

**Shifting Paradigms in Investor-State Arbitration:  
Innovations and Challenges for Multilateralizing the  
Investment Tribunal System  
in CETA & the EU-Vietnam FTA**

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# Canada-EU Comprehensive Economic Trade Agreement (CETA)



- Final, scrubbed text: Feb 2016 → signed in Brussels on 30 Oct 2016

## Joint Interpretative Instrument:

“CETA represents and **radical change** in investment rules and dispute resolution. It lays the **basis for a multilateral effort** to develop further this new approach to investment dispute resolution into a **Multilateral Investment Court** [which]...should be set up **once a minimum critical mass of participants is established, and immediately replace bilateral systems** such as the one in CETA, and be fully **open to accession by any country that subscribes to the principles underlying the Court.**”

## EU-Vietnam FTA

- Latest draft: Feb 2016  
Not yet scrubbed



# EU approach reflects a shift in treaty-drafting practice

Post-2004 treaties:

Lengthier, more complex, precisely drafted treaties

Right to regulate enshrined in preambles, definitions, exceptions to substantive protections (standard of treatment, indirect expropriation, national treatment)

Further guidance to tribunals = richer context for interpretation; reduction of arbitral discretion

Early Generation treaties:

Skeletally drafted, typically very few definitions

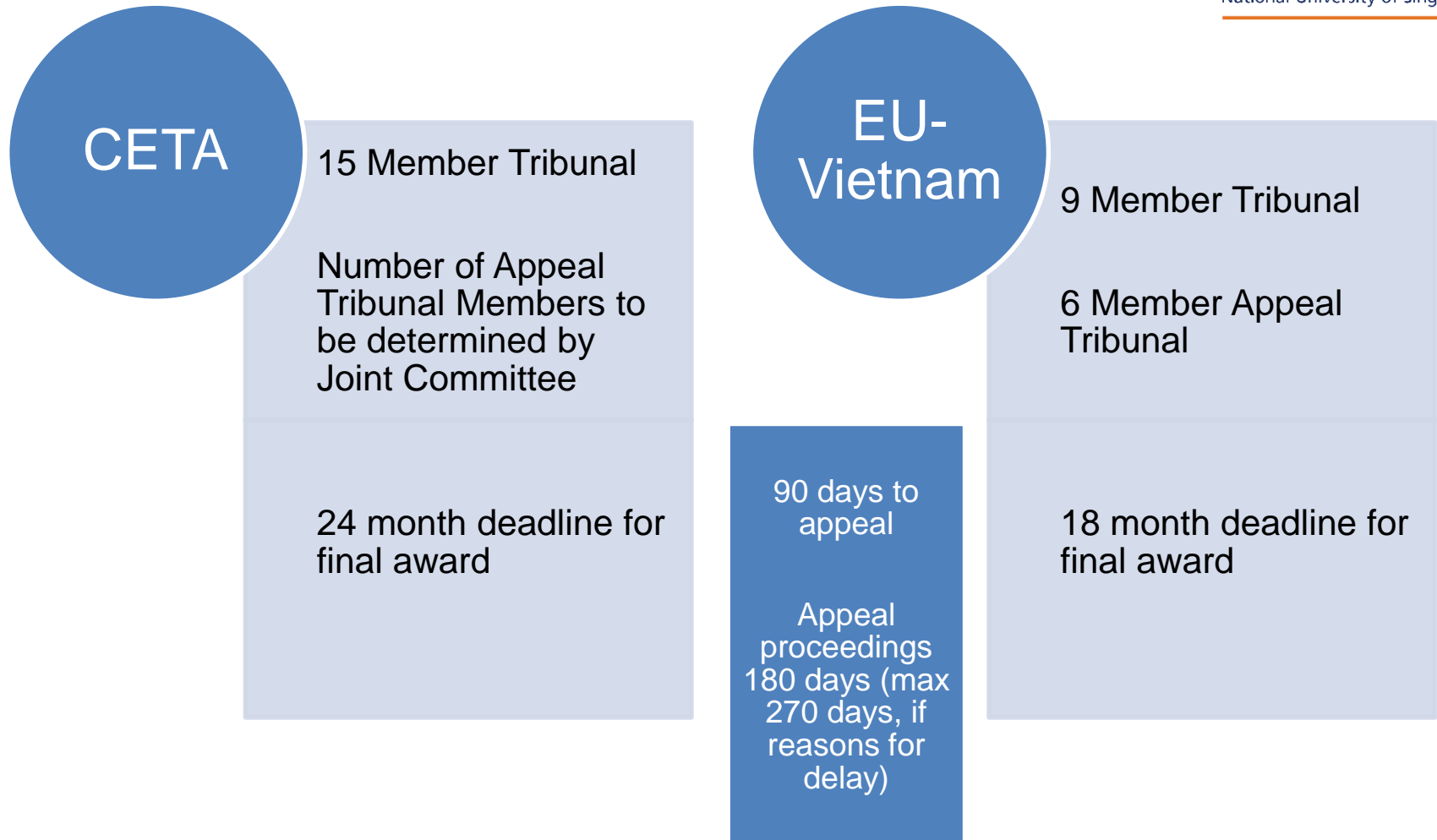
Generally worded substantive obligations

Few or no exclusions

Tribunals acting in good faith and applying the Vienna Convention can easily arrive at divergent interpretations

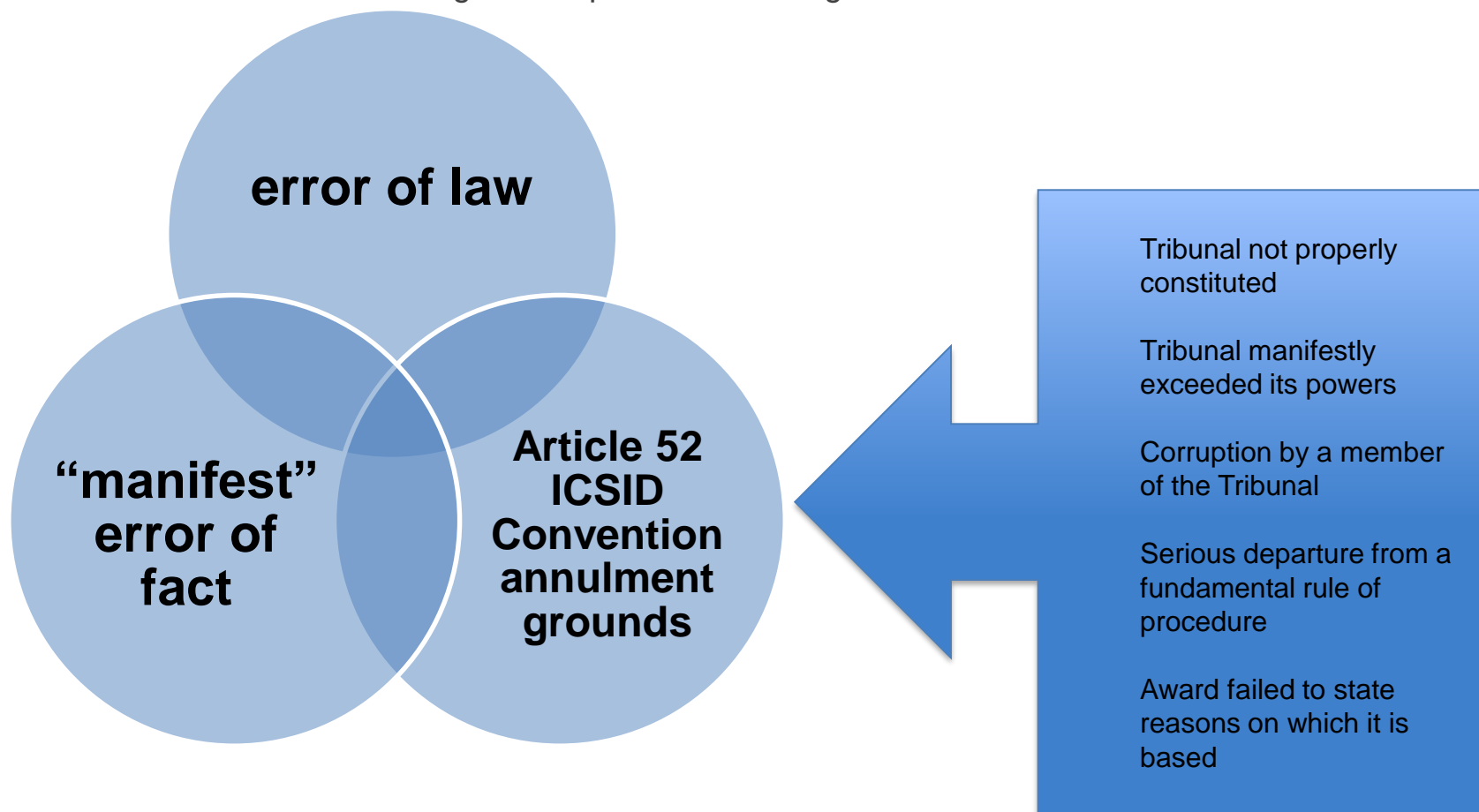


# New two-tier structure



# One – stop – appellate – shop

By encompassing Article 52 annulment grounds, *plus* review for error of law and fact, CETA and EU-Vietnam cover full gamut of possible challenges to arbitral awards



# Pre-selected roster of tribunal members

- CETA: 15 Members appointed by Joint Committee to Tribunal, each sitting for 5-year once renewable term; 7 out of 15 extended for 6 years; 5 Canadian, 5 EU, 5 neutral
- EU-Vietnam: 9 Members, 4-year once renewable term; 5 out of 9 terms extended for 6 years; 3 EU, 3 Vietnam, 3 neutral
- Extension only for 1<sup>st</sup> wave of Members appointed immediately after entry into force, determined randomly; facilitates retention of institutional knowledge and experience with the workings of the Investment Tribunal System
- Each side may appoint up to 3 non-nationals, which will be considered their nationals

# No Double-Hatting

- Members of the Tribunal (and presumably the Appeal Tribunal) are barred from acting as counsel or party-appointed experts during their term
- Not barred from serving as arbitrators in other cases, provided they remain available to hear CETA / EU-Vietnam cases
- Might prevent younger lawyers from becoming investment arbitrators, for most cannot afford to give up their legal practices to become full-time arbitrators until much later in their careers

# Duty to be

**AVAILABLE NOW**

**CIL**

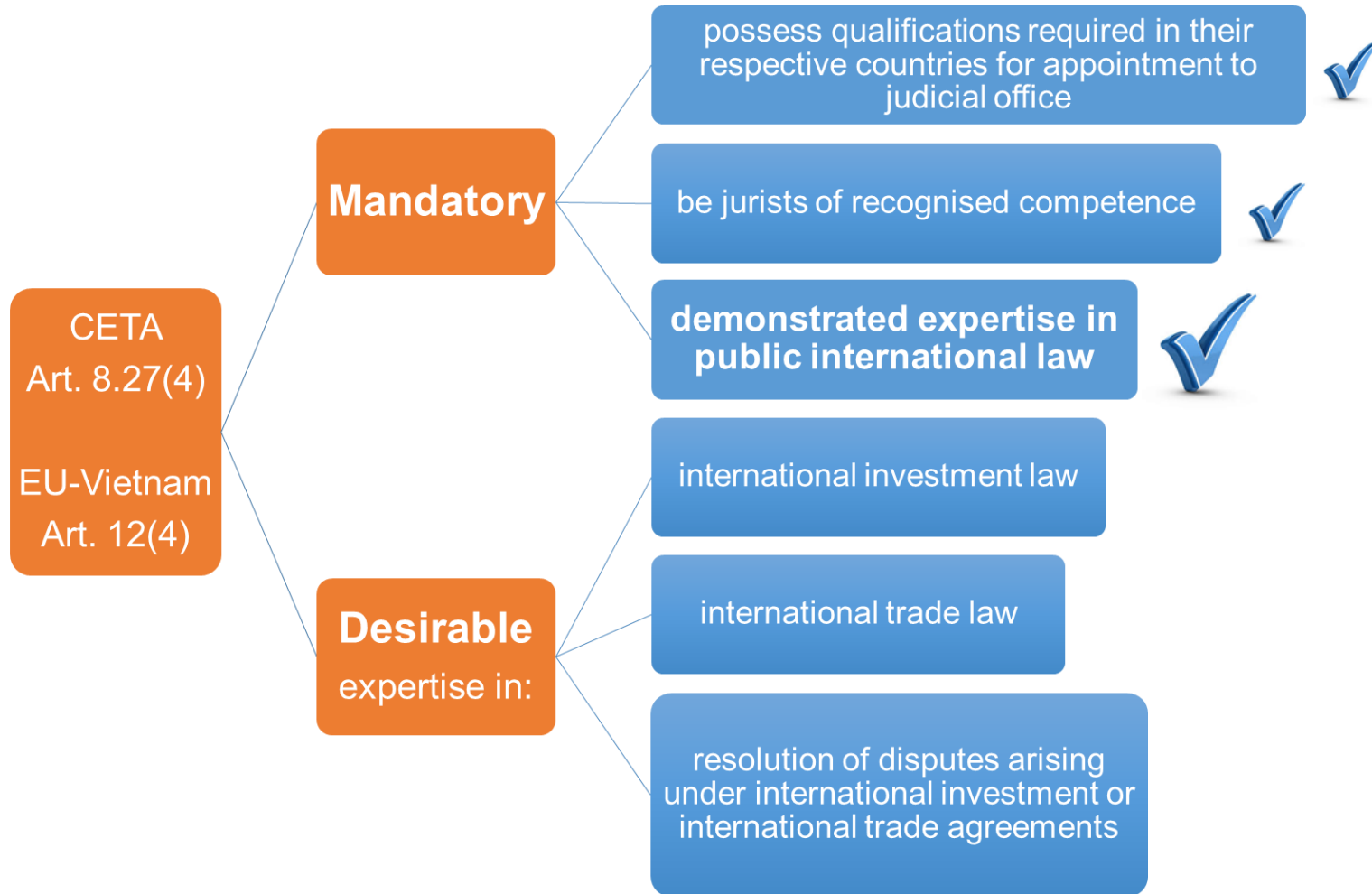
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- Tribunal Members start part-time (on-call basis) on monthly retainer
  - amount unknown (to be determined by Joint Committee)
  - TTIP: European Commission first proposed €2000/month retainer (€7000 for President & Vice-President)
- eventually move to salaried full-time, judge-like tenure once the Tribunal and Appellate Tribunal have full caseload
- Prior to full-time, Members have a duty to remain available at all times and on short notice (but may take on other arbitral appointments)



# Qualification Requirements

## Members Of Tribunal & Appeal Tribunal



# Qualification Requirements

- Novel focus on international law expertise (policy decision by States)
- Might preclude appointment of experienced commercial arbitrators and/or retired national court judges who do not have the required “demonstrated expertise in public international law”
- Considering the high qualifications and degree of expertise required of Members, and the prohibition on counsel work, will the salaries subsequently paid be sufficient to attract high caliber candidates?
- Initial interest amongst potential candidates, but desirability could diminish once the Tribunal has established a full-time case load

# Deadlines

- CETA: 24 months for Final Award
- EU-Vietnam: 18 months to issue Provisional Award (on merits, or jurisdiction if bifurcation); if no appeal within 90 days, becomes Final Award
- Additional time allowed *if* Tribunal gives reasons for delay
- **Deadline is not realistic**
  - aspirational at best, considering general investor-State arbitration experience
  - two rounds of pleadings, together with witness statements, expert reports, requests for document production –plus the time the Tribunal requires to digest the written pleadings and oral evidence in order to formulate its award – will take the case beyond the time limits prescribed under the treaties

# Thank You

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