a national court.<sup>204</sup> In other words, the parties’ autonomy to select the arbitrators, or to agree upon a means of selecting arbitrators, “is one of the foundations of the arbitral process”.<sup>205</sup> Another facet related to choice and constitution of the tribunal is the latter’s *ad hoc* character, in the wide sense of a tribunal constituted on a case-by-case basis, whether by the parties or otherwise.<sup>206</sup>

92. If the composition of the ITI were to rely on a number of tenured members nominated by States,<sup>207</sup> a claimant investor would, unlike in investor-State arbitration, have no say on the ITI’s composition, while the respondent State would have some influence during the members’ election process. If one were to follow notions of arbitration that place prominence on the parties’ right to (directly or indirectly) appoint the tribunal as a characteristic feature of arbitration, it would be difficult to consider the ITI as arbitration.<sup>208</sup> This conclusion would be reinforced by the fact that the ITI would also lack the case-by-case format typical of arbitration.

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<sup>203</sup> See also *infra* at V.F.

<sup>204</sup> Born (2014), pp. 1639 et seq.

<sup>205</sup> Born (2014), pp. 1637 et seq., with further references. See also Poudret & Besson (2007), p. 3 (“arbitration is a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in the place of state courts by rendering a decision having effects analogous to those of a judgment); Kaufmann-Kohler & Rigozzi (2015), p. 6, para. 1.16 (“arbitration is a consensual method of dispute resolution resulting in binding decisions made by private individuals who are chosen by the parties and empowered to adjudicate disputes in lieu of the courts”).

<sup>206</sup> See Born (2014), p. 1639 (“One of the characteristic features of international arbitration is that there is no standing or pre-established ‘court’ or tribunal to which disputes generally may be submitted. [...] Rather, for most arbitral proceedings, a tribunal must be separately constituted on a case-by-case basis by the parties (or otherwise).”).

<sup>207</sup> Possible options in this respect are discussed *infra* at V.F.

<sup>208</sup> See also Sophie Nappert (2015), *Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism*, The 2015 EFILA Inaugural Lecture, p. 10 (relying on criteria outlined by the Advisory Committee of Jurists in the context of the establishment of the PCIJ (1920), which included the nomination of the arbitrators as a distinguishing feature of arbitration as opposed to adjudication).

93. While the parties' contribution to the selection of the tribunal is an important feature of modern arbitration and may indeed be a key attraction of international arbitration for users,<sup>209</sup> it may nevertheless be equally tenable to view the ITI as arbitration. Indeed, what appears to be of paramount importance among the factors considered above is the consensual or voluntary nature of the submission, which includes not only consent to the body's jurisdiction, but also to the particular method for appointment or composition contained in the body's constitutive instrument.

94. A number of arguments would support this position. First, indirect confirmation can be found by looking at the example of the Iran-U.S. Claims Tribunal, a creature which shares important similarities with the envisaged ITI.<sup>210</sup> The Tribunal was created by way of an international treaty<sup>211</sup> and its jurisdiction extends, *inter alia*, to disputes between individuals/corporations and States.<sup>212</sup> Its rules of procedure are based on arbitral rules (the UNCITRAL Rules with some modifications)<sup>213</sup> and its constitutive documents clearly refer to arbitration.<sup>214</sup> Importantly for these purposes, its members are appointed by the two States, the U.S. and Iran,<sup>215</sup> while disputing parties are powerless in choosing the panel to hear their case.<sup>216</sup>

95. As will be considered elsewhere when discussing problems relating to the law governing the proceedings and enforcement, the nature of the Iran-U.S. Claims Tribunal and of its awards has given rise to heated discussions and remains unsettled in certain respects. However, when the Tribunal's awards in disputes involving private parties faced the test of enforcement, no issue was raised about the fact that its composition did not reflect traditional methods of appointment in international arbitration. Instead, other defenses were raised against enforcement. It was in particular debated whether the Tribunal's awards were made under the Dutch *lex arbitri*

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<sup>209</sup> Born (2014), p. 1640, citing to Christian Bühring-Uhle (2005), *A Survey on Arbitration and Settlement in International Business Disputes*, in Richard W. Naimark & Christopher R. Drahozal (eds.), *Towards A Science of International Arbitration: Collected Empirical Research*, Kluwer Law International, pp. 25–42; Queen Mary University of London (2012), *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, pp. 5–6.

<sup>210</sup> See CSD, Article I (claims “shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement”); Article II (establishment of an “[a]n international arbitral tribunal”).

<sup>211</sup> CSD, Article II.

<sup>212</sup> CSD, Article II(1).

<sup>213</sup> There is an abundance of writings on the Iran-U.S. Claims Tribunal. Among many, see David D. Caron (1990), *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, *American Journal of International Law*, Vol. 84, pp. 104–156; Charles N. Brower (1990), *The Iran-United States Claims Tribunal*, *Collected Courses of the Hague Academy of International Law*, Vol. 224, pp. 123–396.

<sup>214</sup> CSD, Articles I, II(1), IV(2), VII(2); GD, General Principles B, Articles 7, 16 and 17.

<sup>215</sup> CSD, Article III(1); Tribunal Rules of Procedure, Articles 6–8.

<sup>216</sup> John C. Guilds III (1992), *If It Quacks Like a Duck: Comparing the ICJ Chambers to International Arbitration for a Mechanism of Enforcement*, *Maryland Journal of International Law*, Vol. 16(1), pp. 43–82, 53 f. and 56.

as opposed to being “a-national”,<sup>217</sup> and whether there was an arbitration agreement “in writing”.<sup>218</sup> As will be seen below, in the context of the ITI these issues could give rise to no serious challenges today. If anything, the nature of the Iran-U.S. Claims Tribunal as true arbitration could have been disputed – and has indeed been disputed<sup>219</sup> – in connection with the element of compulsion it entailed, as American claimants had no other choice than to pursue their claims before the Tribunal and were barred from initiating or continuing actions in U.S. courts.<sup>220</sup> But the Tribunal’s arbitral nature was never disputed for reasons linked to its composition.

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<sup>217</sup> *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. and others*, U.S. District Court (Central District of California), Decision of 14 January 1988, published in Albert J. van den Berg (ed.), *Yearbook Commercial Arbitration*, Vol. XIV (1989), pp. 763 et seq. (“*Gould, District Court*”); *Gould Inc., Gould Marketing v. Hoffman Export Corporation, Gould International, Inc. v. Ministry of Defense of the Islamic Republic of Iran*, U.S. Court of Appeals (9<sup>th</sup> Circ.), Decision of 23 October 1989, 887 F.2d 1357 (“*Gould, Court of Appeals*”); *Dallal v. Bank Mellat*, UK Queen Bench Division, Decision of 27 June 1985, [1986] QB 441.

<sup>218</sup> Compare *Dallal*, p. 152 (finding that “[i]n the present case, the Tribunal had been established by a treaty which was within the powers of the United States and Iran to hear cases involving persons subject to the jurisdiction of either Iran or the United States concerning rights in action which were situated in either Iran or the United States. [...] The plaintiff could not be allowed to say that the government of his own State had exceeded its competence in establishing the Tribunal. Moreover, the plaintiff had himself recognized the competence of the Tribunal by voluntarily submitting his case to it”) with *Gould, District Court* (p. 765) (finding that “[t]he history of those proceedings teaches that they both embraced the agreement at least as fully as if they had done so. The question whether the Executive can bind U.S. persons to such an arrangement as if they were signatories is quite effectively dispatched by the *Dames & Moore* [Supreme Court] decision. The power to exercise sovereign authority to the objective of settlement of nationals’ claims against foreign governments is not subject to serious doubt. The Claims Settlement Declaration is specific that it constitutes a written agreement between the nations on their own behalf and on behalf of their nations”); and *Gould, Court of Appeals* (where the Court held that the Algiers Accords themselves constituted the requisite agreement in writing under the NYC, relying on the U.S. President’s power to conclude international claims settlements and thus to act on behalf of Gould and other U.S. citizens in entering into such agreement. The Court also noted that in filing and arbitrating its claims before the Tribunal, Gould had “ratified” the actions of the United States in signing the Accords). Indeed, the view put forward by the Court of Appeals in *Gould* is very close to the modern conception of “arbitration without privity” under IIAs and foreign investment laws. While such conception was yet to have its boom in the investment arbitration world, one could have well characterized the modality of consent before the IUSCT in the same theoretical terms. See in particular Caron (1990), p. 148 (“the Accords embody a written offer by each state party to the nationals of the other state party to arbitrate certain claims. This offer could be accepted in writing by individual claimants by filing Statements of Claim prior to January 19, 1982. Indeed, each Statement of Claim included an element not normally required by the UNCITRAL Rules, ‘[a] demand that the dispute be referred to arbitration by the Tribunal.’”, internal footnotes omitted). See also David C. Caron (2007), *The Iran – U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT*, in Christopher Drahozal & Christopher Gibson (eds.), *The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for International and Investor-State Arbitration*, Oxford University Press, pp. 375–383.

<sup>219</sup> Peter Schlosser (1975), *Das Recht der internationalen private Schiedsgerichtsbarkeit*, 1<sup>st</sup> ed., Mohr Siebeck, pp. 8 f., para. 14. But see Caron (1990), pp. 148 f.

<sup>220</sup> See GD, General Principle B, Article 11; Reagan Executive Order No. 12,294 (24 February 1981), reprinted at 46 Fed. Reg. 14111 (1981) (implementing the Algiers Accords’ provisions in the U.S., by ordering that claims by Americans against Iran pending before U.S. courts be suspended and referred to the Tribunal) and *Dames & Moore v. Regan*, U.S. Supreme Court, Decision of 2 July 1981, 453 U.S. 654 (1981) (upholding the President’s authority to issue that

96. Second, rules of a number of *arbitral* institutions provide for the institution's sole power to appoint the arbitrators, without any input from the parties. For example, the CAS Arbitration Rules for the Olympic Games set forth that, during the Games, the President of the *ad hoc* Division will appoint a Panel of one or three arbitrators appearing on a "special list" of a small number of individuals, previously selected without the disputing parties' input.<sup>221</sup> Similarly, the Arbitration Rules of the Basketball Arbitral Tribunal (BAT), an arbitral body deciding disputes arising out of contracts between basketball players, club, agents, or coaches, provide that "all disputes before the BAT will be decided by a single Arbitrator appointed by the BAT President on a rotational basis from the published list of BAT arbitrators".<sup>222</sup> The BAT President establishes a list of at least five BAT arbitrators (at present six) for a renewable term of two years.<sup>223</sup> Although the parties have no say in the composition of the panels either before the CAS *ad hoc* division or before the BAT, it is undisputed that these mechanisms are in the nature of arbitration,<sup>224</sup> which was actually confirmed by the Swiss Federal Tribunal, which is competent to review their awards as a consequence of their seat being in Switzerland.<sup>225</sup>

97. Finally, additional comfort may be taken from the recent proposals to abandon the practice of party-appointed arbitrators in favor of all-institution appointed arbitrators.<sup>226</sup> At a minimum, these proposals lend support to the conclusion that, conceptually, arbitration might well "outlive" the institution of party-appointment.<sup>227</sup>

98. In conclusion, for the ITI to qualify as arbitration rather than a court-like dispute settlement method, the most important element is that recourse to the ITI is based on

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order). For the reasons explained above, no similar element of compulsion would be present in the ITI.

<sup>221</sup> CAS Arbitration Rules for the Olympic Games, Article 11.

<sup>222</sup> Basketball Arbitral Tribunal, Arbitration Rules (2014), Article 8.

<sup>223</sup> FIBA Internal Regulations (2014), Article 3–299 let. b. The current list of BAT Arbitrators is available at [http://www.fiba.com/downloads/v3\\_expe/bat/composition\\_of\\_bat\\_2013.pdf](http://www.fiba.com/downloads/v3_expe/bat/composition_of_bat_2013.pdf) (last consulted on 3 May 2016).

<sup>224</sup> See Antonio Rigozzi (2005), *L'arbitrage international en matière de sport*, Helbing & Lichtenhahn, pp. 243 et seq., *inter alia* 307 f.; Kaufmann-Kohler & Rigozzi (2015), pp. 43 f., paras 1.130–1.133.

<sup>225</sup> See 4A\_424/2008, Swiss Supreme Court, Decision of 22 January 2009, para. 2 (in respect of the CAS *ad hoc* division) and 4A\_198/2012, Swiss Supreme Court, Decision of 14 December 2012, para. 2.1 (in respect of the BAT).

<sup>226</sup> For this controversy, see Albert Jan van den Berg (2010), *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Mahnouch H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Brill | Nijhoff, pp. 821–843, 834; Charles N. Brower & Charles B. Rosenberg (2013), *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, *Arbitration International*, Vol. 29(1), pp. 7–44, esp. 8 et seq.; Jan Paulsson (2013), *The Idea of Arbitration*, Oxford University Press, p. 162; V.V. Veeder (2013), *The Historical Keystone to International Arbitration: The Party Appointed Arbitrator – From Miami to Geneva*, *American Society of International Law, Proceedings of the Annual Meeting*, Vol. 107, pp. 387–405, 402.

<sup>227</sup> Tellingly, Jan Paulsson advocated the abandonment of unilateral appointments in a book entitled "The Idea of Arbitration". See *supra* note 226.

an agreement, between the State and the investor. That consent encompasses the acceptance of the arbitrator selection method provided in the constitutive instrument.

99. As will be discussed in the section dealing with composition, it would certainly be an option to design methods of appointment in which the disputing parties' freedom of choice would not be entirely curtailed.<sup>228</sup> For instance, the disputing parties could choose from a roster of previously elected members or the election process could involve some consultation of organizations representative of investor interests. To a different degree, either solution would provide comfort to claimant-investors that their voice in the tribunal's selection process is heard and reduce the concern that the mechanism may not meet the definition of arbitration.

### C. THE LAW GOVERNING THE PROCEEDINGS

100. A further issue which the design of the ITI will have to consider is that of the law governing the proceedings before the ITI, which has important consequences for the possible supervisory competence of domestic courts, for annulment/appeal, and for enforcement. The answer to this question may in part depend on the characterization discussed above at V.B.

101. In the event that the ITI is viewed as arbitration, two main choices are available.

- A first option would be to envisage that – like most types of arbitration – the proceedings be subject to a national *lex arbitri*. If this path is chosen, two further possible avenues could be explored. The legal seat of the ITI could be pre-determined once and for all, with the consequence that all proceedings would be subject to the same *lex arbitri*. It would be natural, in this case, that the legal seat of the proceedings correspond to the physical location where the ITI were to be located. It would then be critical that such seat have an established tradition in terms of neutrality, support of and non-interference with arbitration. One precedent for this kind of approach is the Court of Arbitration for Sport (CAS), whose proceedings are all legally seated in Lausanne and are thus all subject to Chapter 12 of the Swiss Private International Law (“PILA”) as the *lex arbitri*.<sup>229</sup> In the alternative, the choice of the seat could be left to the disputing parties or to the ITI. This solution would, in turn, reflect what is provided in most arbitral rules and be seen as most in line with “traditional” arbitration.
- A second option would be to subject the proceedings only to international law. The clear precedent in this respect is the ICSID Convention regime, where the arbitral proceedings are subject to the Convention and are not governed by any national *lex arbitri*.<sup>230</sup> This solution would present a number of advantages and may thus be a preferable option for the following reasons. First, it may be difficult for States to choose *a priori* a suitable domestic *lex arbitri* (to which all

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<sup>228</sup> See *infra* at V.F.

<sup>229</sup> See CAS Code, S1 and R28 and Swiss Private International Law Act (PILA), Article 176(1). See also Kaufmann-Kohler & Rigozzi (2015), p. 42, para. 1.128.

<sup>230</sup> Schreuer (2009), p. 1244, para. 3 *sub* Article 62.

States would be willing to agree). On the other hand, leaving the choice of the seat (and, as a consequence, of the procedural law) to the disputing parties or the ITI could result in inconsistencies if different seats under different *leges arbitri* are selected. By contrast, there is no reason to consider that a truly self-contained regime insulated from the supervision and control of domestic courts would pose any problem. As noted, the example of the ICSID Convention is instructive and could be followed in this particular respect.

102. Whatever the choice, it should be clearly articulated. The experience of the Iran-U.S. Claims Tribunal shows the problems resulting from ambiguities in this respect. The question of whether the Tribunal's proceedings were subject to Dutch law (as a result of the Tribunal's seat in The Hague)<sup>231</sup> or whether they were completely "a-national" or "delocalized" was indeed a heavily debated question.<sup>232</sup> In 1983, the Dutch government proposed a "Bill regarding the Applicability of Dutch Law to the Awards of the Tribunal Sitting in The Hague to Hear Claims between Iran and the United States", which would have declared the Tribunal's awards rendered in cases involving private parties to be Dutch awards subject to setting aside proceedings before Dutch courts on limited grounds.<sup>233</sup> As a result of doubts expressed in particular by Iran, the Bill was never enacted. In turn, Iran agreed to withdraw ten lawsuits filed in the District Court of The Hague against the Tribunal's awards.<sup>234</sup> Thus, "the relationship between the Tribunal proceedings and Dutch law remains untested by the courts and authorities of the Netherlands".<sup>235</sup> This same uncertainty also surfaced before domestic courts at the stage of enforcement of the Tribunal's awards.<sup>236</sup> In the U.S., the courts considered that the Tribunal's awards could be enforced under the NYC.<sup>237</sup> In particular, the Court

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<sup>231</sup> See CSD, Article VI.

<sup>232</sup> For this controversy see, among others, L. Hardenberg (1984), *The Awards of the Iran-US Claims Tribunal Seen in Connection with the Law of the Netherlands*, *International Business Lawyer*, Vol. 12, pp. 337–340; Albert Jan van den Berg (1984), *Proposed Dutch Law on the Iran-United States Claims Settlement Declaration, A Reaction to Mr. Hardenberg's Article*, *International Business Lawyer*, Vol. 12, pp. 341–352; William Lake & Jane Tucker (1984), *Judicial Review of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?*, *Law and Policy in International Business*, Vol. 16, pp. 755–812; Caron (1990).

<sup>233</sup> See David D. Caron & Lee M. Caplan (2013), *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, p. 42.

<sup>234</sup> Caron & Caplan (2013), p. 42.

<sup>235</sup> Caron & Caplan (2013), p. 42.

<sup>236</sup> It should be recalled that the GD (paras 6–7) provided for the establishment of a \$1 billion fund with a portion of the Iranian assets which had been frozen by the United States. Iran would have the obligation to refurbish this "Security Account" whenever its balance would fall below \$500 million. The fund was intended to satisfy awards in favor of U.S. nationals. Awards in favor of Iranian nationals or the Iranian government, by contrast, must be enforced in the United States or third countries. See Caron (1990), p. 129 and Sean D. Murphy (2001), *Obligation to Replenish Iran-U.S. Claims Tribunal Security Account*, *American Journal of International Law*, Vol. 95(2), pp. 414–416.

<sup>237</sup> See *Gould, District Court and Gould, Court of Appeals* (both courts substantially agreeing on the application of the NYC); *Iran Aircraft Industries v. Iran Helicopter Support, Renewal Company v. Avco Corporation*, U.S. Court of Appeals (2<sup>nd</sup> Circ.), 980 F.2d 141, Decision of 24 November 1992 (agreeing that the NYC was applicable, but refusing enforcement of the award pursuant to Article V.1(b) of the Convention).

of Appeals in *Gould* considered that “an award need not be made ‘under a national law’ for a court to entertain jurisdiction over its enforcement pursuant to the Convention”.<sup>238</sup> By contrast, the English court in *Dallal v. Bank Mellat* concluded, *in obiter*, that a Tribunal award was “a nullity in Dutch law” as a result of the invalidity of the arbitration agreement under Dutch law in force at that time,<sup>239</sup> and only allowed enforcement on grounds of “international comity”.<sup>240</sup>

103. As will be further explained when dealing with enforcement, it is true that the main problems faced by the Iran-U.S. Claims Tribunal’s awards are not likely to re-surface today. This is because it is now widely accepted that arbitration without privity – an offer in a treaty (or domestic law) accepted by the filing of a request for arbitration – satisfies the requirement of Article II NYC.<sup>241</sup> Likewise, there is nowadays little dispute that at least some type of a-national awards (in particular ICSID awards in respect of non-contracting parties to the ICSID Convention) would fall within the NYC’s scope of application.<sup>242</sup> Nevertheless, the ambiguities surrounding the law governing the procedure before the Iran-U.S. Claims Tribunal suggest that the ITI Statute should make a clear choice in favor of either the localized or the self-contained approach to avoid unnecessary arguments.

104. Finally, in the event that the ITI is deemed an international court subject only to public international law, the issue of the law governing the proceedings is automatically resolved. Other issues will, however, arise, especially in respect of enforcement, which is why that characterization is not favored. Here again, whatever the choice, it would need to be clearly expressed.

#### D. BUILT-IN APPEAL, ANNULMENT AND OTHER ALTERNATIVES

##### 1. Systems of control in general

105. One fundamental issue to consider is what kind of control system (if any) should apply to the (first instance) awards. Like in arbitration, where a limited review is

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<sup>238</sup> *Gould, Court of Appeals*, p. 1365.

<sup>239</sup> *Dallal v. Bank Mellat*, p. 455.

<sup>240</sup> *Dallal v. Bank Mellat*, p. 461 f.

<sup>241</sup> See *infra* at V.E.2.b.

<sup>242</sup> See Albert Jan van den Berg (1981), *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Kluwer Law International, p. 99; Giuliana Cane (2004), *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, *American Review of International Arbitration*, Vol. 15(3–4), pp. 439–463, p. 444 f.; Schreuer (2009), p. 1118. See also Gus van Harten & Martin Loughlin (2006), *Investment Treaty Arbitration as a Species of Global Administrative Law*, *European Journal of International Law*, Vol. 7(1), pp. 121–150, p. 135; Julian D. M. Lew, Loukas Mistelis & Stefan M. Kröll (2003), *Comparative International Commercial Arbitration*, Kluwer Law International, p. 801, para. 28–111; Guido Santiago Tawil (2009), *Binding Force and Enforcement of ICSID Awards: Untying Articles 53 and 54 of the ICSID Convention*, in Albert Jan van den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series No. 14, Kluwer Law International, pp. 327–337, p. 335 footnote 42; Gaëtan Verhoosel (2009), *Annulment and Enforcement Review of Treaty-Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series No. 14, Kluwer Law International, pp. 285–317, pp. 310 and 311 et seq.

normally available, it would be advisable that some system of control of ITI awards be put in place. The crucial question is, however, how to frame it without creating an unnecessarily burdensome and duplicative regime.

106. The challenges in this respect will be to design a framework that strikes a careful balance between conflicting demands: on the one hand, the need for an efficient and final dispute settlement mechanism and, on the other, the concern to protect the integrity of the process and the correctness of the decision-making. In arbitration, the demand for efficiency is largely met by the fact that it is a “one stop” dispute settlement method. But for very limited possibilities (annulment and revision), there are no remedies against the award. This is an important difference compared to national judicial proceedings with two, or more often three, instances available. The demand for integrity and correctness obviously goes to the fairness of the process and the consistency of the law.

107. The main choice lies between the two well-known systems of control in international adjudication, namely “annulment” or “appeal”.<sup>243</sup> Appeal generally focuses on both the integrity of the process leading to the decision and the substantive correctness of the decision. By contrast, annulment more narrowly considers whether, regardless of errors in the application of the law or the findings of fact, the decision resulted from a qualitatively sound process.<sup>244</sup>

108. The following sections will thus explore the two avenues of annulment (V.D.2) and appeal (V.D.3) in the context of the ITI. Thereafter, the authors consider whether some of the objectives that are normally pursued through an appeal could not be more efficiently addressed through other procedures, i.e. preliminary rulings, *en banc*-like determinations and consultation mechanisms (V.D.4).

## 2. Annulment

109. Two options could be considered if an annulment-type system of control were to be designed. These options are in turn affected by the previously discussed issues of characterization and law governing the proceedings.

110. The first possibility would be to provide for a built-in two-tier system, structured on a “first instance” ITI followed by an annulment-type review on limited grounds by a different body. If one were to design the ITI as (i) a self-contained arbitration regime or as (ii) an international court (see *supra* at V.B and V.C), the built-in annulment would come as a natural choice. In other words, the self-contained arbitration or international court regime would in both instances automatically entail the exclusion of any domestic remedy against an ITI award.

111. A built-in system of this kind should reflect the intrinsic features of annulment seen above, i.e. it should provide an opportunity to review the integrity of the process,

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<sup>243</sup> See generally David D. Caron (1992), *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, ICSID Foreign Investment Law Journal, Vol. 7(1), pp. 21–56, esp. 23 et seq.

<sup>244</sup> Caron (1992), p. 24.

in particular compliance with due process, without assessing the correctness of the outcome. Annulment grounds in Article 52 of the ICSID Convention, with some caveats, could provide a useful model. While grounds provided in Article 52(1)(a), (c) and (d) do not pose particular problems (as there can be no doubt that the proper constitution of the tribunal, corruption of one of its members, and serious departures from a fundamental rule of procedure all affect the integrity of the process), drafters should be wary to replicate the language found in Article 52(1)(b) and (e). The ground of “manifest excess of power” under Article 52(1)(b) of the ICSID Convention has in some instances provided a foothold for an annulment committee’s review of the correct application of the substantive law.<sup>245</sup> Such a review, however, falls outside the scope of an annulment, which, when it comes to excess of power, should essentially control excess of jurisdiction. In this respect, a formulation found in some domestic laws, whereby the reviewing body may annul the award “where the arbitral tribunal has wrongly accepted or denied jurisdiction”,<sup>246</sup> seems preferable. Similar doubts can be expressed as to “failure to state reasons” (Article 52(1)(e)). This ground, while in theory aimed at preserving the integrity of the decision, has in some instances led annulment committees to succumb to the temptation to review the merits of the dispute.<sup>247</sup> Essentially, annulment grounds should cover (i) lack of jurisdiction; (ii) irregular constitution of the tribunal and lack of impartiality and independence of its members; and (iii) breach of due process.

112. Other sources of inspiration to draw up annulment grounds would be to rely on Article 34 of the UNCITRAL Model Law (preferably with some drafting adjustments) or on a comparative law review of annulment grounds as they are found in major arbitration jurisdictions.<sup>248</sup>

113. Finally, the composition of the built-in annulment body would need to be determined. This aspect is reviewed in respect of the composition of the ITI (*infra* at V.F) in terms that apply *mutatis mutandis* here as well.

114. In the event that the new dispute settlement body is in the nature of arbitration *and* is subject to a domestic *lex arbitri* (as opposed to being part of a self-contained regime governed by international law, see *supra* at V.B and V.C), the competence to review awards would rest with the courts at the seat and the grounds for annulment would be defined by the international arbitration act of the seat. In this case, the ITI Statute would have to address the relationship between the ITI award and annulment remedies at the seat.

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<sup>245</sup> See Doak Bishop & Silvia M. Marchili (2013), *Annulment under the ICSID Convention*, Oxford University Press, pp. 89–122.

<sup>246</sup> See e.g. Swiss PILA, Article 190(2)(b).

<sup>247</sup> See generally Bishop & Marchili (2013), pp. 151–196. See also Caron (1992), p. 45 (noting that “the annulment ground of ‘failure to state reasons’ can, if one is not careful, shade into an appeal-like inquiry of the substantive correctness of the award”).

<sup>248</sup> Whether in this context violation of public policy must be added and how it should be formulated requires further reflection.

### 3. Built-in appeal

115. Things would be very different if a full-fledged built-in appeal is chosen. As a preliminary observation, annulment (in whatever form) and a built-in appeal appear mutually exclusive. Indeed, grounds for appeal are normally broader than, and thus already include, the usual grounds for annulment.<sup>249</sup> Accordingly, there would be no reason to duplicate those remedies.<sup>250</sup>

116. If a two-tier system based on an appeal procedure is chosen, a number of important features will have to be worked out.<sup>251</sup> These comprise the following:

117. *The appellate tribunal's composition.* The method of election of the members will have to be determined. The issue will be more extensively discussed in relation to the composition of the ITI, which covers both the election process and the assignment to the individual disputes (*infra* at V.F). Similar considerations would apply *mutatis mutandis* to an appeal tribunal (as well as to an annulment body *sub* V.D.2). Issues to be considered will notably include the choice between a truly permanent appellate body versus a roster; the number and qualification of its members; rules on nationality; provisions on conflicts of interests, and (in)compatibility of functions, etc.

118. *Grounds of appeal and standard of review.* This is a crucial issue. On what grounds can an ITI award be appealed? Should the review “be limited to issues of law covered in the panel report and legal interpretations developed by the panel” as in the WTO AB system?<sup>252</sup> Or should the review encompass the tribunal’s assessment of the facts? An issue closely related to the grounds for review, though conceptually distinct, is that of the *standard of review*.<sup>253</sup> Assuming the appellate tribunal’s area of review extends to both issues of law and fact, the question arises whether the appellate tribunal should review these issues *de novo* or whether it should accord some degree of deference to the findings of the first adjudicator. Formulations limiting the appeal to “clear”, “serious” or “manifest” errors of law/assessment of the facts<sup>254</sup> would thus define the “balance of power” between the first and second tier. Whatever solutions will be adopted in respect of the grounds of appeal and the standard of review, it would be preferable to include “autonomous” formulations without attempting to combine new grounds with the grounds set out in Article 52 of the ICSID Convention. Such a

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<sup>249</sup> See, e.g., CETA, Article 8.28.2; EU-Vietnam FTA, Article 28(1).

<sup>250</sup> In case the option of a domestic *lex arbitri* is maintained, contracting parties should consider passing legislation to rule out appeals or any other remedy against ITI awards, as the national laws of some States may not regard a provision in the ITI Statutes excluding additional remedies as sufficient to exclude the right to seek annulment.

<sup>251</sup> See also section VI below (dealing with broadly similar issues in the context of the AM for investor-state arbitral awards).

<sup>252</sup> See DSU, Article 17(6).

<sup>253</sup> For the distinction, see Caron (1992), p. 26.

<sup>254</sup> See, e.g., ICSID Secretariat (2004), Annex, para. 7 (suggesting that grounds for appeal under the proposed Appeals Facility include “clear error of law or on any of the five grounds for annulment of an award set out in Article 52 of the ICSID Convention” and “serious errors of fact”).

combination would inevitably raise interpretive issues and undesired arguments on the scope of and overlap between the various grounds.

119. *The effect of the appellate decision.* Furthermore, the ITI Statute will have to spell out what the outcome of the appeal process would be, that is to say, whether the appellate tribunal can reverse, confirm, modify, or remand the award to the first instance tribunal with instructions. The AB's lack of remand power, in particular, has been criticized in the WTO framework.<sup>255</sup>

120. *The precedential value of the decision.* Should the appeal decision bind only the disputing parties (and the first instance tribunal in case of remand) or should it have broader *stare decisis* effect? As the ITI (whether at the first instance or at the appeal level) applies one particular IIA, it would make sense to limit any *stare decisis* effect to that IIA. However, it will be natural in this framework that the users would regard an appeal decision as "authoritative" beyond the boundaries of the single IIA, as a result of the permanence of the body giving the ruling (as opposed to the currently fragmented *ad hoc* system) and the recurrence of identical or similar issues arising under IIAs.

121. All this being said, States should, however, carefully assess the advisability of a two-tier system with an appeal rather than with an annulment regime. It should be carefully considered whether the beneficial effects of the former two tier-system of adjudication outweigh the possible drawbacks.<sup>256</sup>

122. On the one hand, it is true that the presence of an appeal system would enhance the pursuit of correctness and accuracy of the decision-making and strengthen the consistency of case law. Further, it may increase the confidence in the system, and thus its legitimacy, because for States it may politically be easier to accept and comply with unfavorable decisions if not one, but two, different sets of impartial adjudicators have faulted them with their conduct.

123. On the other hand, a full-blown appeal would also present drawbacks. Finality and the related efficiency, which is one of the main advantages of a one-tier system (like arbitration), would be undermined. The dispute resolution process would inevitably become longer and, as a consequence, more costly. Indeed, the very existence of a possibility to appeal (especially but not only if the review extends to facts and is *de novo*) is likely to induce any losing party to appeal. States could likely not afford *not* to file an appeal, be it only for reasons of internal pressures and accountability.<sup>257</sup> The same may be true of losing corporate claimants. Even where the grounds were to be restricted to a serious mistake of law, a losing party would always have the hope to

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<sup>255</sup> See Joost Pauwelyn (2007), *Appeal without Remand, A Design Flaw in WTO Dispute Settlement and How to Fix it*, ICTSD, Dispute Settlement and Legal Aspects of International Trade Issue Paper, No. 1. in the context of rules of appellate procedure in commercial arbitration (on which see also *infra* footnote 362), both the AAA Appellate Rules, the CPR Appeal Procedure, and the JAMS Optional Arbitration Appeal Procedure provide for no remand and thus envisage that the entire appellate process be completed by the appellate tribunal. See Mateus Aimoré Carreteiro (2016), *Appellate Arbitral Rules in International Commercial Arbitration*, Journal of International Arbitration, Vol. 33(2), pp. 185–216, 200.

<sup>256</sup> See also *supra* at III.B in relation to the advantages and disadvantages of an appeal system.

<sup>257</sup> Kaufmann-Kohler (2005), p. 6.

convince a new tribunal of the correctness of its position, especially on issues on which there are divisions amongst tribunals and commentators. Because the two-tier review process (with the ensuing costs) would likely become the rule, the risk is that a dispute resolution system thus designed would severely disadvantage small and medium-sized investors and developing States.<sup>258</sup>

124. In that light, it may be worth considering whether the aims of correctness and consistency could be better pursued by alternative options, which are explored next.

#### 4. Alternatives to a built-in appeal

125. For greater clarity, the options discussed here are alternatives to an *appeal*, not to annulment. They would come in combination with a narrowly defined annulment-type remedy restricted to serious procedural violations, excess of jurisdiction and issues of impartiality of the tribunal. The following main options can be imagined to address concerns about the correct and consistent application of the law: (i) preliminary rulings, (ii) “en banc” determinations, and (iii) consultations mechanisms.

##### a. Preliminary rulings

126. A “preliminary ruling” procedure can be described as a procedure whereby a court refers a decision on a specific issue arising in pending proceedings to a different court, normally with a view to having a provision of law interpreted by the latter court. The proceedings before the court seeking the ruling are normally suspended pending the determination by the other court, and such ruling will usually bind the court requesting it, which will then incorporate it into its overall resolution of the dispute before it.

127. The most well-known and successful example of this kind is the preliminary ruling procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union (ex Article 234 of the Treaty establishing the European Community), whereby a court of a Member State of the European Union may, and in certain instances shall, request the Court of Justice of the European Union (CJEU) to give a ruling on the interpretation of EU law.<sup>259</sup> In the context of EU law, the preliminary ruling procedure was needed because of the decentralized application and interpretation of

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<sup>258</sup> In this context, in order to discourage “frivolous” appeals, it could be considered to include a procedure for the early dismissal of manifestly unfounded appeals, modeled around Rule 41(5) of the ICSID Arbitration Rules. Indeed, such rule has been found to be applicable also in the context of annulment proceedings such that an annulment committee may dismiss a request that is manifestly without legal merit on an expedited basis. See *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Annulment, Decision on Elsamex S.A.’s Preliminary Objections, 7 January 2014; *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Annulment, Decision on Respondent’s Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), 8 March 2016.

<sup>259</sup> See Consolidated version of the Treaty on the Functioning of the European Union (“TFEU”), OJ C 326, 26 October 2012, Article 267. For preliminary ruling procedures in other international courts and tribunals, see Roberto Virzo (2011), *The Preliminary Ruling Procedures at International Regional Courts and Tribunals*, *The Law & Practice of International Courts and Tribunals*, Vol. 10(2), pp. 285–313.

EU law at the national level. It has worked as a very powerful tool to ensure the preservation of the legal unity of the Union through the uniform interpretation of EU law by the CJEU.<sup>260</sup>

128. The possible transposition of preliminary rulings procedures in investment arbitration has been discussed before.<sup>261</sup> It is worth developing it further here, as it could be particularly well-suited for procedures before the ITI to address the concerns of consistency often voiced. In the context of a permanent dispute resolution body, one could envisage that the panel be allowed to refer certain questions to either a separate body established for that purpose or to a special chamber of the ITI (which for these limited purposes should be permanent and not work on a rotational basis).

129. The preliminary ruling procedure works particularly well because it addresses problems of inconsistency *ex ante*, rather than correcting possible deficiencies *ex post*, as is the case of appeals. As the example of the EU shows, such mechanism is able to ensure the uniform interpretation of a body of law. Of course, there would be a fundamental difference here in the sense that, unlike in EU law, the underlying substantive investment law is embodied in numerous different treaties (at least for the time being). This said, similarly to what would happen with an appeal, it can be expected that given the similarities of the treaties a preliminary ruling would have *de facto* impact well beyond the single treaty at issue, even though it would only be legally binding for a particular IIA.

130. As compared to a full appeal, the overall advantages would be sensible. While also a preliminary ruling procedure would entail some added costs and delay, especially if there were the opportunity for written submissions and a hearing before the special chamber (as is the case before the CJEU), these costs and delay would be considerably lower than in an appellate procedure. First, the scope of the exercise would be narrower, as this kind of incidental proceeding would only be concerned with a discrete question, which can be dealt with more swiftly. Second, there would be no referral as a matter of right, but it would be for the ITI to “filter” the cases warranting a suspension of the proceedings and a referral to the special chamber. The circumstances where a request for preliminary ruling should be granted need, in turn, to be clearly defined. They should be limited to situations where there is a serious concern for the investment treaty system as a whole; or a new legal question never

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<sup>260</sup> In the words of the CJEU, “[the] obligation to refer imposed by the third paragraph of Article 234 EC [now Article 267 TFEU] is based on cooperation, *established with a view to ensuring the proper application and uniform interpretation of [EU] law in all the Member States*, between national courts, in their capacity as courts responsible for the application of [EU] law, and the Court of Justice [...]”. See Case C-495/03 *Intermodal Transports BV v. Staatssecretaris van Financiën* [2005] ECR I-8151, para. 38 (emphasis added). On preliminary rulings in EU law, see generally Thomas de la Mare & Catherine Donnelly (2011), *Preliminary Rulings and EU Legal Integration: Evolution and Stasis*, in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law*, Second Edition, Oxford University Press, pp. 363-406.

<sup>261</sup> See Kaufmann-Kohler (2004), p. 221; Kaufmann-Kohler (2005), p. 8; Kaufmann-Kohler (2007), p. 378; Christoph H. Schreuer (2006), *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, *Transnational Dispute Management*, Vol. 3(2), pp. 23 f.; Schreuer (2008). For already existing mechanisms of “preliminary rulings” in IIAs (for example from an investor-State tribunal to a State-to-State tribunal), see Potestà (2015), pp. 271–273.

addressed before; or a divergence of interpretations in the case law of the single ITI divisions; or the intention to depart from an established line of cases.<sup>262</sup>

131. By contrast, cases which have a question of law or fact in common and/or arise out of the same events or circumstances (for example regulatory measures affecting a number of different investors) are best addressed through provisions on consolidation of claims.<sup>263</sup>

**b. *En banc* determinations and consultation mechanisms**

132. A further possibility to be considered is the design of mechanisms whereby a particular case is transferred from a division to the plenary tribunal for final determination. Several domestic legal systems provide that when issues of coherence and consistency of the law are at stake (because for example there is a jurisprudential split between different chambers or divisions of a court), the case may be decided by the full court (sometimes said to be hearing the case *en banc*) rather than by the court in the usual quorum.<sup>264</sup> The procedural rules of the Iran-U.S. Claims Tribunal also provide that a chamber may “relinquish jurisdiction” to the full tribunal, *inter alia* “where a case pending before a Chamber raises an important issue” and “when the resolution of an issue might result in inconsistent decisions or awards by the Tribunal”.<sup>265</sup>

133. Similar mechanisms could be envisaged within the ITI. The main difference between an *en banc*-like scenario and the preliminary ruling procedure lies in the fact that in the former situation jurisdiction to decide the case is relinquished in favor of the full tribunal, whereas in the latter situation a different body (or a special division of the same body, for that matter) provides a binding interpretation of a provision of law, which the court seeking the preliminary ruling will then apply to the facts of the case before it. Obviously, the *en banc* scenario works for bodies with a limited number of members as opposed to a roster with a larger number.

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<sup>262</sup> See also Schreuer (2008), p. 211 (suggesting that such procedure could be provided where a tribunal is faced with a situation involving a fundamental issue of investment treaty application, or in which it wants to depart from a line of “precedent” or where there are conflicting previous decisions).

<sup>263</sup> On consolidation, see generally Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin & Makane Moïse Mbengue (2006), *Consolidation of Proceedings in Investment Arbitration: How can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently*, ICSID Review – Foreign Investment Law Journal, Vol. 21(1), pp. 59–125.

<sup>264</sup> See, e.g., U.S. Federal Rules of Appellate Procedure, § 35(a) (providing that an appeal or other proceeding may be heard or reheard by the court of appeals *en banc* where this is “necessary to secure or maintain uniformity of the court’s decisions” or “the proceeding involves a question of exceptional importance”); Italian code of civil procedure, Article 374 (providing that Italy’s highest court, the *Corte di cassazione*, may decide in “United Sections” (*Sezioni Unite*) in particular to resolve a jurisprudential split between different divisions (“sections”) of the court or if questions of particular importance are presented to it).

<sup>265</sup> Iran-U.S. Claims Tribunal, Presidential Order No. 1, 19 October 1981, para. 6, reprinted in Pieter Sanders (ed.) (1982), *Yearbook Commercial Arbitration* 1982, Vol. 7, Kluwer Law International, pp. 261–262.

134. Less formal consultation mechanisms could also be contemplated. A particularly enlightening example comes from the WTO AB, in what is called the “exchange of views” between AB members.<sup>266</sup> Rule 4 of the WTO Working procedures for appellate review, entitled “Collegiality”, provides that in order “[t]o ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the [AB] Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure”.<sup>267</sup> In particular, “the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members”,<sup>268</sup> without prejudice to a division’s full authority to decide the appeal.<sup>269</sup> To assist in this process, “each Member shall receive all documents filed in an appeal”.<sup>270</sup> This mechanism has been praised, especially by the AB’s own members, as an instrument that has contributed to the establishment of cohesion, collegiality, continuity and a “sense of common purpose” of the dispute settlement body, and that has ensured coherence and consistency in the development of the AB’s jurisprudence.<sup>271</sup>

135. While these “exchanges of views” occur for every dispute before the AB, in the context of the ITI this consultation mechanism need not be continuous and could be reserved for special circumstances, to avoid rendering the ITI unmanageable, especially in case of a busy docket. Thus, it should be convened in the situations for which the authors have proposed to resort to a preliminary ruling (i.e., where there is a serious concern for the investment treaty system as a whole, a new legal question, a divergence of interpretations in the case law of the single ITI, or the intention to depart from an established line of cases).

136. The details for such procedure would have to be worked out. Depending on a number of variables (e.g., the number of ITI members), it will have to be considered whether the consultation should include all members of the ITI (which has clear advantages for the overall collegiality and cohesion of the body) or be in the form of a “meeting of the presidents” of the single divisions (which would imply that only certain individuals within the ITI would serve as presiding members).

137. In conclusion, all of these alternative mechanisms would be much less burdensome to implement and sustain than an appeal. At the same time, they can

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<sup>266</sup> See Working procedures for appellate review, Rule 4. See also generally Alberto Alvarez-Jimenez (2009), *The WTO Appellate Body’s Decision-Making Process: A Perfect Model For International Adjudication?*, *Journal of International Economic Law*, Vol. 12(2), pp. 289–331.

<sup>267</sup> Working procedures for appellate review, Rule 4(1).

<sup>268</sup> *Ibid.*, Rule 4(3).

<sup>269</sup> *Ibid.*, Rule 4(4).

<sup>270</sup> *Ibid.*, Rule 4(2).

<sup>271</sup> For the personal testimonies on the “exchanges of views” from former AB members and the former Director of the AB Secretariat, see the contributions in Gabrielle Marceau (ed.) (2015), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, WTO & Cambridge University Press, in particular by Debra P. Steger (2015), *The founding of the Appellate Body*, pp. 447–465, esp. 454, 457–458; Claus-Dieter Ehlermann, *Revisiting the Appellate Body: the first six years*, pp. 482–506, esp. 496–497, A.V. Ganesan, *The Appellate Body in its formative years: a personal perspective*, pp. 517–546.

reasonably be expected to ensure the emergence of non-conflicting jurisprudence and foster judicial continuity within the dispute settlement body.

## E. ENFORCEMENT

### 1. Introduction

138. Enforcement of ITI awards is crucial for the overall effectiveness of the system and largely depends on the characterization of the ITI as arbitration or court. If the ITI's decisions cannot be deemed arbitral in nature because of the body's predominant court-like features,<sup>272</sup> the chances of enforcement would be significantly reduced. The reason for this is that, unlike for arbitral awards, there is no uniform international regime for the enforcement of judgments of international courts. Such an international decision would only be enforceable under the specific rules provided in the instrument establishing the court. That means that States which have not consented to that instrument are under no obligation to enforce decisions emanating from that court. In fact, in most States there is currently no statutory basis nor judicial mechanism for enforcing international judgments.<sup>273</sup> This is the main reason why it would be essential to design the new body in the nature of arbitration, as the risk is otherwise to establish a dispute resolution system which would be highly ineffective.

139. The following observations are made in the event that the ITI is characterized as arbitration. As enforcement may be sought in the Contracting States as well as in third countries, it is important to review both situations.

140. With regard to enforcement of ITI awards *in the territory of a State that has consented to the ITI Statute* (either through the Opt-in Convention or in a future IIA), there are essentially two options. The first one would be to provide in the ITI Statute for a special enforcement regime, centered on the Contracting State's obligation to recognize an ITI award as binding and enforce the pecuniary obligations arising out of the award in their territory as if it were a final judgment of their courts. The ITI Statute would thus reflect the special enforcement regime found in Article 54 of the ICSID Convention.<sup>274</sup> This is a particularly favorable solution for the enforceability of the award, as it essentially curtails any court review at the stage of recognition and enforcement.<sup>275</sup>

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<sup>272</sup> See *supra* at V.B.

<sup>273</sup> See generally Richard Frimpong Oppong & Lisa C. Niro (2014), *Enforcing Judgments of International Courts in National Courts*, Journal of International Dispute Settlement, Vol. 5(2), pp. 334–371.

<sup>274</sup> Article 54(1) of the ICSID Convention provides that "(1) 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. [...]". A similar provision is found in the Unified Agreement as concerns enforcement of the judgments rendered by the Arab Investment Court. See Article 34(3): "A judgement delivered by the Court shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgement delivered by their own competent courts."

<sup>275</sup> In general, on the ICSID enforcement regime, see Schreuer (2009), *sub* Article 54.

141. If a special enforcement regime is chosen, then the ITI Statute should spell it out in its entirety and not refer to or incorporate portions of the ICSID Convention by stating, for instance, that the ITI award is to be treated as an award under the ICSID Convention. While such references obviously would seek to enhance the enforceability of the awards emanating from the newly created mechanism, it is doubtful that it would be admissible to drastically alter the carefully designed ICSID Convention regime (by entirely replacing the method of constitution of tribunals, by introducing an appeal, and by dispensing with the annulment mechanism) and still consider that the new creature renders “ICSID awards pursuant to the ICSID Convention”. If admissible, any such solution would only have effect *between the ITI contracting parties* as an agreement to modify the ICSID Convention *inter se* in accordance with Article 41 of the Vienna Convention on the Law of Treaties (VCLT),<sup>276</sup> provided the conditions of Article 41 are met. It could, however, not bind other ICSID Contracting States, for whom the ITI Statute would be *res inter alios acta*. Such States may legitimately question any obligation to enforce a purported “ICSID award” rendered by a body and through a process which bear little resemblance to those of the ICSID Convention to which they have agreed. Such a *renvoi* to the ICSID Convention (or for that matter, to other arbitral rules) would thus likely create interpretative and procedural difficulties.

142. A second solution would be to provide that ITI awards are enforceable pursuant to the NYC, under which States would retain some control over the award through the grounds for non-recognition and non-enforcement in Article V of the Convention. While the applicability of the NYC to an ITI award is a delicate question which is further discussed *infra* at V.E.2, this second solution would, at least in States adhering to monist systems, not be problematic in the relations between contracting parties to the ITI which are also parties to the NYC. This is because those States would have determined that an ITI award falls within the scope of the Convention, which determination would bind their domestic courts.

143. The question is more complex in respect of the enforcement of ITI awards *in third States*. As already noted, third States would of course not be bound by a special enforcement regime provided in the ITI Statute. Until such time as a considerable number of States become party to the ITI Statute (as is now the case with the ICSID Convention to which over 150 States are parties), it is therefore crucial to ensure the enforceability of ITI awards in third States as well. This will largely depend on whether ITI awards fall within the scope of the NYC.<sup>277</sup> In the negative, enforcement would be carried out under domestic laws, which may well be less pro-enforcement than the NYC.

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<sup>276</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679.

<sup>277</sup> As of April 2016, 156 States are parties to the NYC. See [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII1&chapter=22&lang=en)

144. The observations made earlier in respect of characterization (*supra* at V.B) also apply here.<sup>278</sup> In addition, further aspects connected to the specific requirements of the NYC are analyzed next.

**2. Would ITI awards fall within the scope of the New York Convention?**

145. When requested to recognize an ITI award under the NYC, it is expected that a court of a non-contracting party to the ITI Statute would autonomously assess whether the “objective” conditions for recognition/enforcement under the Convention are met, irrespective of whether the ITI Statute may say so expressly. In this exercise, the court would in particular ask itself the following questions: (a) Is the decision an “award” under the NYC?; (b) Is there an “agreement in writing” under Articles II and V(1)(a) of the Convention?; (c) If there were one, would the presence of a built-in appeal pose any problems under the NYC?

146. These are of course not the only questions that a court will ask when requested to recognize/enforce an award under the NYC, but those that deserve special attention in the peculiar context of the ITI.

**a. Would an ITI award be an “award” under the New York Convention?**

147. The Convention does not define “arbitration”, “arbitral tribunal” or “arbitral award”. Article I is nevertheless instructive as it sets territorial conditions and speaks of awards of “permanent arbitral bodies” in the following terms:

“1. The 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.

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. [...]"

**i. “Permanent arbitral body”**

148. Article I(2) of the NYC contrasts the situation where an award is “made by arbitrators appointed for each case” to the one where it is “made by permanent arbitral bodies to which the parties have submitted”. Would the ITI qualify as a “permanent arbitral body” under such provision?

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<sup>278</sup> In addition to the observations made when discussing characterization, a number of insertions in the ITI Statute could be considered to “reinforce” the arbitral nature of the body, with a particular view to the final enforcement of awards. For instance, terms such as “(arbitral) tribunal” (rather than “court”), “arbitrator” or “member” (rather than “judge”), “award” (rather than “judgment”) could be used.

149. The *travaux préparatoires* of the Convention do not shed an entirely clear light on the meaning of such term. Within the Committee which was tasked to prepare a first draft of the Convention in 1955, the delegate from the USSR proposed that the Convention apply also to awards made by permanent arbitral bodies.<sup>279</sup> As can be inferred from the review of the *travaux*, the aim of this proposal was to ensure that awards issued by the “arbitral” institutions of the former socialist States would be enforceable under the Convention.<sup>280</sup> For these purposes, it is less important to understand how those institutions actually worked than to note how they were characterized during the drafting conference of the Convention, which informed the choices made by the drafters. The crux of the discussions within the Committee revolved around the following point, summarized by the delegate from Belgium:

“the real question was whether the jurisdiction of the arbitral bodies referred to by the USSR representative was mandatory or whether the parties were free to submit or not to submit their disputes to those bodies.”<sup>281</sup>

150. Despite the USSR delegate’s reassurances that the Soviet institutions were indeed based on a “previous agreement between the parties”,<sup>282</sup> the proposal to include a reference to “permanent arbitral bodies” was not included in the draft text elaborated by the Committee,<sup>283</sup> and was merely referenced in the accompanying Report.<sup>284</sup> However, the discussion on this issue resurfaced during the 1958 Conference, which was to finally adopt the Convention, when Czechoslovakia proposed a similar amendment.<sup>285</sup> After a series of discussions and despite the skepticism expressed by a number of delegates,<sup>286</sup> the substance of the Czechoslovak

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<sup>279</sup> UN (1955a), *Report of the Committee on the Enforcement of International Arbitration Awards*, UN Doc. E/AC.42/4 (21 March 1955), para. 25.

<sup>280</sup> See UN (1955b), *Summary Record of the Third Meeting*, Committee on the Enforcement of International Arbitration Awards, UN Doc. E/AC.42/SR.3 (23 March 1955), pp. 4 et seq. See also Savage & Gaillard (1999), pp. 129, 477.

<sup>281</sup> UN (1955b), p. 6.

<sup>282</sup> UN (1955b), p. 6.

<sup>283</sup> See *Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Annex to UN (1955a).

<sup>284</sup> UN (1955a), para. 25 (“The expression ‘arbitral awards’ was understood by the Committee to include awards made by arbitral bodies appointed for each case (whether selected by the parties or by an organization), as well as awards made by permanent arbitral bodies, established in accordance with the law of a Contracting State. The Committee considered it unnecessary to include a provision to this effect in the text of the Convention (as proposed by the Representative of the USSR), and decided that a reference in the report would suffice.”).

<sup>285</sup> UN (1958a), *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Czechoslovakia: amendment to the Draft Convention*, Conference on International Commercial Arbitration, UN Doc E/CONF.26/L.10 (22 May 1958).

<sup>286</sup> See in particular UN (1958b), *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Conference on International Commercial Arbitration, Summary Review, 8<sup>th</sup> Meeting, UN Doc. E/CONF.26/SR.8 (and E/2704 and Corr.1; E/CONF.26/L.10) (12 September 1958), pp. 2 et seq.

amendment was eventually included in the Convention, in what would then become its Article I(2).<sup>287</sup>

151. While the distinction between “permanent arbitral bodies” and “arbitral tribunals” was not addressed in detail, it comes as no surprise that nothing similar to the ITI was discussed then. However, two points can be inferred from the *travaux*.

152. First, the paramount issue stressed by the drafters throughout the sessions was the preservation of the *voluntary* nature of arbitration, based on “will” or “agreement” of the parties,<sup>288</sup> as opposed to any type of adjudication based on “compulsory”,<sup>289</sup> or “mandatory”<sup>290</sup> jurisdiction, imposed on the parties “regardless of their will”.<sup>291</sup> Second, other elements such as the choice of arbitrators were not the focus of the discussion.<sup>292</sup> The observations made above by the authors of this paper on the features of arbitration are thus entirely consistent with the notion of arbitration that the drafters of the NYC had in mind.

153. This point has been correctly understood by at least some courts applying Article I(2) of the NYC. For example, a German court held that an award issued by a Polish institution did not fall within the scope of the Convention, because its jurisdiction was mandatory and no contrary jurisdiction agreement was admitted.<sup>293</sup> Further, and interestingly for the ITI, there is precedent in the U.S. courts that the Iran-U.S. Claims Tribunal qualifies as a “permanent arbitral body” under Article I(2) of the Convention.<sup>294</sup>

154. In the authors’ view, there would be good reason to qualify the ITI as a “permanent arbitral body” under the Convention, both under the “ordinary meaning” of Article I(2), and under an “evolutionary interpretation” of the phrase which would take account of developments in international law and arbitration since 1958. However, this does not seem of primary importance. What matters – as it clearly results also from the *travaux* – is the consensual basis of the adjudicator’s jurisdiction, which would be clearly met for the ITI (see *supra* at V.B).

155. That said, while not strictly needed, UNCITRAL may, after the adoption of the ITI Statute, consider issuing a “recommendation”, similar to the one it made in

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<sup>287</sup> UN (1958b), p. 8.

<sup>288</sup> UN (1958b), pp. 2, 3, 5 and 6; UN (1955b), p. 6.

<sup>289</sup> UN (1958b), pp. 2 and 5.

<sup>290</sup> UN (1955b), p. 6.

<sup>291</sup> UN (1958b), p. 2 and see also p. 3 (The “crucial question” was whether “there was an element of compulsion in the submission”).

<sup>292</sup> But see for one exception, the delegate of Israel, for whom tribunal created by law could only be considered “arbitral” if the parties could freely choose their adjudicators or if it was “composed of all States”, UN (1958b), p. 2.

<sup>293</sup> See 14 U 2979/93, Kammergericht Berlin, Decision of 7 March 1995, OLG Report 1996, pp. 68–71, 69.

<sup>294</sup> See in particular *Gould, District Court*, p. 765 (“The [New York] Convention certainly is applicable to the claim here in that the Tribunal is a permanent arbitral body, the dispute involved legal persons and a commercial relationship, and the decision was rendered in the territory of a Contracting State.”). The Court of Appeals (*Gould, Courts of Appeals*, p. 1362) also observed in passing, when reviewing the NYC requirements, that “[t]he Convention defines ‘arbitral awards’ to include those ‘made by permanent arbitral bodies’. Article I(2)”.

connection with the interpretation of Article II(2) and Article VII(1) of the NYC.<sup>295</sup> Such a recommendation would be aimed at clarifying that the ITI falls within the ambit of the NYC, as a “permanent arbitral body” under Article I(2) or otherwise. It would certainly provide comfort to domestic courts faced with the enforcement of ITI awards and would likely improve consistency in the interpretation by courts.

ii. *A-national award*

156. A further issue is whether an ITI award would meet the territorial requirements of the Convention. Pursuant to Article I(1), the Convention applies to so-called “foreign awards” (i.e., “awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought”) and “non-domestic awards” (i.e., “awards not considered as domestic awards in the State where their recognition and enforcement are sought”).<sup>296</sup>

157. If ITI proceedings were subject to a domestic *lex arbitri* (on which see *supra* at V.B), then an ITI award would unquestionably meet the territoriality requirement in Article I(1), first sentence, as it would be deemed to be made at the seat of the arbitration in a particular State.<sup>297</sup> Questions could, however, be raised if the alternative de-localized approach (akin to the ICSID Convention regime) was embraced.<sup>298</sup> The question whether so-called a-national awards (i.e., awards not made under domestic law) could be recognized under the NYC was heavily discussed in the past,<sup>299</sup> but

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<sup>295</sup> See UNCITRAL (2006), *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958*, Official Records of the General Assembly, 66<sup>th</sup> Session, Supplement No. 17, Annex II, UN Doc. A/61/17, pp. 61 et seq.; UN (2006), *Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*, General Assembly, 66<sup>th</sup> session, Resolution No. A/RES/61/33 (18 December 2006).

<sup>296</sup> See also Article I(3) of the NYC (providing that “When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State”).

<sup>297</sup> It is generally considered that, under Article I(1), first sentence, an award is “made” at the seat of the arbitration. See Born (2014), pp. 2943–2948.

<sup>298</sup> See *supra* at V.C.

<sup>299</sup> UNCITRAL, *Guide on the New York Convention*, Nos. 63 et seq. sub Article I; Aida B. Avanesian (1991), *The New York Convention and Denationalised Arbitral Awards: (With Emphasis on the Iran-United States Claims Tribunal)*, Journal of International Arbitration, Vol. 8(1), pp. 5–30, 6 et seq. and 22 et seq.; van den Berg (1981), p. 23; Albert Jan van den Berg (1985), *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, Pace Law Review, Vol. 6, pp. 25–65, pp. 64 f.; Georges R. Delaume (1983), *Arbitration with Governments “Domestic” v. “International” Awards*, The International Lawyer, Vol. 17(4), pp. 687–698, 688; Bernd Ehle (2012), *Article I*, in Reinmar Wolff (ed.), *The New York Convention: A Commentary*, Beck, Hart & Nomos, pp. 26–84, n° 107 et seq. pp. 60 f.; Lake & Tucker (1984); Jan Paulsson (1981), *Arbitration Unbound: Award Detached from the law of its country of Origin*, International Comparative Law Quarterly, Vol. 30(2), pp. 358–387, 369 and 372; August Reinisch (2010), *Enforcement of Investment Awards*, in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements, A guide to the Key Issues*, Oxford University Press, pp. 671–698, 673; Thilo Rensmann (1998), *A-national Arbitral Awards: Legal Phenomenon or*

seems to have lost much of its appeal in more recent days. First, a number of courts have indeed applied the Convention to a-national awards.<sup>300</sup> For example, the United States Court of Appeals for the Ninth Circuit held that “the fairest reading of the Convention itself appears to be that it applies to the enforcement of non-national awards” and held that an award made by the Iran-U.S. Claims Tribunal fell within the ambit of the Convention.<sup>301</sup> Further, it seems beyond dispute, and rightly so, that “delocalized” awards of at least one particular type, those made under the ICSID Convention, can be enforced under the NYC regime, if recognition/enforcement are sought in a non-ICSID Contracting State.<sup>302</sup> The authors of this paper see no convincing reason why a de-localized ITI arbitration regime akin to the ICSID regime should be treated differently.

**b. Are the requirements for an “arbitration agreement” under the New York Convention met?**

158. Like the domestic courts requested to enforce Iran-U.S. Claims Tribunal awards,<sup>303</sup> a domestic court may be faced with the question whether the ITI scenario involves an “arbitration agreement” in writing for the purposes of Article II and V(1)(a) of the Convention. An affirmative answer to this question should be admitted without difficulty.

159. It is well-accepted that the consensual method based on arbitration without privity meets the writing requirement under the NYC. This is not only confirmed in a number of IIAs,<sup>304</sup> but was also validated by several domestic courts applying the NYC in enforcement proceedings of non-ICSID investment awards.<sup>305</sup>

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*Academic Phantom*, Journal of International Arbitration, Vol. 15(2), pp. 38–65, 54 f. and 64; Javier Rubinstein & Georgina Fabian (2008), *The Territorial Scope of the New York Convention and Its Implementation in common and civil Law Countries*, in Emmanuel Gaillard & Domenico Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice*, Cameron May, pp. 91–137, pp. 102 f.; Peter Sanders (ed.) (2011), *ICCA Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, ICCA, p. 23; Schreuer (2009), Nos. 20 f. sub Article 54; *Société Européenne d'Etudes et d'Enterprises (S.E.E.E.) v. Federal Republic of Yugoslavia*, Supreme Court of The Netherlands, Decision of 7 November 1975, published in Yearbook of Commercial Arbitration, Vol. I (1976), pp. 195–198; *Gould, Court of Appeals*, p. 1364 et seq.

<sup>300</sup> See UNCITRAL, *Guide on the New York Convention*, paras 58–64 with reference to cases.

<sup>301</sup> *Gould, Court of Appeals*, p. 1364.

<sup>302</sup> Van den Berg (1981), p. 99; Cane (2004), pp. 439–463, p. 444 f. See also van Harten & Martin Loughlin (2006), pp. 121–150, 135; Schreuer (2009), p. 1118; Tawil (2009), p. 335 footnote 42; Lew, Mistelis & Kröll (2003), paras 28–111 p. 801; Verhoosel (2009), pp. 310 and 311 et seq.

<sup>303</sup> See *supra* note 218.

<sup>304</sup> See, e.g., ECT Article 25(5)(b); U.S. Model BIT (2012), Article 25(2)(b); Canada Model BIT (2004), Article 28(2)(b). In respect of permanent tribunals, see CETA, Article 8.25(2)(b); EU-Vietnam FTA, Article 10(4)(b).

<sup>305</sup> See *Occidental Exploration & Production Company v. The Republic of Ecuador*, UK Court of Appeal, Decision of 9 September 2005, [2005] EWCA Civ 1116, para. 32 (observing that “[t]he application of the New York Convention depends on such an agreement [in writing], and the provisions of the Arbitration Act 1996 (ss.100–104) relating to the enforcement of foreign arbitral awards give effect to this requirement in English law” and concluding that the investor-state

160. This notwithstanding, the ITI Statute could expressly state that (i) consent achieved through the combination of the state's offer with the investor's submission of a claim to the dispute settlement mechanism "shall satisfy the requirements of Article II of the NYC for an 'agreement in writing'"; and that (ii) a claim that is submitted to the ITI shall be considered "to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention". Although these 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.

**c. Would the New York Convention apply to the ITI with a built-in appeal?**

161. Finally, doubts could arise if the ITI Statute were to provide a two-tiered adjudication process. Would the presence of a built-in appeal pose any problems for the enforceability of the ITI award under the NYC?

162. As will also be seen when dealing with the characterization of an AM for investor-State arbitral awards,<sup>306</sup> it is accepted under many national arbitration laws that the parties may agree on a two-level arbitration process. There is no suggestion that the presence of an internal appellate mechanism changes the nature of the process. Indeed, according to Article V(1)(e) of the NYC, the recognition and enforcement on an award which "*has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*" may be refused by domestic courts.

163. In this context, it bears noting that the NYC also gives effect to recourse before a second arbitral tribunal or an appellate authority within the chosen institution.<sup>307</sup> In other words, where a two-tiered process is provided, awards issued by the first-tier tribunal may only be enforced under the Convention once the time limit for the appeal has expired.<sup>308</sup> This has been confirmed by a German court (in *obiter*),<sup>309</sup> and is in line

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arbitration provision in the BIT "must, as it seems to us, have been intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed in the Treaty"; *Republic of Ecuador v. Chevron Corp.*, U.S. Court of Appeals (2<sup>nd</sup> Circ.), Decision of 17 March 2011, 638 F.3d 384, pp. 392–393 ("Ecuador, by signing the BIT, and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate. [...] In effect, Ecuador's accession to the Treaty constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor's written demand for arbitration completes the "agreement in writing" to submit the dispute to arbitration."); *Werner Schneider v. The Kingdom of Thailand*, U.S. Court of Appeals (2<sup>nd</sup> Circ.), Decision of 8 August 2012, 688 F.3d 68, pp. 72–73 ("The existence of an arbitration agreement between Walter Bau and Thailand is beyond dispute. Thailand, 'by signing the [2002 Treaty], and [Walter Bau], by consenting to arbitration, have created a separate binding agreement to arbitrate.'" See also, in the context of the Iran-U.S. Claims Tribunal awards, *Gould, Court of Appeals*.

<sup>306</sup> See *infra* section VI.B.

<sup>307</sup> Van den Berg (1981), pp. 342 and 357; Born (2014), pp. 3162 and 3615 f.

<sup>308</sup> This is also what is provided under both the CETA and the EU-Vietnam FTA. See CETA, Article 8.28.9; EU-Vietnam FTA, Articles 29(1) and 31(1)–(2).

<sup>309</sup> III ZR 269/88, Federal Court of Justice of Germany, Decision of 18 January 1990, § III available at [http://www.newyorkconvention1958.org/index.php?lvl=notice\\_display&id=1335](http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=1335) (last consulted on 4 May 2016).

with French, U.S. or Swiss national laws.<sup>310</sup> Finally, it should be added that internal institutional appeals were specifically mentioned during the drafting works of the NYC,<sup>311</sup> which would also confirm that the Convention does not preclude two-tier arbitration in any way.

164. In conclusion, as long as the overall process can be regarded as arbitration (which in the authors' view would be the case for a properly designed ITI), no issue related to the presence of a built-in appeal would arise under the NYC.

#### F. THE COMPOSITION AND STRUCTURE OF THE ITI

165. The paper has already touched upon the ITI's composition on several occasions. Conceptually, it is important to distinguish the method by which the members are to become part of the new adjudicative body, i.e. the election process, from the way those elected members are appointed or assigned to a panel to decide a dispute.

166. Starting with the election of the members of the ITI, several considerations must come into play. First, speaking of a multilateral tribunal, it is important to provide for an election procedure acceptable to the greatest number of States while preserving the workability of the ITI. In other words, while every State will not have "its" member on the ITI, the composition should nevertheless be acceptable to all States joining the system. One could thus contemplate entrusting the election to a body that is representative of the international community as a whole,<sup>312</sup> so in particular the U.N. General Assembly. In that sense the election would then resemble that of the ICJ judges.<sup>313</sup>

167. This said, one should mention in this respect the risk that such an election system may become affected by political considerations. This would constitute a step back from the often-praised depoliticization of investment arbitration, one facet of which is the decision-makers' distance from politics. In this connection, it would also seem important that the selection process be transparent and susceptible of being clearly monitored by the various constituencies. Keeping in mind the criticism towards the alleged democratic and transparency deficit of investor-State arbitration, solutions avoiding to the greatest extent possible any opacities in the selection process should

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<sup>310</sup> UNCITRAL, *Guide on the New York Convention*, No. 25 sub Article I; Born (2014), pp. 2926 and the mentioned authorities, see also 3610 and 3615 f. and the mentioned authorities; Christoph Liebscher (2012), Article V(1)(e), in Reinmar Wolff (ed.), *The New York Convention: A Commentary*, Beck, Hart & Nomos, pp. 356-379, p. 361, para. 363. Kaufmann-Kohler & Rigozzi (2015), p. 528, fn. 667. See also Savage & Gaillard (1999), p. 973, and references.

<sup>311</sup> See UN (1958c), *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Conference on International Commercial Arbitration, Summary Record, 7<sup>th</sup> Meeting, UN Doc. E/CONF.26/SR.17 (12 September 1958), p. 3.

<sup>312</sup> See Stephan W. Schill (2015b), *Das TTIP-Gericht: Keimzelle oder Stolperstein für echte Multilateralisierung des internationalen Investitionsrechts?*, VerfBlog, 25 November 2015, available at <http://verfassungsblog.de/das-ttip-gericht-keimzelle-oder-stolperstein-fuer-echte-multilateralisierung-des-internationalen-investitionsrechts/> (last consulted on 4 May 2016).

<sup>313</sup> Schill (2015b).

be favored. Indeed, transparency in the process would also reduce the risks for politicization.

168. Furthermore, one can ask whether it is desirable that only States participate in the election process or whether investors should also have a say.<sup>314</sup> Without reintroducing the system of party appointment of arbitrators, which is currently considered objectionable, a consultation of business organizations, i.e. organizations representative of investor interests,<sup>315</sup> may have its advantages.<sup>316</sup> Indeed, it would mitigate the risk of shifting from the current model that resembles commercial arbitration to the other extreme, that is to an interstate paradigm. This shift would neglect the fact that investor-State dispute settlement is asymmetric, i.e. the disputes are between an investor and a State and not between two States.<sup>317</sup>

169. Such a solution would also strengthen the view that the dispute settlement body meets the characteristics of arbitration and must be treated as such especially for purposes of enforcement.<sup>318</sup>

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<sup>314</sup> Opponents to the very idea of a permanent body have raised the objection of a lack of investor participation. See Koorosh Ameli et al. (2016), p. 60; González García (2015), pp. 424–436; Tams (2006), pp. 36 and 47; Zuleta (2015), pp. 411 and 422.

<sup>315</sup> One may also envisage a consultation of arbitral institutions, as they have valuable insight into the performance of decision-makers. In respect of investment disputes, this applies primarily to ICSID and PCA. Such consultations would serve more the purpose of ensuring expertise than to give a say to the investor-claimants in the election process.

<sup>316</sup> Interestingly, during the preparatory works of the ICSID Convention, Aron Broches suggested a similar consultation mechanism for the designations of the individuals to serve on the Panels of Conciliators and of Arbitrators. See Aron Broches' "Working Paper in the Form of a Draft Convention for the Resolution of Disputes between States and Nationals of Other States", dated 5 June 1962, reprinted in Antonio R. Parra (2012), *The History of the ICSID Convention*, Oxford University Press, Appendix I, Article II Section 17(1), (envisaging that Contracting States would be required, before making their designations, to "seek such advice as they may deem appropriate from their highest courts of justice, schools of law, bar associations and such commercial, industrial and financial organizations and shall be considered representative of the professions they embrace").

<sup>317</sup> The authors recognize that human rights courts which are composed of judges elected exclusively by States also handle asymmetric disputes.

<sup>318</sup> In theory, it would also protect the award against non-enforcement because of an "imbalance" in the constitution of the tribunal. Domestic courts have on some occasions been seized with challenges to arbitration agreements, in which one party enjoyed a disproportionate advantage in the process of appointment of the tribunal. See generally Born, pp. 1643 et seq., 1659 et seq., 1747 et seq. and 3526. Courts in several countries have held that none of the parties should "play a preponderant role [...] in the process of appointment of the arbitral tribunal" (ATF 76 I 87, Swiss Supreme Court, Decision of 21 June 1950, p. 90 as translated in Kaufmann-Kohler & Rigozzi (2015), p. 74, para. 2.51), or "have a preponderant influence on the composition of the list" (Kaufmann-Kohler & Rigozzi (2015), p. 75, para. 2.51, with regard to *Larissa Lazutina & Olga Danilova v CIO, FIS & CAS*, ATF 129 III 445, Swiss Supreme Court, Decision of 27 May 2003, p. 458 that each party shall have the opportunity to choose an arbitrator with as much freedom as its opponent); *Société Russanglia v. Société Delom*, Paris Court of Appeal, Decision of 7 October 1999, published in *Revue de l'arbitrage* (2000), No. 2, pp. 288 et seq. See also *Dutco v. BKMI and Siemens*, French Court of Cassation, Decision of 1 January 7 1992, published in *Yearbook Commercial Arbitration*, Vol. XV (1992), pp. 124 et seq. (where the French Court of Cassation found that parties have a right to equal treatment with regard to the appointment procedure and that such right cannot be waived before the dispute has arisen); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, U.S., District Court of

170. Further issues to be determined in this context are the term of a member's office (with the possibility of re-election) and the number of members of the ITI. With regard to the first aspect, a shorter term of office accompanied by the possibility of re-election would enable States (possibly in consultation with business organizations) to confirm sitting members with a good performance record, while excluding those with which they are dissatisfied. On the other hand, a longer non-renewable mandate would shield members from the possible (conscious or unconscious) pressure deriving from the desire to be re-elected and would thus strengthen their actual and perceived independence.<sup>319</sup> With regard to the number of ITI members, this may in part depend on whether preference is given to a smaller body with standing members in a permanent setting or to a "roster" of members in a semi-permanent arrangement, which is discussed next. The number is likely to be larger in the second.

171. Turning now to the second aspect, i.e. the assignment of the individual disputes to the elected members, two different models can be envisaged once the individuals have been elected to the ITI through one of the previously discussed methods. Under a first model, the elected members would constitute a "roster", from which the disputing parties could select the individuals to constitute the tribunal or panel. Similarly to the consultation with business organizations at the election stage, and perhaps even more forcefully, this solution would reinforce the view that the dispute resolution body fulfils the characteristics of arbitration, especially for enforcement purposes. It would also certainly find the favor of investor-claimants able to keep at least some margin in the choice of a decision-maker and may also find some sympathy in those States attached to the same idea. Yet, it would address the criticism towards party-appointment in a more limited measure.<sup>320</sup> In fact, it is to be expected that both claimants and

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Massachusetts, Decision of 26 January 1998, 995 F. Supp. 190, p. 208 (holding that "[w]here arbitrators are not appointed by a neutral party, such as the AAA, both parties must have an equal right to participate in the appointment process"). For a recent example in the context of sports arbitration, see *Pechstein v. International Skating Union*, Oberlandesgericht Munich, Decision of 15 January 2015, OLG München U 1110/14 Kart. (where the court considered that, through their influence on the composition of the ICAS, the sports federations exercise a considerable influence on the composition of the list of CAS arbitrators, resulting in an "abuse of dominant position" and in the structural imbalance of CAS arbitration in favor of the sports federations and to the detriment of athletes).

In practice, in the ITI context, an "imbalance" objection could be raised by an investor resisting the enforcement of an unfavorable award, but would be unlikely to succeed as the investor would be deemed to have freely and knowingly submitted to the dispute settlement mechanism when filing its claim.

<sup>319</sup> See Ruth Mackenzie, Kate Malleson, Penny Martin & Philippe Sands (2010), *Selecting International Judges: Principle, Process, and Politics*, Oxford University Press, pp. 120-122; Daniel Terris, Cesare P.R. Romano & Leigh Swigart (2007), *The International Judge. An Introduction to the Men and Women who Decide the World's Cases*, Oxford University Press, pp. 154-159, esp. 155-156. The European Court of Human Rights, for instance, moved from a 6-year renewable term to a non-renewable 9-year term in 2010, with the entry into force of Protocol No. 14. See Council of Europe (2004), *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention Strasbourg*, para. 50 ("The judges' terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality [...]").

<sup>320</sup> See *supra* at II.D and III.B.

respondents would pick those members whom they perceive as best “representing” their interests within the tribunal. This may incentivize polarization with members tempted to adopt extreme positions in order to “profile” themselves for future re-appointments.

172. Second, the alternative would be that of a standing-tribunal model, where the disputing parties have no say in the appointment of the panel hearing their dispute (save of course for the opportunity to challenge a member, which should in any event be provided). Under this scenario, it would likely fall on the President of the ITI to constitute individual panels or divisions for each specific dispute. The CETA and EU-Vietnam FTA both follow this approach.<sup>321</sup>

173. While details will need to be worked out later, two further aspects should already be flagged here. First, panel members must of course be impartial. Among other requirements ensuring independence and impartiality, consideration should be given to possible nationality restrictions of ITI members in relation to disputes in which one of the disputing parties is either his/her State or a national thereof. Rules on nationality of decision-makers in international courts and tribunals are quite diverse.<sup>322</sup> For example, the ICSID Convention contains certain restrictions on nationality of arbitrators as well as of *ad hoc* committee members.<sup>323</sup> In the WTO dispute settlement system, while panels may not include nationals of a State party to the dispute (unless the disputing parties agree otherwise),<sup>324</sup> there is no prohibition against AB members sitting on cases involving the State of which they are nationals.<sup>325</sup>

174. Admittedly, bonds of nationality appear less of a concern for an adjudicator’s impartiality or independence today than they may have been in the past. In fact, especially in international commercial arbitration, the continuous validity of nationality rules for arbitrators’ appointments is sometimes questioned. That said, the authors of this paper are of the view that, on balance, it would be wise that the ITI Statute include rules prohibiting ITI members to sit on cases involving their State of nationality (or an investor of the same nationality as the ITI member). This is because many investment disputes, unlike most commercial disputes, involve issues of public interest and sometimes of high political sensitivity (a State’s default on sovereign bonds; decisions to pursue a nuclear-free agenda; policies in the framework of renewable energies; measures for the preservation of public health; disputes involving fundamental rights,

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<sup>321</sup> CETA, Articles 8.27.7 and 8.28.5; EU-Vietnam FTA, Articles 12(7) and 13(9).

<sup>322</sup> See generally Tom Dannenbaum (2012), *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed*, Cornell International Law Journal, Vol. 45(1), pp. 77–184.

<sup>323</sup> See ICSID Convention, Articles 38, 39 and 52(3).

<sup>324</sup> DSU, Article 8(3).

<sup>325</sup> McRae (2010), p. 375. See also Peter Van den Bossche (2005), *The making of the ‘World Trade Court’: the origins and development of the Appellate Body of the World Trade Organization*, in Rufus Yerxa & Bruce Wilson (eds.), *Key Issues in WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, pp. 63-79, esp. 70 (noting that “[w]hile Appellate Body divisions often comprised members with the nationality of the appellant or appellee, and in some appeals such a member even presided over the division, there has been no criticism of national bias”).

such as access to water, to name just these). In those types of disputes, an adjudicator who is a national of the respondent State may find him/herself under a certain psychological, if not actual political, pressure, when making decisions. While many international “judges” would feel absolutely impartial also vis-à-vis their State of nationality, temptations of “judicial nationalism” may and do occur.<sup>326</sup> It thus appears preferable to remove a possible obstacle to the perception of the dispute resolution process as truly independent and impartial from all interests at stake. By contrast, in the contrary solution where each disputing party has a national on the panel (which in any event would be difficult to achieve in a truly multilateral setting, unless one were to introduce a mechanism akin to the ICJ judges *ad hoc*) and only the president is neutral, the outcome most often rests ultimately with the president only. This tends to concentrate a significant amount of power in one individual and is hardly compatible with the collegiality of a well-functioning decision-making body. This deficiency is even worse if there is an appeal and the appeal replicates this concentration of power.

175. Second, thought should be given to the ideal number of members on a panel. This is particularly important if there is no appeal and, if there is an appeal, for the composition of the appellate body itself.<sup>327</sup> The 2010 UNCITRAL Arbitration Rules provide for instance for a tribunal composed of three members, unless the disputing parties agree otherwise.<sup>328</sup> Under the ICSID Convention, a tribunal must always consist of a sole arbitrator or any uneven number of arbitrators as the parties may agree or, failing such agreement, of three arbitrators.<sup>329</sup> The current investor-State arbitration practice is indeed for three-member tribunals. Interestingly, most international courts as well as the highest national courts decide in larger compositions. One could object that the impact of decisions in investor-State disputes do not rise to the level of the one of these courts. This may well depend on the dispute. However, investor-State tribunals do pass judgment on the conduct of States and, for this very reason already, their decisions inevitably carry weight. So for instance, one counts 15 to 17 judges at the ICJ;<sup>330</sup> chambers of 7 or 17 judges at the European Court of Human Rights;<sup>331</sup> chambers of 3, 5 or 15 at the European Court of Justice;<sup>332</sup> chambers of 3 or the full tribunal of 9 arbitrators at the Iran-U.S. Claims Tribunal (the latter for important issues including when the resolution of an issue might result in inconsistent decisions or awards). The WTO AB, composed of seven members, sits in formations of three, but exchanges views on cases among all members and benefits from strong institutional support in the preparation of the decisions.<sup>333</sup> As for national courts, one can cite the

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<sup>326</sup> Eric Posner & Miguel de Figueiredo (2005), *Is the International Court of Justice Biased?*, *The Journal of Legal Studies*, Vol. 34(2), pp. 599–630, 600 et seq.

<sup>327</sup> See *supra* at V.D.3 (discussing the possibility of a built-in appeal).

<sup>328</sup> UNCITRAL Rules (2010), Article 7(1).

<sup>329</sup> ICSID Convention, Article 37(2).

<sup>330</sup> Statute of the ICJ, Articles 3(1) and 31(3).

<sup>331</sup> ECHR, Article 26(1).

<sup>332</sup> Protocol No. 3 on the Statute of the Court of Justice of the European Union, Annex to the TFEU, OJ C 326, 26 October 2012, Article 16.

<sup>333</sup> See DSU, Article 17; Working procedures for appellate review, Rule 4.

U.S. Supreme Court with 9 justices,<sup>334</sup> or the German *Bundesgerichtshof*,<sup>335</sup> the French *Cour de Cassation*<sup>336</sup> and the Swiss Federal Tribunal<sup>337</sup> which all generally sit in formations of 5 judges. This recurrent number of five is probably no coincidence. Although not entirely uncontroverted, studies by psychologists and sociologists on group dynamics and decision-making tend to show that five is a good possibly even the ideal number. In smaller groups of two or three, individuals are less efficient because they feel more exposed. In larger groups, the process is more cumbersome and individual members tend to be less engaged.<sup>338</sup>

176. A final issue of practical significance is worth mentioning: a multilateral ITI will need an institutional structure, which will entail certain costs. The experience of the WTO shows that both the panels and the AB do not operate in a vacuum but are assisted by a strong Secretariat, whose role is recognized in the Dispute Settlement Understanding itself.<sup>339</sup> The Secretariat provides, *inter alia*, legal and administrative

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<sup>334</sup> Judiciary Act of 1869, 16 Stat. 44, 10 April 1869.

<sup>335</sup> Judicature Act (*Gerichtsverfassungsgesetz*), BGBl. I S. 1077, 9 May 1975, § 139(1).

<sup>336</sup> Code of Judicial Organization, R431–5.

<sup>337</sup> Federal Supreme Court Act, SR/RS 173.110, Article 20(2) (where a judge so asks, where the case raises a fundamental legal issue, or in certain other specific situations - otherwise in formations of 3 judges (Article 20(1))).

<sup>338</sup> See for instance Philip E. Slater (1958), *Contrasting Correlates of Group Size*, *Sociometry*, Vol. 21 (2), pp. 129–139, 131 et seq.; J. Richard Hackman and Neil Vidmar (1970), *Effects of Size and Task Type on Group Performance and Member Reactions*, *Sociometry*, Vol. 33(1), pp. 37–54, 48 et seq.; L. L. Cummings, George P. Huber & Eugene Arendt (1974), *Effects of Size and Spatial Arrangements on Group Decision Making*, *The Academy of Management Journal*, Vol. 17(3), pp. 460–475, generally but esp. 473. See also Edwin J. Thomas & Clinton F. Fink (1963), *Effects of group size*, *Psychological Bulletin*, Vol. 60(4), pp. 371–384, generally but esp. 383; Albert B. Kao & Iain D. Couzin (2014), *Decision accuracy in complex environments is often maximized by small group sizes*, *Proceedings of the Royal Society B*, Vol. 281(1784); Philip Yetton & Preston Bottger (1983), *The relationships among group size, member ability, social decision schemes, and performance*, *Organizational Behavior and Human Decision Processes*, Vol. 32(2), pp. 145–159, generally, but esp. 157 et seq.; Brian Mullen, Cynthia Symons, Li-Tze Hu & Eduardo Salas (1989), *Group size, leadership behavior, and subordinate satisfaction*, *Journal of General Psychology*, Vol. 116(2), pp. 155–170, 157 and ref., 164; The Wharton School (2006), *Is Your Team Too Big? Too Small? What's the Right Number?*, Knowledge@Wharton, University of Pennsylvania, 14 June 2006, available at (last consulted on 9 May 2016): <http://knowledge.wharton.upenn.edu/article/is-your-team-too-big-too-small-whats-the-right-number-2/>.

<sup>339</sup> See, e.g., DSU, Articles 17(7) and 27. As of 2014, the overall staff of the WTO Secretariat, composed of the Legal Affairs Division and the Rules Division (assisting panels) and the Appellate Body Secretariat (assisting the AB in the appeals) were 64 individuals (47 lawyers and 17 dispute settlement staff, such as paralegals, secretary to panels, etc.). The AB Secretariat was composed of 12 lawyers and 5 non-lawyers. See the figures mentioned by the WTO Director General, in Roberto Azevêdo (2014), “Azevêdo says success of WTO dispute settlement brings urgent challenges. 26 September 2014”, available at [https://www.wto.org/english/news\\_e/spra\\_e/spra32\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra32_e.htm) (last consulted on 29 May 2016). On the WTO Secretariat, see Marceau (2015); Håkan Nordström (2005), *The World Trade Organization Secretariat in a Changing World*, *Journal of World Trade*, Vol. 39(5), pp. 819–853; Joost Pauwelyn (2015), *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, *American Journal of International Law*, Vol. 109(4), pp. 761–805, 795–796 (comparing the role of the WTO and the ICSID Secretariats); Joseph H. H. Weiler (2001), *The Rule of Lawyers and the Ethos of Diplomats*

support to panels and the AB,<sup>340</sup> functions in a certain sense as the “repository of institutional memory”,<sup>341</sup> and is a “critical element in the success of WTO dispute settlement”.<sup>342</sup> Especially if the ITI members were to sit on a part-time basis, if strict time-limits for the rendering of the final award were to be provided (as is the case in the WTO) and numerous cases were to be referred to them, it appears essential that an appropriate secretariat with expertise in international investment law be put in place, in order to ensure the body’s efficient handling of the disputes.

## G. JURISDICTIONAL ISSUES AND RELATIONSHIP BETWEEN OTHER IIA BODIES

177. Other issues will of course have to be considered once the main features of the design are clarified. This paper merely flags two further aspects of particular relevance. The first is the scope of the ITI’s jurisdiction (*infra* at G.1) and the second is the relationship with other bodies envisaged in IIAs, in particular State-to-State arbitral tribunals and joint committees of the contracting parties (*infra* at G.2).

### 1. Scope of the ITI’s jurisdiction

178. One issue which will require consideration is the delimitation of the ITI’s jurisdiction. Over what kind of disputes will the ITI have adjudicative authority? It is well-known that investor-State arbitration provisions in IIAs differ as to the tribunals’ scope of jurisdiction. As concerns jurisdiction *ratione materiae*, for example, a broad survey of IIAs shows that investor-State tribunals may have jurisdiction (i) over “any” or “all” disputes relating to investments; or (ii) only over alleged violations of the substantive provisions of the treaty itself (NAFTA; the ECT); or (iii) over a plurality of sources, such as an investment authorization, an investment agreement or an alleged breach of the treaty (IIAs based on the U.S. Model BITs of 2004 and 2012); or finally (iv) over disputes relating to the quantum of an expropriation (typically the old Soviet IIAs).<sup>343</sup> Would the ITI be limited to the same jurisdictional scope as an investor-State tribunal?

179. The particularity here is that the ITI dispute settlement mechanism would be “inserted” into an existing IIA (according to the modalities that will be analyzed when dealing with the Opt-in Convention in section VII). Because the ITI would either replace investor-State arbitration with a new mechanism or complement it,<sup>344</sup> the better view

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*Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, Journal of World Trade, Vol. 35(2), pp. 191-207, 205-206.

<sup>340</sup> See DSU, Articles 17(7) and 27.

<sup>341</sup> Weiler (2001), p. 205.

<sup>342</sup> Donald McRae (2010), *The WTO Appellate Body: A Model for an ICSID Appeals Facility?*, Journal of International Dispute Settlement, Vol. 1(2), pp. 371–387, p. 387 (also describing the WTO secretariat’s lawyers as the “repository of knowledge of the procedure and even the substantive law of the WTO Agreements”).

<sup>343</sup> See generally Zachary Douglas (2009), *The International Law of Investment Claims*, Cambridge University Press, pp. 234–235.

<sup>344</sup> As is discussed in section VII.D.2 on the Opt-in Convention, States should be allowed to choose whether the new ITI system is to entirely replace the investor-State arbitration

would be that the jurisdiction of the ITI over disputes arising under a given IIA be defined by that IIA. This solution would be consistent with the general idea that the creation of the ITI would impact underlying IIAs as little as possible (as otherwise the path to the multilateral endeavor is rendered more arduous). That is to say, neither the ITI Statute nor the Opt-in Convention would purport to modify the IIA definitions of disputes subject to settlement, of “investors” and “investments”; or the scope of application *ratione temporis* of the treaty. Thus, all limitations in connection with jurisdiction or procedural/admissibility requirements provided in the IIA would apply in respect of the ITI.

## 2. Relationship with other IIA bodies

180. Many IIAs provide for State-to-State arbitration (a) and some also for joint committees of the contracting parties (b).

### a. State-to-State arbitration

181. Virtually all BITs provide, alongside investor-State arbitration, for State-to-State arbitration for the resolution of disputes between the contracting parties concerning the “interpretation and/or application” of the treaty.<sup>345</sup> How would the ITI interrelate with any such body?<sup>346</sup>

182. One possibility would be to entrust inter-State disputes on the interpretation/application of the IIA to the ITI itself either as sole remedy or alternatively in addition to interstate arbitration. When hearing those disputes, the ITI could then sit in a different and broader composition than when it is hearing investor-State disputes. Such double role for the ITI would strengthen the pursuit of consistency in case law, as IIA provisions would be interpreted by the same body, irrespective of whether they must be applied in an investor-State or a State-to-State dispute.

183. The obvious comparator is, once more, the Iran-U.S. Claims Tribunal, the jurisdiction of which extends to (i) “claims of nationals of the United States against Iran and claims of nationals of Iran against the United States [...]”,<sup>347</sup> (ii) “official claims of the United States and Iran against each other arising out of [certain] contractual arrangements”,<sup>348</sup> and, importantly for these purposes, also to (iii) “any dispute as to

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provisions in existing treaties or to supplement them (such that the claimant has the choice between the existing investor-State arbitration option(s) provided in the IIA and the new ITI).

<sup>345</sup> See generally Potestà (2015), pp. 249-271.

<sup>346</sup> The EU-Vietnam FTA contains an interesting provision addressing the coordination between the settlement of an investor-State dispute under the permanent tribunal and a concurrent submission of a claim to State-to-State dispute settlement. See Article 8.8 (providing that where claims “concerning the same treatment” are brought before the two fora, a division of the tribunal constituted to hear the investor-State dispute shall “take into account proceedings pursuant to [the FTA’s section on State-to-State settlement]” and “[t]o this end, it may also, if it considers necessary, stay its proceedings”).

<sup>347</sup> CSD, Article II(1).

<sup>348</sup> CSD, Article II(2).

the interpretation or performance of any provision of [the General] Declaration”<sup>349</sup> or “[a]ny question concerning the interpretation or application” of the Claims Settlement Declaration.<sup>350</sup> Similarly, both the Arab Investment Court<sup>351</sup> and, in the field of human rights, the European Court of Human Rights<sup>352</sup> are competent both in respect of individual-State complaints and State-to-State disputes.

#### b. **Committees of the Contracting States**

184. Finally, a number of treaties empower joint committees composed of representatives of the Contracting States to issue interpretations of the IIA, which are binding on the investor-State arbitral tribunals constituted under that treaty.<sup>353</sup> Would an interpretation by such a committee bind the ITI? As under general international law treaty parties can always reach subsequent agreements on interpretation,<sup>354</sup> it appears uncontroversial to envisage a continuing role for these committees alongside the existence of the ITI. There would be nothing unusual if the ITI, when applying a particular IIA, were bound by the interpretation given by the States parties to that IIA.<sup>355</sup>

#### H. **CONCLUSIVE REMARKS**

185. Section V has considered the main issues that would need to be addressed in relation to the design of the ITI and the elaboration of the ITI Statute. The main conclusions are summarized in section VIII below.

### **VI. THE DESIGN OF AN APPEAL MECHANISM (AM) FOR INVESTOR-STATE ARBITRAL AWARDS**

#### A. **INTRODUCTION**

186. This section deals with the possibilities and challenges for States to design an AM for awards rendered in investor-State arbitration proceedings.<sup>356</sup> It follows a similar structure as section V on the design of the ITI. In fact, several issues that would arise in

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<sup>349</sup> CSD, Article II(3).

<sup>350</sup> CSD, Article VI(4).

<sup>351</sup> See Unified Agreement, Articles 25–36, and esp. Article 29.

<sup>352</sup> See ECHR, Articles 33–34.

<sup>353</sup> See, e.g., NAFTA, Article 1131(2); U.S. Model BIT (2012), Article 30(3); Canada Model BIT (2004), Article 40(2). See also CETA, Article 8.31.3 and EU-Vietnam FTA, Article 16(4).

<sup>354</sup> Roberts (2014), p. 199.

<sup>355</sup> Different problems may arise out of the modalities (in particular the timing) of such interpretive agreements between the contracting parties. See Gabrielle Kaufmann-Kohler (2011), *Interpretive Powers of the Free Trade Commission and the Rule of Law*, in Emmanuel Gaillard et al. (eds.), *Fifteen Years of NAFTA Chapter 11 Arbitration*, Juris Publishing, 2011) pp. 175–194, 188 et seq.

<sup>356</sup> The mechanics of how such AM is to be integrated into existing IIAs is discussed in section VII dealing with the Opt-in Convention. The relationship between an AM and the ICSID Convention is dealt at VII.B.2. below.

the establishment of the ITI would also arise in connection with the creation of an AM. This section will thus refer to the analysis and proposals made in respect of the ITI where appropriate and only address differences. It starts with the characterization of the AM (VI.B); it then addresses the law governing the proceedings before the AM (VI.C); the interaction with annulment remedies normally available against investor-State arbitral awards (VI.D); questions relating to enforcement (VI.E); specific legal issues to be considered in the design of the AM, such as the definition of the types of awards which are subject to appeal (VI.F); and the composition and structure of the AM (VI.G). Finally, alternative options to an AM are briefly addressed (VI.H).

187. Before turning to the specific attributes of a future AM, the place of an appeal within the architecture of the IIA regime must be recalled. The reform proposals for which this paper provides a possible roadmap are built on the premise that the substantive rules of investment protection will, at least for the time being, remain largely unchanged, and that reforms would target the dispute settlement part of the IIA regime.<sup>357</sup>

188. Like for the ITI, strictly speaking, the AM could only achieve consistency in respect of the particular IIA which the AM is to interpret. This makes such AM different from a body like the WTO AB, which is called to interpret either the same agreement or agreements which are linked in a comprehensive treaty regime under the umbrella of the WTO Agreement.<sup>358</sup> As a result, an equivalent level of coherence in the interpretation of the substantive obligations could not be achieved here. However, it is to be expected that even in the absence of a multilateral regime of substantive investment protection, a single multilateral AM would “develop a body of legally authoritative general principles”<sup>359</sup> which would transcend the single IIA at issue. The AM’s broader “vision” on certain issues (does MFN apply to dispute settlement? what are the limits of fair and equitable treatment (FET) clauses? is an expropriation rendered unlawful by mere lack of payment of compensation?, just to name a few) would likely permeate the IIA regime beyond the specificities of a particular treaty.

189. Because of its very function (a “higher” body reviewing decisions of a “lower” body) and its nature (a standing or at least semi-standing body as opposed to *ad hoc* panels; its continuity beyond the single dispute; the strive for a common purpose and judicial task; a sense of institutional belonging), an AM would naturally endeavor to pursue coherence and consistency *across* separate IIAs. Certainly, it would always be bound to the specific text of the treaty before it and parties would always be free to seek to distinguish their case from previous AM decisions. However, an AM would be able to require *de facto* adherence to its own rulings, since an investor-State tribunal would, even in the absence of a formal rule of *stare decisis*, expect the AM to apply the same principles to any new award that is appealed.

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<sup>357</sup> See *supra* IV.B.

<sup>358</sup> See in particular McRae (2010), pp. 382–387.

<sup>359</sup> Sauvart (2016), p. 29.

## B. CHARACTERIZATION OF THE AM

190. For the same reasons as for the ITI, it is necessary to determine the legal nature of the AM as a threshold issue.<sup>360</sup> However, while the ITI would involve a fundamental change from the usual investment arbitration model, the prospect of creating an AM is less radical. Indeed, the first-tier process unquestionably meets the definition of arbitration (whether under the ICSID Convention, the UNCITRAL Rules, or other arbitral rules).

191. The question here is thus simply whether the addition of a second-tier mechanism for the review of arbitral awards in the form of an appeal<sup>361</sup> would change the nature of the whole process. The answer is clearly in the negative. Indeed, despite the fact that most arbitration regimes exclude the possibility of appeals from awards (and instead only afford dissatisfied parties the limited remedies of annulment and revision), there are nonetheless examples of institutional arbitration regimes which provide for internal appellate review of arbitral awards.<sup>362</sup> Under some national arbitration laws parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration.<sup>363</sup>

192. For these reasons, it can be added that the concerns expressed in the context of the ITI about the constitution method are less acute for an AM.<sup>364</sup> Here the disputing parties appoint the first-tier tribunal. With regard to the possibly different method of constitution of the second-tier body (on which see *infra* at VI.G) it should be noted that where arbitral rules provide for an internal second-tier review process (whether annulment-type or appeal-type), they customarily leave less room for the parties' appointments without these raising issues in connection with the arbitral nature of the process. One can think of the annulment process at ICSID, where the Chairman of the

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<sup>360</sup> See *supra* at V.B.

<sup>361</sup> For the distinction between annulment and appeal, see *supra* at V.D.1.

<sup>362</sup> See Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (2009), Arbitration Appeal Rules (2009); American Arbitration Association (AAA) (2013), Optional Appellate Arbitration Rules; JAMS (2003), Optional Arbitration Appeal Procedure; International Institute for Conflict Prevention & Resolution (CPR) (2015), Arbitration Appeal Procedure; European Court of Arbitration (ECA) (2015), Arbitration Rules, Article 28. In sport-related matters, "[a]n appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned". CAS Code, R47(2), on which see Antonio Rigozzi & Erika Hasler (2013), *Commentary on the CAS Procedural Rules, Article R47 [Appeal]*, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, pp. 982-993. In the commodity sector, see the Grain and Feed Trade Association (GAFTA) (2014), Arbitration Rules No. 125, Articles 10–15 (entitling parties to appeal to an internal "Board of Appeal" within 30 days of a GAFTA award). On internal appellate procedures, see generally Carreteiro (2016).

<sup>363</sup> See, e.g., the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 35, para. 45 (noting, in the context of Article 34 of the UNCITRAL Model Law, that "a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades)."). See also Dutch Arbitration Act (1986, as amended in 2015), Articles 1961(a) to 1061(l) (providing an opt-in set of rules for arbitral appeal).

<sup>364</sup> On the ITI, see *supra* at V.B.

Administrative Council appoints all three *ad hoc* committee members from the Panel of Arbitrators.<sup>365</sup> Further under institutional rules in commercial arbitration which provide for internal appeals, the prerogative to appoint an arbitrator at the appellate level is either entirely taken away from the parties and placed in the hands of the institution,<sup>366</sup> or restricted through list procedures.<sup>367</sup> Thus, for the purposes of characterization of the AM, the choice between an AM based on a roster-model and a standing body appears less relevant than in the context of the ITI.

### C. LAW GOVERNING THE PROCEEDINGS

193. Similar issues as those explored in relation to the ITI<sup>368</sup> would arise in respect of the AM, subject to some peculiarities which are different in ICSID and non-ICSID arbitrations.

194. In non-ICSID arbitrations, one option is that the *lex arbitri* applicable in the AM proceedings be the same as before the first-tier tribunal<sup>369</sup> (subject perhaps to the power of the AM to change the seat in exceptional circumstances). Another option would be to give the appellate tribunal (and/or the parties) the possibility to choose a different seat for the appeal proceedings. This possibility would however create unnecessary procedural complications and be a source of difficulties. A further option to explore could be a completely de-nationalized AM procedure subject only to international law.

195. In ICSID arbitrations, if an AM is provided, it would seem natural that the AM is subject only to international law.

### D. RELATIONSHIP WITH ANNULMENT

196. The relationship with existing annulment remedies would be one of the key aspects to be regulated. Whatever the answer to the question on the law governing the proceedings just discussed, it is only logical that the existence of an appeal excludes any further review, including annulment (whether at the seat or by an ICSID *ad hoc* committee, subject to so-called revision). The reason is that grounds for appeal normally encompass (or should be drafted so as to encompass) the narrower grounds for annulment.<sup>370</sup> If an AM is to review errors of law (or even of fact), there is no reason

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<sup>365</sup> See Article 52(2) of the ICSID Convention.

<sup>366</sup> See, e.g., ECA Arbitration Rules, Article 28(5) (“The Court will appoint all the members of the Appellate Arbitral Tribunal consisting of three arbitrators, without the parties being involved in the least in such appointments [...]”).

<sup>367</sup> See Carreiro (2016), pp. 201–204 (discussing in particular the AAA Optional Appellate Arbitration Rules, the JAMS Optional Arbitration Appeal Procedure, the CPR Arbitration Appeal Procedure, and the ECA Arbitration Rules).

<sup>368</sup> See *supra* V.C.

<sup>369</sup> See, e.g., AAA Optional Appellate Arbitration Rules, Rule A-14 (“Unless all parties and the appeal tribunal agree otherwise, the appeal shall be conducted at the same place of arbitration as the underlying arbitration”).

<sup>370</sup> See also *supra* V.D.3.

why it should not also review excess of jurisdiction or due process violations. Furthermore, keeping the annulment remedy would *de facto* create a three-tier dispute settlement system, which would go against the objectives of finality and efficiency (including cost-efficiency).

197. In an AM subject to a national *lex arbitri*, the AM Statute should therefore provide for a waiver of judicial review in respect of awards rendered by the AM in order to avoid a duplication of remedies. Because not all domestic laws would necessarily recognize such waiver as a valid agreement to exclude the right to seek annulment before their courts, contracting parties should consider passing legislation to this effect. In that context, it should also be provided that the AM (and the first-level tribunal) must be seated in a State which has consented to the AM Statute (either through the Opt-in Convention or by referring to it in a future IIA).<sup>371</sup> Otherwise, in case the seat is situated in a third State, there is a risk that such State would not recognize the waiver of judicial review as valid.

198. In respect of ICSID awards, the AM Statute should similarly exclude any annulment under Article 52 of the ICSID Convention.<sup>372</sup>

#### E. ENFORCEMENT

199. What are the effects of adding an AM layer to the enforcement of an award which has been subject to appeal under the AM? Here, the discussion of the applicability of the NYC to an ITI built-in appeal (*supra* V.E.2.c) would apply *a fortiori*, as there would be no doubt that the process must be seen as arbitration.<sup>373</sup> Thus, a decision on an appealed award (or the appealed award itself) would be enforceable under the NYC.

200. With regard to the enforcement of an appellate decision on an ICSID award, the situation for ICSID contracting parties who are not contracting parties to the Opt-in Convention referring to the AM Statute must be considered. Assuming the Opt-in Convention could be considered as an *inter se* agreement under Article 41 of the VCLT (which is discussed *infra* at VII.B.2), it appears that non-parties to the *inter se* modification would not be bound to apply the special enforcement regime under Article 54 of the ICSID Convention to awards subject to appeal. They would be in a situation similar to that of non-ICSID contracting parties in respect of an ICSID award. Consequently, they would have to enforce the ICSID decision in accordance with the NYC. Alternatively, they might regard the decision as a product of ICSID and apply Article 54 of the ICSID Convention by analogy.

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<sup>371</sup> Certain IIAs provide that the seat be fixed in a contracting party to the treaty. See, e.g., NAFTA, Art. 1130 and Canada Model BIT (2004), Art. 36 (providing that, unless the disputing parties agree otherwise, a tribunal shall hold an arbitration in the territory of a contracting party that is a party to the New York Convention).

<sup>372</sup> Law of treaties issues linked to the interaction between the AM and the ICSID Convention are addressed in section VII.B.2. below.

<sup>373</sup> See also Born (2014), p. 3162 (“[w]here parties agree to internal appellate review, there is no reason not to give full effect to this mechanism. Indeed, this result is required by both the New York Convention and modern arbitration legislation”).

## F. SPECIFIC ISSUES IN THE DESIGN OF THE AM

201. A number of issues will need to be considered in the design of the AM. These include (i) the grounds of appeal and the standard of review; (ii) the effect of the appellate decision; and (iii) the binding nature (*vis-à-vis* whom?) of the decision. In those respects, we refer to the discussion at V.D.3 in the context of the ITI built-in appeal system, which would apply here *mutatis mutandis*.

202. One important aspect would be the determination of the awards subject to appeal. Under the ICSID Convention framework, there is only one “award”, i.e. the final award putting an end to the arbitration. Earlier decisions (such as decisions on jurisdiction or on liability) are incorporated by reference into the final award and are subject to annulment only at the stage of the final award.<sup>374</sup> This is not necessarily the case under other rules and arbitration laws, where it may be possible (and indeed necessary) to challenge preliminary awards as soon as they are issued.<sup>375</sup> The 2004 ICSID discussion paper proposed that, in order to avoid discrepancies of coverage between ICSID and non-ICSID cases, the proposed Appeals Facility Rules could either provide that challenges be in no case made before the issuance of the final award or allow challenges in all cases in respect of interim awards and decisions.<sup>376</sup>

## G. THE COMPOSITION AND STRUCTURE OF THE AM

203. Similarly to the ITI scenario, the composition of the AM should aim at achieving the widest possible adhesion to the AM Statute while ensuring that its working procedures remain manageable. The distinction between the election of individuals to the body and the assignment of members to the single disputes would come up in similar terms as in respect to the ITI (see V.F). However, it has already been noted that the dichotomy between a roster-model and a standing body-model appears less important in the AM scenario.<sup>377</sup> This is because the parties would maintain the right to appoint “their” arbitrators at the first instance level (whether under the ICSID Rules, the UNCITRAL Rules, or any other arbitral rules). At the second level, the individual members of the AM chosen for a specific dispute could either be appointed by an institution,<sup>378</sup> if the AM is placed under the aegis of an institution, or most likely by the President of the AM.

204. Two further points on the choice of the individuals composing the AM should be made. First, rules on incompatibility between the roles of AM member and arbitrator or counsel, especially in arbitrations which may come before the AM, should be

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<sup>374</sup> See ICSID Secretariat (2004), Annex, para. 8.

<sup>375</sup> For example, under the Swiss PILA, partial awards within the meaning of Article 188 must be challenged immediately like final awards, and preliminary awards must be challenged immediately for irregular constitution or erroneous determination on jurisdiction. See Swiss PILA, Articles 188 and 190; Kaufmann-Kohler & Rigozzi (2015), p. 426, para. 8.19.

<sup>376</sup> ICSID Secretariat (2004), Annex, para. 8.

<sup>377</sup> See *supra* at VI.B.

<sup>378</sup> As for example contemplated under ICSID’s proposal. See ICSID Secretariat (2004), Annex, paras 5–6.

considered. In the present scenario, the risk of “issue conflicts”<sup>379</sup> would appear more serious than in “ordinary” circumstances, as a decision by the AM would have broader effect than an “ordinary” arbitral award.

205. Second, like for the ITI, consideration should be given to possible nationality restrictions of AM members in relation to disputes in which one of the disputing parties is either his/her State or a national thereof. Similar observations made above in relation to the ITI members would apply here.<sup>380</sup>

206. Finally, like the ITI, a multilateral AM will need an institutional structure, with a well-functioning secretariat. Here the experience of the WTO AB, which is often discussed as a possible model for the design of an AM for investor-State arbitral awards generally,<sup>381</sup> is particularly noteworthy as far the presence of a strong secretariat is concerned. Again, reference is made to the remarks in relation to the ITI.<sup>382</sup>

#### H. ALTERNATIVE OPTIONS

207. This final section briefly discusses possible alternatives to an AM for investor-State arbitral awards. The description of the advantages and disadvantages of creating an AM will not be repeated here, as they have been previously addressed both in general terms (at II.D and III.B), and more specifically when discussing the option of establishing a built-in appeal within the ITI (at V.D). Similar considerations apply here.

208. In the context of the ITI, we set out three alternative options to a built-in appeal: (i) preliminary rulings; (ii) *en banc* determinations; and (iii) consultation mechanisms.<sup>383</sup> We envisaged that these possibilities would be combined with an additional system of control (preferably annulment) as dissatisfied parties should in any event have the opportunity to challenge an award on grounds that go to the integrity of the process.<sup>384</sup>

209. In the present framework, *en banc* rulings and consultation mechanism are difficult to conceive. This is because the first-tier level of adjudication in this scenario is “traditional” investor-State arbitration, and not a standing or semi-permanent ITI. Thus, there would be no opportunity for *ad hoc* arbitral tribunals to either decide in a broader composition or implement consultation mechanisms with other *ad hoc* tribunals.

210. With regard to the introduction of a preliminary ruling procedure in the AM framework, this possibility could in theory be implemented. However, there would be a serious risk of duplication of proceedings and waste of resources, as the appeal

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<sup>379</sup> On issue conflicts, see generally, International Council for Commercial Arbitration (ICCA) (2016), *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration*, ICCA Reports No. 3.

<sup>380</sup> See *supra* at V.F.

<sup>381</sup> See, amongst many, McRae (2010); Steger (2012); Ngangjoh-Hodu & Ajibo (2015); Lee (2015); Ameli et al. (2016), pp. 43–59. See also ICSID Secretariat (2004), Annex, para. 5.

<sup>382</sup> See the observations made *supra* at V.F in the text and in footnotes 339-342.

<sup>383</sup> See *supra* at V.D.4.

<sup>384</sup> See *supra* at V.D.4.

function would co-exist alongside the referral function. One could of course envisage rules whereby a party would be precluded from appealing an issue of law on which the AM has given a preliminary ruling and only be allowed to seek review as to whether the original tribunal correctly applied the principle of law. However, the application of a preclusion rule of this type is likely to give rise to procedural debates that are best avoided for the sake of efficiency. Moreover, the preclusion would not discard the risk of duplication of proceedings, as there could be a referral for preliminary ruling on one issue and an appeal on others.

## I. CONCLUSIVE REMARKS

211. Section VI has considered the main issues that would need to be addressed in relation to the design of an AM for investor-State arbitral awards and the elaboration of the AM Statute. The main conclusions are summarized in section VIII below.

## VII. THE OPT-IN CONVENTION

### A. INTRODUCTION

212. Section VII of the paper discusses the modalities through which States may extend the ITI/AM dispute settlement options to their existing IIAs. The underlying assumption is that the ITI and AM Statutes provide for the answers to the questions discussed in sections V and VI above and thus define the dispute settlement options chosen by the States. The Opt-in Convention, for its part, extends those options to existing IIAs. In other words, the Opt-in Convention is the instrument by which the Parties to IIAs express their consent to submit disputes arising under their existing IIAs to the ITI/AM.

213. Before delving into the specific aspects that would need to be considered in the drafting of the Opt-in Convention, a few more general considerations need to be made to place the operation of the Convention into the right perspective.

214. As a preliminary matter, it will be recalled that the Opt-in Convention would be a particularly efficient mechanism to implement the reforms discussed in the previous sections, for a number of reasons.<sup>385</sup> First, it would have the same effect as renegotiating the underlying IIAs, while releasing States from the burden to pursue the potentially complex and long amendment procedures. The end result of the reform process would be a multilateral instrument which will co-exist alongside IIAs and supplement their dispute settlement provisions with automatic effect (subject to the Opt-in Convention's own rules). Second, the Opt-in Convention approach targets one discrete issue of IIA reform, i.e. only the treaties' investor-State arbitration provisions. It thus avoids possible controversies on the reform of substantive protection standards for which consensus may be more difficult to achieve. Hence, the non-dispute settlement-related issues of the IIAs would not be affected, and the new dispute

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<sup>385</sup> See *supra* at IV.B.

resolution bodies (whether the ITI or the AM) would apply the existing substantive standards in investment treaties. With respect to dispute settlement-related matters, it should be recalled that the scope of, and requirements for, jurisdiction and admissibility provided in the IIA would also remain unchanged.<sup>386</sup> For instance, an IIA dispute settlement clause limiting the arbitral tribunal's jurisdiction to the quantum of an expropriation or subjecting arbitration to a six-month waiting period would remain so limited and these limitations would apply to the new dispute resolution mechanisms.

215. Moreover, the Opt-in Convention would primarily be aimed at *existing treaties*. Indeed, the extension of the new dispute resolution mechanisms to *future treaties* appears easier to effect, as States may simply refer to the ITI or AM Statutes in their newly concluded treaties, if they so wish.<sup>387</sup>

216. In a similar vein, States would be able to offer their consent to the new dispute resolution mechanism in future national legislation on foreign investment (or amend their existing legislation to reflect the reforms). The ITI/AM Statutes should thus be drafted so as to be susceptible of being referred to in both existing and future IIAs (and legislation). For its part, the Opt-in Convention may specify, for reasons of clarity, that nothing in its text precludes States from incorporating references to the ITI/AM Statutes in the dispute settlement clauses of their future IIAs and national legislation on foreign investment to the extent that they deem it appropriate. In this respect, UNCITRAL may also consider possible work on providing model clauses for future IIAs and legislation on investment.

217. A further general observation is in order on the choice in the Opt-in Convention in favor of either the ITI or the AM or both. While inspired by similar concerns, the ITI and the AM reflect somewhat different philosophies of reform of the IIA dispute resolution regime: through the creation of an AM, investor-State arbitration maintains most of its basic features, while being complemented with an appeal. By contrast, the ITI entails a more radical change from the existing model of investor-State arbitration. One could thus think that when negotiating at the multilateral level States will likely make a choice for one or the other reform path.

218. That said, the two reform initiatives could also be pursued simultaneously. It should of course not be possible to refer the same dispute to both the ITI and arbitration subject to an AM at the same time. However, IIA dispute resolution provisions could refer to both options as alternatives. Concretely, one could imagine a (post-reform) IIA dispute resolution clause in either of these four basic constellations: (i) only investor-State arbitration subject to an AM; (ii) only the ITI; (iii) the ITI *or* investor-State arbitration without an AM (at the choice of the investor); (iv) the ITI *or* investor-State arbitration subject to an AM (at the choice of the investor). States would choose to pursue only one or both options of reforms and to implement one or the other of the four basic constellations as a matter of policy. Depending on the choices made, the

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<sup>386</sup> See *supra*, in relation to the ITI, at V.G.1. The same considerations would apply in respect of an AM for investor-State arbitral awards.

<sup>387</sup> One could also contemplate that the Opt-in Convention cover all treaties, existing and future ones. Without distinction in time, this approach may be one manner to further the uniformity of the new dispute settlement regime.

drafting of the Opt-in Convention would require specific solutions and different levels of specificity. This being so, given that the Opt-in Convention is an instrumental mechanism aimed at extending the reach of the ITI and/or AM Statutes, its general features will not vary considerably based on the option chosen. We will focus on these general features in the following paragraphs, while noting where appropriate any specific issue that would arise in respect of one or the other option. More detailed rules would need to be considered once it is clear which reform initiative (whether the ITI, the AM, or both) States were to decide to embrace.

219. Finally, whatever solution States were to adopt, a matter for consideration is the extent to which the Opt-in Convention should contain elements of flexibility, allowing States to modulate their level of involvement in the new reforms within agreed boundaries. Concretely, States could have the possibility of making reservations or opt-in/opt-out declarations in order to exclude the effect of certain provisions or to choose between pre-determined options. These mechanisms would accommodate specific concerns, for example a State's wish not to abandon investor-State arbitration altogether (while agreeing to provide the ITI as an alternative option) or to exclude certain IIAs from the reform. Options of this kind are likely to enhance the Convention's chances of success.

220. Building on these general observations, this section will first address issues of treaty law arising in the implementation of the Opt-in Convention (VII.B). Thereafter, it will review the concrete application of the new dispute settlement mechanisms under existing IIAs (VII.C) and, next, the mechanisms to ensure the flexibility discussed above (VII.D). Finally, it will examine a few specific issues, in particular the possible operation of most-favored nation (MFN) clauses in underlying IIAs (VII.E).

## **B. TREATY LAW ISSUES**

221. The implementation of the Opt-in Convention raises law of treaties issues which will need to be carefully considered. In particular, two conceptually different questions will arise: (1) the relationship between the Opt-in Convention and existing IIAs; and (2) the relationship between the Opt-in Convention extending the AM for investor-State arbitral awards and the ICSID Convention. They will be addressed in turn.

### **1. Relationship with existing IIAs**

222. At the outset, it should be recalled that the final objective of the exercise that is envisaged here is the implementation of a multilateral instrument aimed at producing changes to the network of existing IIAs. Ultimately, the multilateral instrument (the Opt-in Convention) and the IIAs will co-exist.

223. Precedents for modifying bilateral treaties with a multilateral instrument exist in a number of areas of public international law. A relevant analysis which will be referred to in this chapter is a study prepared by the OECD, entitled "Developing a Multilateral

Instrument to Modify Bilateral Tax Treaties” (the “OECD study”).<sup>388</sup> As the OECD study notes, “there have been a number of situations in which States have adopted multilateral conventions in order to introduce common international rules and standards and thereby harmonise a network of bilateral treaties, for example, in the area of extradition”.<sup>389</sup>

224. The OECD study discusses the possibility to adopt a multilateral instrument to modify the myriad of existing bilateral tax treaties, thus envisaging an exercise similar to the one discussed here. The study is accompanied by an Annex A, which reflects the work of a working group composed of treaty law experts, and provides valuable insight on treaty law issues that will be relevant in this context.<sup>390</sup>

225. Treaty law issues also came up during the drafting of the Mauritius Convention, when UNCITRAL Working Group II addressed the nature of the future Mauritius Convention in relation to existing investment treaties. More specifically, it discussed whether the Convention should be considered as a subsequent or successive treaty creating new obligations or as an amendment of existing treaties.<sup>391</sup> In the first case, the relationship between the Convention and existing treaties would have been subjected to Article 30 of the VCLT. In the second case, it would have been governed by the amendment provisions of each individual existing treaty and to Part IV of the VCLT.<sup>392</sup> The *travaux* record that “[a] great number of delegations were inclined to view the transparency convention as a successive treaty”.<sup>393</sup> The Commission then confirmed that it shared this view.<sup>394</sup>

226. Similarly, there may be a possibility to view the reform of the IIA dispute resolution framework as an amendment of the investor-State dispute resolution provisions in the existing investment treaties. In that case, attention should be given in the Opt-in Convention to provisions on amendment of investment treaties.<sup>395</sup> It should in any event be noted that, even where the underlying IIA contains an amendment clause (setting forth a particular procedure by which the IIA can be amended), that is not necessarily a difficulty. As a leading authority on the law of treaties notes, “[t]he advantage of an amendment clause is that the means by which the amendment is to be done is agreed from the start. But should the means not be suitable, the parties can

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<sup>388</sup> OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.

<sup>389</sup> OECD (2015), p. 31, para. 14.

<sup>390</sup> See OECD (2015), pp. 29 et seq.

<sup>391</sup> UNCITRAL (2013c), paras 17-22; UNCITRAL (2013d), *Settlement of commercial disputes: Application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to existing investment treaties — Draft convention Note by the Secretariat*, Records of the UNCITRAL, 59<sup>th</sup> session, UN Doc. A/CN.9/WG.II/WP.179 (1st August 2013), paras 5-7.

<sup>392</sup> UNCITRAL (2013c), para. 17; UNCITRAL (2013d), para. 7.

<sup>393</sup> UNCITRAL (2013b), para. 5; UNCITRAL (2013c), para. 22.

<sup>394</sup> UN (2014b), *Report of the UNCITRAL – Forty-seventh session*, Official Records of the General Assembly, 69<sup>th</sup> session, Supplement No. 17, UN Doc. A/69/17, para. 25.

<sup>395</sup> For a survey of IIA amendment provisions, see Gordon & Pohl (2015), pp. 32-39.

simply ignore it and amend the treaty in any way they can agree on”.<sup>396</sup> If necessary, further information could be collected from States on domestic procedures that such reforms would trigger at the national level.

227. Alternatively, the relationship between the Opt-in Convention and the existing IIAs could be viewed as one of subsequent treaties having the same subject-matter. This appears indeed the more correct view. It is also consistent with the view held by the Commission in respect of the Mauritius Convention and it reflects the position taken in the OECD study with regard to the development of a multilateral instrument to modify bilateral tax treaties.<sup>397</sup>

228. As a result, in the silence of the Opt-in Convention, the applicable customary international law rules codified in Article 30 of the VCLT would apply. The following situations must be distinguished.

229. On the one hand, in accordance with Article 30(3) of the VCLT, when all the parties to the earlier IIA are also parties to the Opt-in Convention and the rules apply to the same matter, the later-in-time treaty will prevail (*lex posterior derogat legi priori*). Accordingly, previously concluded IIAs would continue to apply only to the extent that their provisions are compatible with those of the later Opt-in Convention.<sup>398</sup> This will mean, for instance, that if both parties to an IIA become parties to the Opt-in Convention, the dispute settlement provisions of the earlier IIA will apply only to the extent that they are compatible with the new framework envisaged in the Opt-in Convention.

230. On the other hand, in accordance with Article 30(4)(b), “[w]hen the parties to the later treaty do not include all the parties to the earlier one [...] as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”.<sup>399</sup> This rule reflects the principle *pacta tertiis nec nocent nec prosunt*, according to which a party to a treaty cannot be affected by an agreement which other parties to the treaty conclude with third States.<sup>400</sup> It means that, as a general rule, if some of the State parties to the earlier IIA do not become party to the Opt-in Convention, the Opt-in Convention will be

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<sup>396</sup> Antony Aust (2013), *Modern Treaty Law and Practice*, 3<sup>rd</sup> ed., Cambridge University Press, pp. 234-235.

<sup>397</sup> See OECD (2015), p. 31, para. 15 (noting that “the term ‘modification’ is better adapted to this project than the term ‘amendment’. There is no need for a formal ‘amendment’ of each one of the existing bilateral tax treaties. Rather, these treaties will be ‘modified’ automatically by the multilateral instrument”). See also *ibid.*, p. 31, para. 18 (“In the silence of the multilateral treaty, the applicable customary rule, codified in Article 30(3) of the VCLT, is that when two rules apply to the same matter, the later in time prevails (*lex posterior derogat legi priori*). Accordingly, earlier (i.e. previously concluded) bilateral treaties would continue to apply only to the extent that their provisions are compatible with those of the later multilateral treaty.”).

<sup>398</sup> See VCLT, Article 30(3) (“When all the parties to the earlier treaty are also parties to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.”).

<sup>399</sup> See VCLT, Article 30(4).

<sup>400</sup> See also VCLT, Article 34 (“A treaty does not create either obligations or rights for a third State without its consent”).

*res inter alios acta* for those non-parties. Thus, the earlier IIA entered into between a State which is a party to the Opt-in Convention and another one that is not will continue to apply with its original dispute settlement framework between those States and their nationals.<sup>401</sup>

231. For example, in a situation where there is a bilateral IIA between A and B and only A is a party to the Opt-in Convention, the IIA AB will not be affected by the Opt-in Convention. Similarly, in case of a multilateral IIA between ABCD and the Opt-in Convention between ABXY, the original multilateral framework in the IIA will continue to apply in the mutual relations between A and C. We will consider in the subsequent section whether, despite the *pacta tertiis* principle, investors from a home State which is not a party to the Opt-in Convention may nonetheless benefit from the new dispute settlement framework set out in the Opt-in Convention.<sup>402</sup>

232. That being said about the general rules provided under Article 30 of the VCLT, it should be noted that these are default rules.<sup>403</sup> It would certainly be preferable to address possible conflicts between the later Opt-in Convention and the earlier IIAs through so-called compatibility or conflict clauses. Not only is “prevention [...] better than cure”,<sup>404</sup> but this appears also essential in the present context, as the main objective of the multilateral instrument is to regulate the relationship between the Opt-in Convention and other treaties.

233. As the OECD study explains, a compatibility or conflict clause has been included “in several other cases in which the provisions of a multilateral instrument have superseded the provisions of an existing network of bilateral treaties, particularly when the subject matter is complex”.<sup>405</sup> The survey of compatibility clauses in multilateral treaties conducted by the OECD is of particular interest, and States will have the benefit of formulations adopted in those treaties.<sup>406</sup> As further noted in the OECD study, “[t]he practice is diverse and there is no standard compatibility clause. [...] The level of precision and the extent of changes made to the bilateral treaties vary”.<sup>407</sup> For example, some multilateral conventions (on extradition, repatriation of minors, etc.), provide that they “supersede” earlier bilateral treaties between contracting parties.<sup>408</sup> In other cases, the provisions of the later multilateral treaty are said to be “included” or “deemed to be included” into earlier bilateral treaties.<sup>409</sup>

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<sup>401</sup> It barely needs noting that the relations between parties to the Opt-in Convention that are not parties to an IIA between themselves would generally not be affected in any manner.

<sup>402</sup> See *infra* section VII.C *sub* constellation (ii).

<sup>403</sup> See Aust (2013), p. 202.

<sup>404</sup> Aust (2013), p. 194.

<sup>405</sup> OECD (2015), p. 32, para. 20.

<sup>406</sup> See in particular OECD (2015), pp. 32 et seq.

<sup>407</sup> OECD (2015), p. 32, para. 23.

<sup>408</sup> See, e.g., European Convention on Extradition, 13 December 1957, CETS No. 024, Article 28 (“*Relations between this Convention and bilateral Agreements*. This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties”); European Convention on the Repatriation of Minors, 28 May 1970, CETS No. 071, Article 27(1) (“Subject to the provisions of paragraphs 3 and 4 of this article, this Convention shall, in respect

234. Similar approaches could be followed here. For example, the Opt-in Convention could provide that the dispute settlement option pursuant to the ITI/AM shall be deemed to be included in the provisions for the resolution of disputes between investors and States in existing IIAs concluded by States parties to the multilateral convention, according to the modalities established in the Opt-in Convention itself. The reference to “provisions for the resolution of disputes between investors and States” must necessarily be in these (or similar) general terms, as the variety of dispute settlement clauses (having different level details, requirements, jurisdictional scope, etc.) does not allow a more precise cross-reference to IIAs.

235. Two further related issues will have to be considered by States when drafting the Opt-in Convention. First, some IIAs may themselves contain compatibility clauses and it is therefore necessary to address the relationship with those clauses. For example, Article 16 of the ECT provides as follows:

“Where two or more Contracting Parties have entered into a prior international agreement, or *enter into a subsequent international agreement*, whose terms in either case concern the subject matter of Part III [Investment Promotion and Protection] or V of this Treaty [Dispute Settlement, including investor-State arbitration],

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) *nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,*

*where any such provision is more favourable to the Investor or Investment.*”<sup>410</sup>

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of the territories to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements between Contracting States governing the repatriation of minors for the reasons specified in Article 2, to the extent that the Contracting States may always avail themselves of the facilities for repatriation provided for in this Convention.”).

<sup>409</sup> See, e.g., International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, 2178 UNTS 197 / 39 ILM 270 / [2002] ATS 23, Article 11 (“1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. [...] 5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.”); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, 1678 UNTS 201 27 / ILM 672 / [1993] ATS 10, Article 11(7) (“1. The offences set forth in article 3 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. [...] 7. With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.”).

<sup>410</sup> ECT, Article 16 (emphasis added).

236. Second, the possible impact of “survival” or “sunset” clauses in IIAs must be considered. These clauses are normally intended to cover the different issue of unilateral termination or denunciation of the treaty,<sup>411</sup> and as such should be of little concern here. However, some survival clauses also apply to mutually agreed modifications or amendments of the treaty, and may provide for transitional arrangements. For example, some BITs concluded by Malaysia provide that “an alteration or modification of [the BIT] shall be done without prejudice to the rights and obligations arising from [the BIT] prior to the date of such alteration or modification until such rights and obligations are fully implemented”.<sup>412</sup>

## 2. The relationship with the ICSID Convention

237. A different treaty law question is the relationship between the Opt-in Convention, in the situation where the underlying reform were to refer to an AM for investor-State arbitral awards,<sup>413</sup> and the ICSID Convention. If the new AM were to apply to arbitrations conducted under any arbitral rules without distinction, what would the relationship be with ICSID Convention arbitration? The question is pertinent because the ICSID Convention rules out any remedy other than those provided in the Convention itself and specifically excludes an appeal in Article 53.<sup>414</sup> Providing for an appeal of an ICSID Convention award would thus be in direct conflict with Article 53, which, unlike other rules in the Convention, is not open to derogation by the parties.<sup>415</sup>

238. Because amending the ICSID Convention requires unanimity of the (now over 150) Contracting States,<sup>416</sup> it would be unrealistic to pursue an amendment process.<sup>417</sup> For those ICSID State parties wishing to embrace the reform, the Opt-in Convention would constitute an *inter se* agreement modifying the ICSID Convention as between those States.<sup>418</sup> This possibility is contemplated under Article 41 of the VCLT, which

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<sup>411</sup> See generally Joachim Pohl (2013), *Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions*, OECD Working Papers on International Investment, 2013/04, OECD Publishing; Tania Voon, Andrew Mitchell & James Munro (2014), *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights*, ICSID Review – Foreign Investment Law Journal, Vol. 29(2), pp. 451-473.

<sup>412</sup> See Gordon and Pohl (2015), p. 33, fn. 73, with references to BITs.

<sup>413</sup> By contrast, the Opt-in Convention which were to refer to the ITI would not create a conflict with the ICSID Convention, as the ITI would operate as an alternative to investor-State arbitration (including ICSID Convention arbitration).

<sup>414</sup> Article 53(1), first sentence, of the ICSID Convention provides that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”.

<sup>415</sup> See Schreuer (2009), p. 1105.

<sup>416</sup> See ICSID Convention, Article 66 (requiring decision by the Administrative Council taken by two-thirds of its members and ratification, acceptance or approval of the amendment by all States parties to the Convention).

<sup>417</sup> See also ICSID Secretariat (2004), paras 3 and Annex, para. 2.

<sup>418</sup> See also ICSID Secretariat (2004), Annex, para. 2.

allows State parties to multilateral treaties to “contract out” of the treaty under certain conditions, and create a special regime applicable in their mutual relations.<sup>419</sup>

239. Assuming that the conditions set out in Article 41 VCLT reflect customary international law,<sup>420</sup> it will have to be considered whether those conditions would be met in case of the introduction of an AM for ICSID awards for certain ICSID Contracting States only.<sup>421</sup>

240. Article 41 VCLT specifies two cumulative substantive conditions under which *inter se* modifications may be regarded as permissible. First, “the modification in question [...] [must] not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations”.<sup>422</sup> Second, the modification in question must “not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole”.<sup>423</sup> In order to assess whether a modification meets these two conditions, one generally distinguishes between treaties imposing obligations which are of a reciprocal nature and treaties imposing obligations which are absolute (also called integral or interdependent).<sup>424</sup> In “reciprocal” treaties, State parties engage with one another in a quasi-bilateral fashion. By contrast “absolute” treaties bind States in an interdependent fashion, the effectiveness of the treaty being dependent on compliance with all its provisions (human rights treaties or disarmament treaties, for instance, qualify as interdependent).<sup>425</sup> More than modifications of reciprocal treaties, *inter se* modifications of interdependent treaties are likely to affect the rights and obligations of other State parties or be incompatible with the object and purpose of the treaty.<sup>426</sup>

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<sup>419</sup> See generally Mark E. Villiger (2009), *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill | Nijhoff, pp. 528-538; Anne Rigaux & Denys Simon (2011), *Article 41, in Olivier Corten & Pierre Klein (eds.), The Vienna Convention on the Law of Treaties. A Commentary*, Oxford University Press, Vol. II, pp. 986-1008.

<sup>420</sup> Technically the Vienna Convention on the Law of Treaties (1969) is not applicable to the ICSID Convention (1965) since under its Article 4, it applies only to treaties concluded after its entry into force. In relation to Article 41, there is some discussion as to whether its content reflects customary international law. According to some authors, “[e]ven if no tribunal and no State has formally pronounced on the customary character of Article 41, constant practice resolutely points in favor of the recognition of such character”. See Rigaux & Simon (2011), pp. 990-4, esp. 994. See also Villiger (2009), p. 538. For a more nuanced position, see Oliver Dörr & Kirsten Schmalenbach (eds.) (2012), *Vienna Convention on the Law of Treaties A Commentary*, Springer, pp. 85 and 722-723.

<sup>421</sup> See ICSID Secretariat (2004), Annex, para. 2.

<sup>422</sup> VCLT, Article 41(1)(b)(i).

<sup>423</sup> VCLT, Article 41(1)(b)(ii).

<sup>424</sup> ILC (2006b), *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), paras 309-313; Rigaux & Simon (2011), pp. 1003-1004; Kerstin Odendahl (2012), *Article 41, in Oliver Dörr & Kirsten Schmalenbach (eds.), pp. 719-727, 725.*

<sup>425</sup> Rigaux & Simon (2011), pp. 1003-1004.

<sup>426</sup> Rigaux & Simon (2011), pp. 1003-1004; ILC (2006b), paras 309-313; Odendahl (2012), p. 725.

241. In the context of the ICSID Convention, it appears possible to “break down” the obligations into bundles of separate bilateral rights and obligations. With regard to the two conditions of Article 41(1)(b) VCLT, the first one requires, according to the ILC, that the modification shall not prejudice the rights of the other parties, or add to their obligations.<sup>427</sup> As a rule, no such prejudice will arise as long as the execution of the modified treaty can be undertaken separately and independently among the different treaty parties.<sup>428</sup> In the context of the contemplated modification of the ICSID Convention, for those State parties that have accepted the AM, the dispute settlement regime between them (and their nationals) would consist of arbitration subject to an AM. In contradistinction, in relations with non-parties to the Opt-in Convention, the “ordinary” ICSID annulment regime will apply. Thus, States which are not parties to the modification and their nationals would not find themselves subject to the AM.

242. Under the second requirement of Article 41(1)(b), one would have to consider whether derogating from the prohibition of appeal in the ICSID Convention would be “incompatible with the effective execution of the object and purpose of the treaty as a whole”.<sup>429</sup> In other words, the new agreement must not run counter to the object and purpose of the original treaty as a whole, in such a way that “the object and purpose of the treaty could no longer be implemented in practice and would remain (at least in part) meaningless”.<sup>430</sup>

243. In this regard, the ICSID Convention provides in Article 1(2) that “[t]he purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention”.<sup>431</sup> Although this provision specifically refers to the purpose of the *Centre*, it may equally be said to inform the object and purpose of the ICSID Convention more generally. The wording of the preamble and references in the Report of the Executive Directors have led to further suggestions that the object and purpose of the Convention include the facilitation of “private international investment”, the promotion of economic development, and the strengthening of partnership between countries.<sup>432</sup> Whether or not all of these goals are

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<sup>427</sup> Villiger (2009), p. 534, citing to ILC (1996), Yearbook 1966, Vol. II, UN Doc. A/CN.4/SER.A/1966/Add.1, p. 235, para. 2.

<sup>428</sup> Villiger (2009), pp. 534-535.

<sup>429</sup> VCLT, Article 41(1)(b)(ii).

<sup>430</sup> Villiger (2009), p. 535.

<sup>431</sup> ICSID Convention, Article 1(2).

<sup>432</sup> See ICSID Convention, preamble (“[c]onsidering the need for international cooperation for economic development, and the role of private international investment therein [...]”); Report of the Executive Directors on the Convention (“9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it. [...] 12. [...] adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.”); Schreuer (2009), pp. 4-5, 116-117, 128, 173, 827.

part of the object and purpose of the Convention, the creation of an appeal in lieu of annulment in derogation to Article 53 does not appear incompatible with any such objectives. As explained before, grounds for appeal normally encompass annulment grounds and thus simply expand the scope of review of an award. Derogating from Article 53 would therefore not frustrate the aims stated in Article 1(2) or in the preamble of the Convention and would thus not be incompatible with the effective execution of the Convention's object and purpose as a whole.

244. For these reasons, one may reasonably conclude that an *inter se* agreement to that effect would fulfil the two substantive requirements set out in Article 41 VCLT.<sup>433</sup> In addition to those, the procedural condition requiring notification to the other ICSID parties of the intention to modify the Convention would also need to be observed.<sup>434</sup>

245. Finally, consistent with the principle that an *inter se* modification remains *res inter alios acta* for the other parties, it appears that those other parties would not be bound to apply the special enforcement regime under Article 54 of the ICSID Convention to awards subject to appeal or decisions of the AM. They would however be in a situation similar to that of non-ICSID contracting parties in respect of an ICSID award. Consequently, they would have to enforce the ICSID decision in accordance with the NYC. Alternatively, they might regard the decision as a product of ICSID and apply Article 54 of the ICSID Convention by analogy.

### C. THE APPLICATION OF THE NEW DISPUTE SETTLEMENT FRAMEWORK IN PRACTICE

246. This section explains how the reformed IIA dispute settlement mechanism would work in practice as a result of the changes produced by the Opt-in Convention. Four constellations can be envisaged.<sup>435</sup>

#### (i) Both the respondent host State and the investor's home State which are parties to an IIA are also parties to the Opt-in Convention.

247. In this scenario, the Opt-in Convention will modify the IIA between the two States, with the consequence that the investor will be able to resort to the new dispute settlement mechanism created as a result of such modification. This appears the least controversial option and the one that is the immediate target of the reform. Further details are given below in respect of sub-options and declarations/reservations which would be open to States (at VII.D).

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<sup>433</sup> For a different view, see Roberto Castro de Figueiredo (2015), *Fragmentation and Harmonization in the ICSID Decision-Making Process*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century*, Brill | Nijhoff, pp. 506-530, p. 522 (arguing that "the modification of provisions that govern the jurisdiction of the Centre seems to be inconsistent with the institutional nature of the ICSID Convention").

<sup>434</sup> See VCLT, Article 41(2).

<sup>435</sup> For the avoidance of doubt, it is repeated that these considerations only apply to existing treaties. If future treaties were to provide for obligations of the investor and host State claims against the investor's breach of these obligations, the dispute resolution clause of the future IIA will have to be tailored accordingly.

248. By contrast, the following three constellations present some complexities.

**(ii) The respondent host State but not the investor's home State is a party to the Opt-in Convention.**

249. Within the transparency framework, Article 2(2) of the Mauritius Convention caters for this scenario through the so-called "unilateral offer of application", whereby the Transparency Rules also apply if the claimant-investor agrees to their application.<sup>436</sup> The question is thus whether this mechanism is transposable to the ITI/AM scenarios. An adoption of this mechanism *tel quel* should be considered with caution. Indeed, the Mauritius Convention deals with the implementation of a transparency standard in the IIA context. Even absent the Convention or the Transparency Rules, the disputing parties could agree to adopt transparency in their arbitration (and even the arbitral tribunal could well do so *proprio motu*), subject only to a contrary mandatory rule in the IIA or in the arbitration law of the seat (in non-ICSID arbitrations). Unlike the clearly defined and narrow (albeit important) procedural matter of transparency, the addition of an ITI or an AM changes the dispute settlement mechanism(s) of the original IIA in a more radical fashion.

250. As discussed above, under the general principle *pacta tertiis*, a State party cannot be affected by a modification to which it has not consented. Here, this principle has two consequences. First, the IIA party which is not a party to the Opt-in Convention could of course not be subject to the new dispute resolution mechanisms without its consent. Second, because the original arbitration options contained in the IIA would remain unaffected, the investor would continue to have the right to resort to those options. The question that arises is whether, in addition to those existing options, an investor would be entitled to resort to the ITI/AM in reliance on a unilateral offer made by the respondent host State through the Opt-in Convention.

251. For instance, in a scenario in which the IIA is a BIT between AB and the Opt-in Convention is between ACXY, could a claimant from B bring a claim against A under the new dispute settlement options provided in the Opt-in Convention? And in a scenario in which the IIA is a multilateral treaty between ABC and the Opt-in Convention is between ABXY, could a claimant from C bring a claim against A under the new dispute settlement regime? In the latter example, the problem is particularly acute, because an investor from C would not be able to bring a dispute against A before the new dispute settlement body, while an investor from B under the same treaty would have this possibility, a difference which may possibly trigger a discrimination argument.<sup>437</sup>

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<sup>436</sup> See *supra* at IV.A.

<sup>437</sup> It could be considered that those investors would attempt to invoke an MFN clause to access the new dispute resolution options. Thus, in the first example (IIA AB and Opt-in Convention ACXY), the claimant investor from B could seek to invoke the MFN clause in the IIA AB, claiming that A treats it less favorably than investors from X (protected by a hypothetical IIA AX). In the second example (IIA ABC and Opt-in Convention ABXY), the claimant investor from C could seek to invoke the MFN in the IIA ABC to resort to the broader dispute settlement options against A. The possible operation of the MFN is discussed *infra* at VII.E.

252. It is suggested that the problem could be viewed in the following terms. If a dispute resolution clause of an existing IIA provides, among other options, for dispute settlement under “any other rules agreed by the disputing parties”, this option could arguably cover the new dispute settlement mechanism. For example, the German model BIT includes among various dispute resolution options “any other form of dispute settlement agreed by the parties to the dispute”.<sup>438</sup> Other treaties are to a similar effect.<sup>439</sup> Although the drafters of these clauses may have had “traditional” arbitral rules in mind,<sup>440</sup> these provisions are very broadly worded (“*any other form of dispute settlement*”) and there would be strong arguments to consider that both the ITI and an AM for investor-State arbitral awards could fall within their scope.

253. Many IIAs do not, however, provide for that option, as their dispute resolution clause is limited to arbitration under named rules (ICSID Convention, ICSID Additional Facility, UNCITRAL, etc.).<sup>441</sup> Yet, even then, an investor may arguably take up the offer made in the Opt-in Convention. At least if one subscribes to the view that, subject to any different IIA language, the substantive obligations provided in the IIA are owed as individual rights directly to qualifying investors (as opposed to being owed on an inter-State basis),<sup>442</sup> then it could be accepted that the investor may enforce those substantive rights in any international forum to which the respondent host State consents (here the ITI/AM). On a more practical level, one does not see why the home State would object to its nationals being able to enforce IIA rights in an additional forum, if its treaty partner so consents. Consistent with the principle *pacta tertiis*, this mechanism would add no burden to the home State, while granting additional procedural rights to its nationals.

254. A question could arise though at the enforcement stage, in the (rare) event that the IIA sets forth a special enforcement regime for arbitral awards. For example, the German model BIT provides that “[t]he award [under any of the arbitration options provided in the BIT, including non-ICSID options] shall be enforced by the Contracting States as a final and absolute ruling under domestic law”.<sup>443</sup> The investor’s home State

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<sup>438</sup> Germany Model BIT (2009), Article 10(2)(5).

<sup>439</sup> See e.g. Austria Model BIT (2008), Article 14(1)(b).

<sup>440</sup> As is clear in other IIAs. See, e.g., U.S. Model BIT (2012), Article 26(3) (“a claimant may submit a claim [...] (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules”); Japan-Uruguay BIT (2015), Article 21.3(d) (“any arbitration in accordance with other arbitration rules”); Burkina-Faso-Canada BIT (2015), Article 25.1.4 (“any other instrument that allows the arbitration procedure to be conducted in accordance with the provisions of this Agreement and that is adopted or applied by the national or regional arbitration centre proposed by the investor, provided that the disputing parties so agree”).

<sup>441</sup> See, e.g., France Model BIT (2006), Article 8; Italy Model BIT (2003), Article X; Russia Model BIT (2002), Article 8(2).

<sup>442</sup> For this controversy, see in particular Douglas (2009), pp. 1-38; Zachary Douglas (2003), *The Hybrid Foundations of Investment Treaty Arbitration*, British Yearbook of International Law, Vol. 74(1), pp. 151-289, esp. 162-164; Kate Parlett (2011), *The Individual in the International Legal System: Continuity and Change in International Law*, Cambridge University Press, pp. 103-120.

<sup>443</sup> See Germany Model BIT (2009), Article 10(3). See also Germany-Congo BIT (2010), Article 9(2)-(3) (providing for several arbitral options at the choice of the investor, including ICSID, ICSID Additional Facility, UNCITRAL, ICC, LCIA and SCC, and adding that “*la sentence*”

would not be bound to enforce the award that results from such a modified dispute settlement framework under the special enforcement regime, because such award is not the product of a dispute settlement process to which it has consented (unless the IIA includes among the options “any other form of dispute settlement”, as in fact the German model BIT does, and one accepts that this covers the ITI/AM). This being so, the home State would have to enforce the award under its “ordinary” enforcement regime (normally, under the New York Convention), for the reasons discussed earlier when dealing with the enforcement of ITI/AM awards.

255. With these considerations and limitations in mind, one can conclude that a careful drafting could achieve the extension of the new dispute settlement mechanism under this constellation. The “unilateral offer to resolve disputes” through the ITI/AM would thus resemble the unilateral offer mechanism envisaged in Article 2(2) of the Mauritius Convention in respect of transparency.

**(iii) The investor’s home State but not the respondent host State is a party to the Opt-in Convention.**

256. For the ITI/AM to apply in such situation, the investor would have to seek the respondent’s State consent. If such consent is given *ad hoc*, then there would seem to be no bar to the application of the ITI/AM, as both States would have consented to the application of the ITI/AM. The difference with the scenario under (i) is that this constellation (iii) does not bring about a modification of the IIA (for all investors falling within the IIA scope). It merely applies the dispute settlement framework to one *specific* dispute. Because of the *ad hoc* nature of the consent provided by the respondent State, it is doubtful whether in this scenario the resulting award could be enforced in that State under the special regime if one is provided under the IIA.

**(iv) Neither the respondent host State nor the investor’s home State are parties to the Opt-in Convention.**

257. If the respondent State were to give its *ad hoc* consent to the submission of a given dispute under the ITI/AM system, then the situation would be similar to the one under constellation (ii) and the considerations made there would apply here *mutatis mutandis*.

258. If States wish to promote the use of the ITI/AM in constellations (iii) and (iv) they could insert a provision in the Opt-in Convention, whereby the Convention is without prejudice to the application of the new dispute settlement mechanisms whenever the disputing parties agree.

**D. MECHANISMS TO ENSURE FLEXIBILITY: RESERVATIONS AND DECLARATIONS**

259. A matter for consideration is the extent to which the Opt-in Convention should contain elements of flexibility allowing States to tailor their level of involvement in the new reforms. Within agreed boundaries, States could thus have the possibility of

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*arbitrale est exécutée par les Parties contractantes comme un jugement national ayant force de chose jugée”).*

making reservations or opt-in/opt-out declarations in order to exclude the effect of certain provisions or to choose between pre-determined options. Policy considerations will guide the choices, such as the degree of uniformity that States seek to achieve in reforming the investor-State dispute resolution system, or the degree of flexibility that they wish to keep. This, in turn, may have an impact on the expected results (for instance, too much flexibility will not permit to achieve the pursued objectives of consistency, etc.).

260. For certainty and in order to prevent that the entire content of the Opt-in Convention be carved out, the list of reservations/declarations should be exhaustive.<sup>444</sup> This section discusses some possible reservations and declarations, being of course noted that additional ones could also be contemplated.

## 1. Reservations

261. With regard to reservations, a useful starting point would be the list of reservations allowed under the Mauritius Convention, which could be considered for adoption here *mutatis mutandis*. They are as follows:

(a) **Exclusion of a specific IIA.**<sup>445</sup> This reservation would entail no particular difficulty. States could thus exclude specific IIAs from the scope of the reforms.

(b) **Exclusion of arbitration under specific arbitration rules.**<sup>446</sup> This reservation would only be relevant for the AM scenario. It could in particular be considered whether through this reservation States could exclude ICSID Convention awards from the application of the AM.

(c) **Exclusion of the “unilateral offer” mechanism described in constellation (ii) above.**<sup>447</sup> If constellation (ii) were covered in the Opt-in Convention, the possibility for a reservation excluding this mechanism could be provided. Thus, a State party to the Opt-in Convention would only agree to apply the new dispute settlement options on the basis of reciprocity, i.e. where its IIA partner (the home State) also agrees.

## 2. Declarations

262. Among others, the following two declarations could be allowed under the Opt-in Convention:

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<sup>444</sup> This was also the approach adopted in the Mauritius Convention (see Article 3(4)).

<sup>445</sup> See Mauritius Convention, Article 3(1)(a) (“A Party may declare that: (a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty”).

<sup>446</sup> See Mauritius Convention, Article 3(1)(b) (“A Party may declare that [...] (b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent”).

<sup>447</sup> See Mauritius Convention, Article 3(1)(c) (“A Party may declare that [...] (c) Article 2(2) [unilateral offer of application] shall not apply in investor-State arbitration in which it is a respondent”).

**(a) Declaration as to whether the new dispute settlement framework is to apply exclusively or alternatively**

263. States could be allowed to make a declaration as to whether the new dispute resolution mechanism provides an additional choice (supplementing existing investor-State provisions in their IIAs) or as an exclusive choice (entirely replacing such provisions). This declaration would apply in particular for the ITI, although it could possibly also work for the AM.<sup>448</sup> This possibility would take into account a possible wish not to abandon investor-State arbitration entirely and would entail a gradual transition from investor-State arbitration to the ITI. By contrast, in the absence of such possibility, the Opt-in Convention's options would automatically replace the existing dispute resolution procedures. This would more rapidly and radically transform the system.

264. Taking inspiration from existing examples,<sup>449</sup> the following system could be contemplated:

- When signing, ratifying or acceding to the Opt-in Convention (or at any time thereafter), a State shall be free to choose, by means of a written declaration, whether the new dispute settlement option of the ITI would apply *in replacement* of or *in addition* to existing investor-State arbitration options in its IIAs.
- A default rule should be provided in case a State fails to make such a declaration. For example, it could be provided that a State party which does not make a declaration will be deemed to have opted for the new dispute settlement framework as additional option.<sup>450</sup>
- If the declarations of two IIA Contracting States “match” or concur, that concurrence would provide the solution under the relevant IIA (whether a bilateral or multilateral treaty).<sup>451</sup> For instance, if both A and B have declared that they select the ITI as the exclusive forum, then in the IIA AB, the ITI will be the exclusive forum (similarly, if both have declared that they wish to retain it as additional forum, then such IIA will have both investor-State arbitration and ITI, at the choice of the investor). In the event that the result of the matching declarations is ITI plus investor-State arbitration, a fork-in-the-road clause in the

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<sup>448</sup> For reasons of simplicity and because this possibility is more likely to be adopted for the ITI, the following paragraphs refer only to the ITI. However, the same mechanism could also be adopted in relation to the AM *mutatis mutandis*. Thus, under the Opt-in Convention, States could be allowed to choose investor-State arbitration either with or without AM. If under an IIA the investor were to have the two alternatives, its request for arbitration would have to specify which of the two mechanisms it chooses.

<sup>449</sup> See in particular Article 287 of the United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 3 / [1994] ATS 31 / 21 ILM 1261.

<sup>450</sup> See e.g. UNCLOS, Article 287(3) (“A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII”).

<sup>451</sup> See e.g. UNCLOS, Article 287(4) (“If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree”).

Opt-in Convention should prevent the use of both, in order to avoid the proliferation of proceedings with the well-known ensuing drawbacks.

- The Opt-in Convention would need to provide a default solution for the event that two declarations do not match.<sup>452</sup> For example, it could be established that, if Contracting Parties have made different declarations, a dispute may be submitted to existing dispute settlement rules or the new rules *in alternative* (i.e. the ITI would be an additional and not the exclusive forum).<sup>453</sup> Such an approach would favor the solution that departs least from the current framework and may likely enhance the reform's success. Indeed, States which are not entirely ready to abandon investor-State arbitration would know that, without their consent, their investors could not be deprived from existing ISDS options. The opposite solution providing that, in case of non-matching declarations, the ITI prevails as exclusive forum, is of course also conceivable, but it is likely to be more controversial.

#### (b) Declaration in connection with State-to-State arbitration

265. It was mentioned earlier<sup>454</sup> that inter-State disputes on the interpretation and/or application of the IIA may be entrusted to the ITI, either as sole forum or alternatively in addition to interstate arbitration provided under IIAs. Again, States could choose to make this possibility the subject of an opt-in or of an opt-out. Similar considerations as those under (2)(a) on default rules and matching would apply *mutatis mutandis*.

### E. FINAL ISSUES

#### 1. The possibility of an “MFN-bar”

266. As a final matter, States could consider whether there should be room for limitations to the operation of MFN clauses on the application of the new dispute resolution mechanisms. The issue was discussed during the preparatory works of the Mauritius Convention,<sup>455</sup> as a result of which the Convention includes the following provision:

*“Most favoured nation provision in an investment treaty.*

The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the

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<sup>452</sup> See e.g. UNCLOS, Article 287(5) (“If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree”).

<sup>453</sup> Provisions should also be drafted to say what happens in case a new declaration is made or a declaration is revoked.

<sup>454</sup> See *supra* at V.G.2.

<sup>455</sup> See in particular UNCITRAL (2014), *Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session*, Records of the UNCITRAL, 47<sup>th</sup> session, UN Doc. A/CN.9/799 (13 February 2014), paras. 40-46, 88-96.

application of the UNCITRAL Rules on Transparency under this Convention”.<sup>456</sup>

267. The application of MFN treatment to procedural matters is a contentious issue in investment arbitration and the jurisprudence is divided as to whether a claimant may invoke the MFN clause contained in an IIA in order to “import” better procedural treatment from another IIA. The discussion that follows does not purport to take a position on the topic, but addresses the matter in the same spirit as was done in relation to the Mauritius Convention.

268. One could think of various hypotheticals. For instance, one could imagine one IIA between AB, another one between AC, and the Opt-in Convention between ACXY. In the context of the Opt-in Convention, both A and C have made declarations that the ITI is the exclusive mechanism under their treaties. As a result, in the IIA AC, the ITI is the exclusive forum for the resolution of investor-State disputes. By contrast, the IIA AB is not affected by the reform as B is not a party to the Opt-in Convention. In proceedings against A under the IIA AC, can an investor from C invoke the MFN clause contained in the IIA AB to import the “better” treatment, i.e. investor-State arbitration, provided under the IIA AB? If the Opt-in Convention were to include an “MFN-bar” similar to Article 1(5) to the Mauritius Convention, such limitation would be opposable to C and its nationals, as both A and C are parties to the Opt-in Convention as well as of the underlying IIA (thus, they agree that the MFN provision in their treaty must be interpreted in a certain way). The claimant from C could thus not invoke the MFN to seek to avoid the application of the new dispute resolution options under the Opt-in Convention.

269. In other scenarios, the application of an MFN-bar would be less clear. For instance, in one of the hypotheticals referred to when discussing constellation (ii) above (IIA between ABC and the Opt-in Convention between ABXY), the question was asked whether a national of C could bring a claim against A under the new dispute resolution options.<sup>457</sup> If the possibility of a unilateral offer discussed above were excluded, then the claimant investor from C could seek to invoke the MFN in the IIA ABC to resort to the broader dispute settlement options against A. Here, however, it is doubtful whether any MFN-bar in the Opt-in Convention akin to Article 1(5) of Mauritius Convention could be opposed to State C and its nationals, as C is not a party to the Opt-in Convention.

270. In other words, it could be argued that any MFN-bar in the Opt-in Convention could affect the scope of the MFN in the underlying IIA only in the relations between parties to the Opt-in Convention *inter se*, but not in relations to third States (and their nationals). One could thus argue that the right of the claimant of State C to rely on the MFN clause in the underlying IIA is not affected by any provision to the contrary in the Opt-in Convention.<sup>458</sup> However, one could also consider that when purporting to claim

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<sup>456</sup> Mauritius Convention, Article 1(5).

<sup>457</sup> See *supra* at VII.D.

<sup>458</sup> A similar problem was already considered during the debates leading to the adoption of the Mauritius Convention. See UNCITRAL (2014), para. 41 (“A view was expressed that paragraph (3), which provided that a claimant could neither avoid nor invoke the provisions of the

under the new dispute settlement regime extended through the Opt-in Convention, the investor is bound to take the new framework with its limitations. Thus, if the new framework specifies that it will not apply in case of invocation by way of MFN, the investor would be barred from using the MFN to obtain more beneficial procedural treatment. One could say that an MFN-bar in the Opt-in Convention expresses that such Convention “does not wish to be applied” in this circumstance or, in other words, that the scope of application of the Convention does not cover this situation.

## 2. Clarity of the rules

271. Finally, given the changes in the rules, it will be important to ensure that the modifications to the IIA network are clear. It should be easy to understand for investors and States alike what options are available to them as a result of a State’s ratification, reservations, and opt-in/opt-out declarations.

272. One can imagine ways to ensure that modifications are clear and easily accessible. For instance, an Opt-in Convention prepared by UNCITRAL and adopted by the UN General Assembly would mean that a publicly available list of ratifications, reservations and declarations would be made available by the UN Treaty Section. All the IIAs affected could also be listed, as is currently done by UNCITRAL in relation to IIAs that refer to the Transparency Rules.<sup>459</sup>

## F. CONCLUSIVE REMARKS

273. Section VII has considered the main issues that would need to be considered in drafting the Opt-in Convention. The main conclusions are summarized in section VIII below.

## VIII. CONCLUSIVE REMARKS

274. This research paper has sought to analyze whether the Mauritius Convention could provide a useful model for broader reform of the investor-State arbitration framework. To this end, it has proposed a possible roadmap that could be followed if States were to decide to pursue a reform initiative aimed at replacing or supplementing the existing IIA investor-State arbitration regime with permanent dispute resolution bodies. It has presented such possible reform plan against the backdrop of the increasing criticism to the investor-State arbitration system and the growing demands for changes.<sup>460</sup> Building on existing proposals for reform and incipient attempts to

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transparency convention on the basis of an MFN clause, should be deleted, because [...] including such a provision would not prevent MFN clauses from being invoked when the party attempting to invoke such a clause was from a State or a regional economic integration organization *not party to the transparency convention.*” (emphasis added)).

<sup>459</sup> See

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Rules\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html) (last visited on 30 May 2016).

<sup>460</sup> See *supra* at II.

substitute the current procedural IIA framework with new dispute resolution mechanisms,<sup>461</sup> it has presented a reform plan developed on three main blocks:

- a. The design of an ITI;<sup>462</sup>
- b. The design of an AM for investor-State arbitral awards;<sup>463</sup>
- c. The establishment of a multilateral instrument (the Opt-in Convention) to extend those new dispute resolution options to States' existing IIAs.

275. In so doing, it has proposed to follow an approach similar to the one pursued in respect of the Transparency Rules and the Mauritius Convention, where first the "substantive" transparency rules were drafted and subsequently a multilateral treaty was elaborated to extend those rules to existing IIAs.<sup>464</sup> In that vein, the paper has first analyzed the main challenges that would be faced when designing the ITI and the AM respectively. For that purpose, it has set out the principal options available to States when setting up those dispute settlement bodies.<sup>465</sup> Next, it has addressed the legal issues to be considered in drafting the Opt-in Convention, which would be aimed at extending the new dispute resolution options to the existing network of IIAs.<sup>466</sup>

276. The main pillars of the reform initiative reviewed in this paper can be summarized as follows.<sup>467</sup> *First*, what is envisaged is a truly multilateral dispute settlement system, resulting in the creation of one single ITI potentially competent to resolve investment disputes concerning as many States as would opt into it, and/or in the creation of one single AM potentially competent to serve as appellate tribunal for investor-State arbitral awards across all States' IIAs. A multilateral framework of this kind can in fact be expected to counter more effectively the consistency concerns that are raised in relation to the current investor-State arbitration system. *Second*, the reform initiative is highly targeted, in that it is directed at one discrete issue of IIA reform, i.e. the treaties' investor-State arbitration provisions. It thus avoids possible controversies on the reform of substantive protection standards for which consensus may be more difficult to achieve. *Third*, the mechanism centered around the multilateral instrument of the Opt-in Convention effectively releases States from the burden of pursuing the potentially complex and long amendment procedures set out in the existing 3,000 IIAs.

277. The following paragraphs recap the main issues which the paper has considered in the design of the ITI (1), of the AM (2), and in the possible adoption of the Opt-in Convention (3). With regard to the design of the ITI and the AM, the authors wish to emphasize that the paper has concerned itself with the main architectural and institutional challenges and possibilities to be considered in the establishment of such

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<sup>461</sup> See *supra* at III.

<sup>462</sup> See *supra* at V.

<sup>463</sup> See *supra* at VI.

<sup>464</sup> See *supra* at IV.A.

<sup>465</sup> See *supra* at V and VI.

<sup>466</sup> See *supra* at VII.

<sup>467</sup> See *supra* at VI.B and VII.A.

bodies. More detailed procedural features will need to be addressed by States if and when drawing up the ITI and AM Statutes or, depending on the type of rule in question, by the dispute resolution bodies themselves through “Rules of the ITI/AM”.

#### A. THE INTERNATIONAL TRIBUNAL FOR INVESTMENTS (ITI)

278. The move from the *ad hoc* system of investor-State arbitration to a permanent (or at least semi-permanent) ITI would raise a number of issues, which section V has analyzed. A threshold question concerns the characterization of the new dispute resolution body, i.e. whether the ITI will qualify as “arbitration” or whether it will be in the nature of an international court. The answer to this question is determinative of a number of important design features and has key consequences.<sup>468</sup> The paper has thus reviewed the features which are normally said to be characteristic of arbitration and their possible impact on the design of the ITI.<sup>469</sup>

279. A related aspect is that of the law governing the proceedings. It has been seen that ITI proceedings could either be subject to a national *lex arbitri* or entirely self-contained (as to the procedure). Choices in this respect would also be determinative of further design features.<sup>470</sup>

280. Next, the paper has considered possible options with regard to the available systems of control against ITI decisions or awards.<sup>471</sup> Here, States may opt between a form of review that is only concerned with the integrity of the process (i.e., an annulment-type system) or one that extends also to the correctness of the decision-making (in which case an appeal-type system would be chosen). For both instances, the paper has considered the main issues and possibilities.<sup>472</sup> It has noted that the beneficial effects of a two-tier system with an appeal rather than with an annulment will have to be balanced against the possible drawbacks. In this respect, the paper has also explored alternative options which would be available to States, namely preliminary rulings, *en banc* determinations and mechanisms for consultation among the adjudicators, which would pursue the same aims of consistency and correctness through less burdensome and heavy means.<sup>473</sup>

281. An essential aspect will be the enforceability of the new dispute resolution body’s decisions/awards, not only in States that have consented to the ITI Statute but also in third States.<sup>474</sup> Enforcement will ensure the ultimate effectiveness of the system and is thus of utmost importance for the entire architectural design of the new body. It is particularly in this context that a characterization of the ITI as arbitration rather than as international court appears relevant. Only in the former case would the ITI’s

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<sup>468</sup> See *supra* at V.B.

<sup>469</sup> See *supra* at V.B.

<sup>470</sup> See *supra* at V.C.

<sup>471</sup> See *supra* V.D.

<sup>472</sup> See *supra* V.D.2 and V.D.3.

<sup>473</sup> See *supra* at V.D.4.

<sup>474</sup> See *supra* at V.E.

decisions/awards benefit from existing international mechanisms of enforcement. In that vein, the paper has discussed possible options to strengthen enforcement in both Contracting States and in third States.

282. The ITI's composition will be equally crucial.<sup>475</sup> The paper has distinguished between the election process by which the members are to become part of the ITI and the way those elected members are appointed or assigned to a panel to decide a dispute. With regard to the former issue, it was discussed, *inter alia*, whether the election process is to be based only on the States' input or whether there should also be room for the consultation of organizations representative of investor interests. In respect of the composition of the individual panels deciding cases, two different systems have been explored, that of a standing body (where the disputing parties have no say in the constitution of the panel) versus that of a "roster", from which the disputing parties could select the individuals. This latter model presents several advantages, including the fact that it would strengthen the view that the dispute resolution body fulfils the characteristics of arbitration, especially for enforcement purposes. In the context of the composition of the panel, issues of nationality and size of the panel have also been discussed.

#### **B. THE APPEAL MECHANISM (AM) FOR INVESTOR-STATE ARBITRAL AWARDS**

283. The reform option which centers around the creation of an AM envisages that investor-State arbitration maintains most of its basic features, while being complemented with an appeal. The presence of an AM essentially addresses demands for greater consistency in the decisions of investor-State arbitral tribunals and legal correctness.

284. The paper navigated the main architectural and institutional issues that would arise in the design of an AM for investor-State arbitral awards, following a similar structure as for the ITI. It has thus dealt with the characterization of the AM;<sup>476</sup> the options available in relation to the determination of law governing the proceedings before the AM;<sup>477</sup> the interaction with annulment remedies against investor-State arbitral awards (whether at the seat or within the ICSID self-contained system);<sup>478</sup> questions relating to enforcement;<sup>479</sup> specific legal issues to be considered in the design of the AM, such as the definition of the types of awards which are subject to appeal;<sup>480</sup> and the composition and structure of the AM.<sup>481</sup> Finally, alternative options to an AM were also briefly addressed.<sup>482</sup>

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<sup>475</sup> See *supra* at V.F.

<sup>476</sup> See *supra* at VI.B.

<sup>477</sup> See *supra* at VI.C.

<sup>478</sup> See *supra* at VI.D.

<sup>479</sup> See *supra* at VI.E.

<sup>480</sup> See *supra* at VI.F.

<sup>481</sup> See *supra* at VI.G.

<sup>482</sup> See *supra* at VI.H.

### C. THE OPT-IN CONVENTION

285. If the reform initiative centered around the ITI and/or the AM for investor-State arbitral awards were to be pursued, the Opt-in Convention would be the instrument by which the Parties to IIAs express their consent to submit disputes arising under their existing IIAs to the new dispute resolution bodies. While the Opt-in Convention would be primarily aimed at the existing IIA network, it would be without prejudice to the possibility that future investment treaties may refer to the new dispute resolution options, as States may deem appropriate.<sup>483</sup>

286. The implementation of the Opt-in Convention would raise law of treaties issues which would need to be carefully considered.<sup>484</sup> The paper has considered both the questions concerning the relationship between the Opt-in Convention and existing IIAs<sup>485</sup> and the relationship between the Opt-in Convention and the ICSID Convention (in the situation where the Opt-in Convention were to extend the AM to ICSID awards).<sup>486</sup>

287. The concrete application of the new dispute resolution options would depend on the investor's home State's and the host State's participation in the Opt-in Convention system.<sup>487</sup> In that context, the paper has in particular examined the prospect of a "unilateral offer of application" of the new dispute resolution bodies by the host State, which would further extend the scope of application of the reforms.<sup>488</sup>

288. The paper has next considered possible mechanisms to ensure elements of flexibility which would allow States to tailor their level of involvement in the new reforms.<sup>489</sup> It has thus examined possible reservations aimed at limiting the Opt-in Convention's scope of application.<sup>490</sup> In addition, declarations could be allowed under the Opt-in Convention to permit States to decide whether the new dispute settlement framework of the ITI and/or AM are to apply exclusively or as an additional alternative to the existing investor-State arbitration options.<sup>491</sup> The presence of such possibility would in particular entail a gradual transition from the existing to the new dispute resolution framework.

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289. In conclusion, the research paper shows that the challenges involved in broader reforms of the investor-State arbitration regime are substantially more complex than the introduction of a transparency standard in investment treaties. At the same time, it also

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<sup>483</sup> See *supra* at VII.A.

<sup>484</sup> See *supra* at VII.B.

<sup>485</sup> See *supra* at VII.B.1.

<sup>486</sup> See *supra* at VII.B.2.

<sup>487</sup> See *supra* at VII.C.

<sup>488</sup> See *supra* at V.C *sub* constellation (ii).

<sup>489</sup> See *supra* at VII.D.

<sup>490</sup> See *supra* at VII.D.1.

<sup>491</sup> See *supra* at VII.D.2.

shows that the Mauritius Convention could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level.

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