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The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime

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Abstract

In its recent treaties, the European Union (EU) has established a new model of investor-State dispute settlement (ISDS). The EU's new model entails the replacement of ad hoc arbitration with standing, treaty-based investment tribunals, staffed with judges appointed by the states parties. Awards produced by the EU's new process will be subject to appellate review on issues of law and fact. The EU has indicated that it will pursue a treaty to multilateralize its new tribunal system. This article addresses the compatibility of the EU's new ISDS model with existing instruments of the investment treaty regime: first, whether the introduction of an appellate mechanism or, indeed, the total reworking of ISDS to establish investment tribunals, renders instruments like the ICSID Convention and the New York Convention inapplicable to the modified process of ISDS; second, how the integration of any appellate mechanism with existing international investment treaties might technically be achieved.

Keywords

investor-state dispute settlement – ICSID Convention – European Union – appellate mechanisms – New York convention

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Introduction: A Brief Lay of the Land

Presently there are some 2,650 international investment agreements (IIAs) in force.[1] Virtually all provide for some kind of investor-State arbitration, whether under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), various institutional rules, or by ad hoc arrangement. None contain an appellate mechanism of any kind.

As investor-State dispute practice under these treaties has begun to mature – there are by now some 700 cumulative, known claims[2] – concerns have been raised about the legitimacy of the investment treaty regime and, in particular, about the legitimacy of the process of investor-State arbitration. While the concerns raised about investor-State arbitration are manifold, among the most salient for present purposes are that the legitimacy of the present regime is undermined by the potential for inconsistent (and incorrect) decisions by ad hoc investor-State arbitral tribunals.[3] On this account, the present regime of ad hoc arbitral tribunals, deciding claims under individual IIAs, undermines the legitimacy of the investment treaty regime as a whole by (a) periodically producing awards which are inconsistent with respect to the interpretation and application of similar, if not identical, provisions of other

1 UNCTAD, 'International Investment Agreements Navigator' <http://investmentpolicyhub.org/IIA> accessed 15 August 2016. (The total number of signed IIAs, not necessarily all in force, is higher – approximately 3,300.) The term IIA is used to refer to international treaties which establish investment disciplines on States admitting foreign investment, whether contained in bilateral investment treaties (BITs), investment chapters in bilateral free trade agreements (FTAs), or, regional treaties on investment and/or trade (eg North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA)).

2 UNCTAD, 'Investor-State Dispute Settlement Navigator' <http://investmentpolicyhub.unctad.org/ISDS> accessed on 15 August 2016.

3 Summarizing the state of the debate in its 2015 World Investment Report, the United Nations Conference on Trade and Development (UNCTAD) observed that the concerns raised about the present regime of investor-State arbitration include 'that the current mechanism [i.e., investor-State arbitration] exposes host States to additional legal and financial risks, often unforeseen at the point of entering into the IIA and in circumstances beyond clear-cut infringements on private property, without necessarily bringing any benefits in terms of additional FDI flows; that it grants foreign investors more rights as regards dispute settlement than domestic investors; that it can create the risk of a "regulatory chill" on legitimate government policymaking; that it results in inconsistent arbitral awards; and that it is insufficient in terms of ensuring transparency, selecting independent arbitrators, and guaranteeing due process.' UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 128.

IIAs;[4] (b) by producing awards which are occasionally inconsistent in their interpretation and application of IIAs which have been the subject of prior interpretation and application;[5] and (c) as a result, by producing a piecemeal, horizontal jurisprudence in which it can be difficult for investors and States to form an *ex ante* understanding of what the law is.

These concerns have driven recent proposals for the creation of an appellate mechanism (or mechanisms) for use in investor-State arbitration. Explaining the general rationale for establishing a process to make investor-State arbitral awards subject to appellate review, the United Nations Conference for Trade and Development (UNCTAD) noted in its recent Investment Framework for Sustainable Development, '[a]n appellate mechanism could serve to enhance the predictability of treaty interpretation and improve consistency among arbitral awards. All this could significantly contribute to enhancing the political acceptability of ISDS and the IIA regime as a whole.'[6] In the same vein, UNCTAD's 2015 World Investment Report identified the introduction of an appeals facility as a key potential reform of investor-State dispute settlement (ISDS).[7]

Consideration of the creation of an appellate process for investor-State disputes is not new. Discussion seems to have first arisen among commentators in the early 1990s,[8] while the first discussion at the governmental level occurred during the ultimately unsuccessful negotiations for a Multilateral Agreement on Investment (MAI) in the late 1990s. In the context of the MAI, the establishment of an appellate mechanism had been proposed for both State-to-State and investor-State disputes. The negotiations, however, did not result in an agreement to include an appellate process in the MAI. Rather, the parties

4 See eg *Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) and *Société Générale de Surveillance SA v Philippines*, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004); *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001); ibid, Final Award (14 March 2003); *Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001).

5 Compare *Glamis Gold Ltd v United States*, UNCITRAL/NAFTA, Award (14 May 2009) with *Merrill & Ring Forestry LP v Canada*, UNCITRAL/NAFTA, Award (31 March 2010).

6 UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations 2015) s 6.4, 108.

7 See UNCTAD (n 3) table IV.3 (2), 133.

8 See Elihu Lauterpacht, *Aspects of the Administration of International Justice* (CUP 1991); Stephen Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur Mariott, and VV Veeder (eds), *The Internationalisation of International Arbitration* (Graham & Trotman/Martinus Nijhoff 1995) 115.

agreed in their draft that they would wait to consider whether the MAI should be amended to include an appellate mechanism following a review of practical experience five years after the MAI was to come into force.[9]

With respect to State proposals, the United States was the first State to include the possibility of developing an appellate mechanism in its treaty practice. The 2004 US Model bilateral investment treaty (BIT) included an Annex D in which the parties would agree to consider the establishment of an appellate mechanism for investor-State disputes under the treaty, three years after the treaty came into force.[10] In the event, however, although the 2004 model text served as the basis for a number of treaties, in none of those treaties has the United States established any bilateral appellate bodies or similar mechanisms.[11]

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9 OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), 'Selected Issues on Dispute Settlement' DAFFE/MAI(98)12 (13 March 1998). Delegations broadly agreed with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal where there might have been an error in law. However, concerns were expressed about the delays and costs that an appeal might add to dispute settlement and its departure from the philosophy of fast, inexpensive, one-step arbitration.

10 In 2002, the US Congress passed the US Trade Act of 2002, granting trade promotion authority to the Executive Branch of the US Government and establishing a number of negotiating objectives with respect to foreign investment. See 19 USC § 3802(b)(3). These included the objective of negotiating an appellate mechanism for investment disputes under the United States' free trade agreements: 'providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements...'. As a result of this Act, specific language on an appellate mechanism was inserted into the 2004 US Model BIT and a number of subsequent US FTAs. See eg United States-Singapore Free Trade Agreement (signed 6 May 2003, entered into force 1 January 2004) (Singapore-US FTA) Exchange of Letters on the Possibility of Bilateral Appellate Mechanism; Free Trade Agreement Between the Government of the United States of America and the Government of the Republic of Chile (signed 6 June 2003, entered into force 1 January 2004) (Chile-US FTA) annex 10-H; United States-Morocco Free Trade Agreement (signed 15 June 2004, entered into force 1 January 2006) (US-Morocco FTA) annex D. Indeed, the US-Dominican Republic-Central America Free Trade Agreement went so far as to include text providing for the establishment of a negotiating group and identifying the issues for the negotiators to consider. See Free Trade Agreement between Central America, the Dominican Republic and the United States of America (signed 5 August 2004, entered into force 1 January 2008) (CAFTA) annex 10-F.

11 Indeed, following the 2012 revision of the US Model BIT, US treaties no longer include the text previously contained in Annex D with respect to the possible establishment of a bilateral appellate mechanism. US treaties do, however, contain text addressing the possibility that a multilateral treaty arrangement creating an appellate mechanism might be established in the future. Article 28(10) of the US 2012 Model BIT uses a non-committal

On the multilateral level, discussion of an appellate mechanism for use in investment treaty arbitration has arisen most recently within the International Centre for Settlement of Investment Disputes (ICSID) on the occasion of debates preceding the rule changes of 2006. Similar to ideas suggested in the MAI negotiations and US treaty practice, the ICSID discussions envisioned the establishment of an appellate mechanism as an additive procedure for use with existing investor-State arbitration.[12] In the event, however, the idea to pursue the establishment of an appeals facility under the auspices of ICSID was not carried forward.[13]

Most recently, discussion about the creation of an appeals mechanism for use in ISDS has acquired a new salience through the developing treaty practice of the European Union (EU). In 2015, in the context of its Transatlantic Trade and Investment Partnership (TTIP) negotiations with the United States, the EU laid out a proposal to include not only an appellate mechanism under TTIP, but to reconceive ISDS more fundamentally through the establishment of an 'investment court system' of which an appellate mechanism would be a part.[14] Following the EU's TTIP proposal, where negotiations have not concluded, the new EU investment tribunal model has found its way into the EU-Vietnam FTA, the negotiations for which were concluded in January 2016,[15] and, more recently, into the final text of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), published in February 2016.[16]

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formula regarding the possible future establishment of an appellate mechanism: '[i]n 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 [the investor-State arbitration mechanism] should be subject to that appellate mechanism...'.

12 See ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' Discussion Paper (22 October 2004) Annex 'Possible Features of an ICSID Appeals Facility.'

13 The work of the ICSID Secretariat in 2004 in connection with a possible ICSID Appeals Facility is discussed in further detail infra nn 24–37 and accompanying text.

14 European Union, 'Proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership' (published 12 November 2015) (TTIP Proposal).

15 Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam (draft text published 1 February 2016) (EU-Vietnam FTA).

16 Comprehensive Economic and Trade Agreement Between Canada and the European Union (signed 30 October 2016, not yet in force) (CETA) (text published 29 February 2016).

With the EU's conclusion of these treaties, which illustrate what can be called a 'new EU model' of ISDS, the establishment of an appellate mechanism in ISDS has been presented in concrete terms for the first time.[17] Significantly, the new EU model departs from prior conceptions of appellate mechanisms, in which the appellate mechanism was seen as a possible 'bolt-on' to existing investor-State arbitration.[18] Instead, the EU approach to the inclusion of an appellate mechanism is conceived as part of a full-scale reworking of ISDS through the establishment, inter alia, of a two-tiered investment tribunal system, with State-appointed judges sitting on a standing investment tribunal and a standing appeals tribunal.

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It is not the purpose of this article to assess the policy merits of proposals for appellate review in ISDS. Rather this article is concerned with issues relevant to the legal effectiveness of the processes outlined in such proposals. In particular, this article examines the compatibility of proposed appellate mechanisms with existing instruments of the international investment treaty regime. Two of those instruments, the ICSID Convention and the New York Convention, underpin the entire structure of dispute settlement under IIAs. In order to ensure the effectiveness of ISDS it is not sufficient that the dispute settlement obligations created under an IIA are recognized and enforced by the parties

17 The EU's approach to dispute settlement in its investment treaties has been the subject of a broad range of commentary. For a small selection, see eg Gus Van Harten, 'Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP' Osgoode Legal Studies Research Paper No 16/2016; Sonja Heppner, 'A Critical Appraisal of the Investment Court System Proposed by the European Commission (2016) 19 Irish J Eur L 38; Céline Lévesque, 'The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?' Centre for International Governance Innovation, Paper No 10 (September 2016); August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 J Intl Econ L 761; Stefanie Schacherer, 'TPP, CETA and TTIP Between Innovation and Consolidation – Resolving Investor-State Disputes Under Mega-Regionals' (2016) 7(3) JIDS 628.

18 The US approach, for example, has treated the possibility of an appellate mechanism as a bolt-on to existing modes of investor-State arbitration, not as part of a more general reshaping of ISDS through the establishment of an investment court system as per the EU proposal. See eg 2004 US Model BIT art 28(10) and annex D and 2012 US Model BIT art 28(10). So too did the mechanism outlined by the ICSID Secretariat (n 12).

to that treaty. As with international commercial arbitration, the effectiveness of the regime also depends upon the willingness of third States to the dispute to give recognition and enforcement to agreements to arbitrate and to arbitral awards under the IIA. As a practical matter, therefore, it has been essential to the effectiveness of ISDS that the process of IIA dispute settlement has been compatible with the requirements of existing multilateral instruments, such as the ICSID Convention and the New York Convention, in order to facilitate, internationalize, and regularize the process of investor-State dispute settlement across borders. The open question is whether the introduction of an appellate mechanism or, indeed, a more total reworking of ISDS to establish international investment tribunals in addition to appellate review, might render these essential multilateral instruments inapplicable to the modified process of ISDS. As was flagged by the United States and its co-parties to the Central America-Dominican Republic Free Trade Agreement (CAFTA) over a decade ago, a central issue with respect to the successful development of any appellate mechanism in ISDS is 'the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.'[19]

A second set of issues concerns the compatibility of proposed appellate mechanisms with the 2,650 or so IIAs already in force which do not include an appellate mechanism. Thus far, States have not addressed these treaties in their concrete proposals. Mechanisms for appellate review have only been made applicable to new treaties which have not, as yet, come into force. In more conceptual discussions, however, the possibility of a multilateral appellate mechanism that would be applicable to both existing and future IIAs has been mooted.[20] The issue that arises in this connection is how the integration of a new appellate mechanism with existing IIAs might technically be achieved.

19 CAFTA (n 10) annex 10-F.

20 In the spring of 2015, the EU published a concept paper in which it described the EU's commitment to 'pursue the creation of one permanent [investment] court. This court would apply to multiple agreements and between different trading partners … on the basis of an opt-in system. The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization.' European Union, Directorate General for Trade (DG Trade), Concept Paper, 'TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' (6 May 2015) 11–12 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 15 August 2016. See UNCTAD (n 6) s 6.4, 108 (identifying a similar approach as a reform option for modifying the current institutional set up of ISDS).

This article proceeds as follows. Part 1 provides an overview of modalities of possible mechanisms for appellate review in ISDS with a central focus on the new EU model as contained in the EU's agreements with Canada and Vietnam and its proposal to the United States in the TTIP negotiations. To date, the new EU model is the only concrete proposal for ISDS including an appellate mechanism put forward by any State, and it serves as an important baseline of analysis for the issues examined in the following parts. Part 2 examines the compatibility of an appellate mechanism with arbitration under the ICSID Convention. Part 3 addresses the compatibility of arbitration incorporating an appellate mechanism with the New York Convention. And finally, Part 4 considers the position of existing IIAs and the legal effectiveness of a possible 'opt-in' treaty along the lines of the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a way of facilitating the application of a multilateral appellate mechanism not only to future investment treaties, but to existing treaties as well.

1 An Overview of Modalities of Possible Appellate Mechanisms in Investment Treaty Dispute Settlement

Various modalities for the inclusion of appellate review in ISDS have been mooted over the years. As noted above, for nearly a decade it was US policy to consider the possibility of establishing treaty-specific appellate mechanisms, essentially acting as a 'bolt-on' addition to existing investment treaty arbitral mechanisms in order to review and correct awards under specific treaties.[21] Yet, notwithstanding the inclusion of this language in various US treaties, in no case did it result in the negotiation and implementation of an appellate mechanism.[22]

A second approach has addressed the possibility of a generally applicable multilateral appeals facility designed to review and correct arbitral awards

21 See supra nn 13–14 and accompanying text.

22 See eg Singapore-US FTA (n 10) Exchange of Letters on the Possibility of Bilateral Appellate Mechanism; Chile-US FTA (n 10) annex 10-H; US-Morocco FTA (n 10) annex D. Indeed, CAFTA went so far as to include text providing for the establishment of a negotiating group and identifying the issues for the negotiators to consider. See CAFTA (n 10) annex 10-F. As noted in n 14, following the 2012 revision of the US Model BIT, US treaties no longer include text with respect to the possible establishment of a treaty-specific, bilateral appellate mechanism.

rendered under multiple (if not to say all) existing and future IIAs.[23] In October 2004, the ICSID Secretariat prepared a discussion paper in which it outlined the possible features of such a mechanism, which it termed an 'ICSID Appeals Facility.'[24] As conceived in that paper, the ICSID Appeals Facility would have functioned under a set of optional ICSID Appeals Facility Rules (based on the model of the Additional Facility Rules) adopted by the Administrative Council of the Centre.[25] States would have been able to provide in an IIA or other treaty (including a treaty amending an earlier one) that awards, made in cases covered by the treaty, would be subject to review in accordance with the ICSID Appeals Facility Rules.[26] It was proposed that the Appeals Facility Rules be designed for use in conjunction with ICSID Convention arbitration, ICSID Additional Facility arbitration, arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and any other form of arbitration provided for in IIAs.[27]

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23 This modality is given reference in current US treaty practice in Article 28 of the 2004 and 2012 US Model BITs. Under Article 28(10) of the 2004 US Model, in the event that a multilateral appellate mechanism comes into force, 'the Parties shall strive to reach an agreement that would have such appellate body review awards' rendered pursuant to the US investment treaty. The 2012 revision of the US Model, however, tempers the obligation of the parties with respect to such a prospective multilateral appellate mechanism, providing simply that the parties to the BIT should 'consider' whether arbitral awards rendered under the BIT should be made subject to the new process. 2012 US Model BIT art 28(10). The possible development of a generally applicable, multilateral appellate mechanism is also referred to in the new EU model treaties. Article 15 of the EU-Vietnam investment chapter, for example, contains a commitment that '[t]he 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.' Similar provisions are found in the CETA and the TTIP Proposal. See CETA art 8.29; TTIP Proposal (n 14) art 12.

24 ICSID Secretariat (n 12). The ICSID Secretariat's 2004 Discussion Paper was prepared as part of a general review of the ICSID Regulations and Rules. Antonio R Parra, *The History of ICSID* (OUP 2012) 249. In addition to the possibility of an appellate mechanism, the Discussion Paper also addressed possible changes to preliminary procedures, publication of ICSID awards, third-party participation, disclosure requirements for arbitrators, mediation and training. See ICSID Secretariat (n 12). See also Parra, ibid, 249–53 (describing the background to the preparation of the Discussion Paper). The Secretariat's decision to include these particular areas of possible change in its Discussion Paper appears to have been driven largely by changes made around the same time by the United States in its FTA practice and in its 2004 Model BIT. Parra, ibid, 250.

25 ICSID Secretariat (n 12) annex para 1.

26 ibid.

27 ibid.

As outlined for discussion in the ICSID Secretariat's paper, the Appeals Facility Rules would have provided for the establishment of an Appeals Panel composed of fifteen members of different nationalities elected by the Administrative Council of the Centre on the nomination of the Secretary-General.[28] An appeals tribunal consisting of three members of the Appeal Panel would have been appointed by the Secretary-General to decide each challenge of an award,[29] and appellate proceedings under the Appeals Facility would have been administered by the ICSID Secretariat, regardless of the rules of the original arbitration.[30] An award could be challenged pursuant to the Appeals Facility Rules for a clear error of law or any of the five grounds for annulment found in Article 52 of the ICSID Convention.[31] Serious errors of fact could also serve as a basis for appeal.[32] The appeals tribunal would have had the power to uphold, modify or reverse the challenged award, or annul it in whole or part.[33] Finally, the discussion paper anticipated that the decision by States to have recourse to the Appellate Facility Rules would have been to the exclusion of any other rights of appeal or challenge before national courts or under the ICSID Convention.[34]

In the end, the ideas explored in the ICSID Secretariat's discussion paper did not advance beyond the discussion stage. Although the discussion of an Appeal Facility received considerable attention and generated considerable debate,[35] '[m]any doubted the wisdom of the suggestion; most considered it premature at best.'[36] In May 2005, with interest in a possible appellate mechanism waning, the Secretariat notified the Administrative Council that it would not attempt to establish an appellate mechanism for the foreseeable future.[37]

The third, most recent, and to date most concrete, proposal is the new EU model which involves not only the introduction of appellate review in

28 ibid para 5.

29 ibid para 6.

30 ibid para 12.

31 ibid para 7.

32 ibid.

33 ibid para 9.

34 ibid para 13.

35 See eg contributions collected in Federico Ortino, Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issues*, vol I (BIICL 2005); Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP 2008).

36 Parra (n 24) 253.

37 ibid 254.

individual IIAs but entails a fundamental rethink of investor-State dispute settlement generally by, among other things, replacing ad hoc arbitral tribunals with the establishment of a standing investment tribunal for particular IIAs, staffed by judges or members appointed by the States parties and with an appeals chamber. Appeals are not simply additive to the familiar process of investor-State arbitration, but rather are integrated into the EU's more general overhaul of ISDS. Thus, the system of dispute settlement where States and private parties select arbitrators for the resolution of each particular dispute is replaced by a tribunal system with appointed judges. Those judges, in turn, are made subject to new codes of conduct and new criteria for appointment, again replacing the processes and terms under which arbitrators are currently appointed in investor-State disputes. The following subparts provide brief overviews of the constitution and jurisdiction of the investment tribunals established under the EU's TTIP proposal, the EU-Vietnam FTA, and CETA. Understanding the details of the various iterations of the EU's new model is important as it bears upon the analysis of whether the awards produced by this new process of dispute resolution are compatible with existing multilateral frameworks like the ICSID and New York Conventions.[38]

1.1 *The TTIP Proposal*

The earliest iteration of the EU's new model is its 2015 TTIP proposal to the United States in which an appeals mechanism is conceived as part of a more fundamental reworking of ISDS to include the establishment of an investment tribunal system composed of a permanent Tribunal of First Instance and an Appeal Tribunal.[39] The Tribunal of First Instance is to be made up of fifteen 'Judges' selected by a specialized 'Committee' established under the treaty.[40] The fifteen judges are to be composed of five nationals of Member

38 A fourth approach is also identifiable – the multilateralization of the new EU model, which takes a similar 'root and branch' approach, reconceiving ISDS and replacing the current regime of multiple, ad hoc arbitral tribunals established under individual treaties with a standing international investment tribunal with an appeals chamber competent to hear investment disputes arising under all IIAs. See European Union, DG Trade (n 20) 11–12. See also UNCTAD (n 6) s 6.4, 108 (identifying a similar approach as a reform option for modifying the current institutional set up of ISDS). This possibility is addressed in pt 4.

39 TTIP Proposal (n 14) art 9 and 10.

40 The TTIP Proposal does not contain details about the composition or function of this specialized committee. The institutional arrangements under CETA, however, likely provide a reasonable indication of what the EU has in mind. See infra Section 1.3.

States of the EU, five nationals of the United States, and five nationals of third countries.[41] The term of appointment is for six years (renewable once).[42]

Judges of the Tribunal are required to possess 'the qualifications required in their respective countries for appointment to judicial offices, or be jurists of recognized competence.'[43] Moreover, they are required to have 'demonstrated expertise in public international law.'[44] It is further provided that '[i]t is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.'[45] Beyond these criteria of qualification, Judges of the Tribunal of First Instance (as well as members of the Appeals Tribunal) are also subject to provisions on ethics and a compulsory Code of Conduct.[46]

The proposed Appeal Tribunal is to be composed of six 'Members': two nationals of Member States of the EU, two nationals of the United States, and two nationals of third States. The qualifications required of Members of the Appeal Tribunal are largely the same as for the Tribunal.[47] Members of the Appeal Tribunal are to be appointed for four years (renewable once).[48]

The jurisdiction of the Tribunal of First Instance is limited to deciding claims submitted by covered investors with respect to alleged breaches of the investment chapter of TTIP.[49] Under Article 6, claims by investors may be submitted to the Tribunal of First Instance pursuant to a choice of existing arbitral procedures:

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41 TTIP Proposal (n 14) art 9(2).

42 ibid art 9(5).

43 ibid art 9(4).

44 ibid.

45 ibid.

46 'The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct).' ibid art 13(1).

47 Appeal Tribunal Members are required to possess 'the qualifications required in their respective countries for appointment to *the highest* judicial offices, or be jurists of recognised competence.' ibid art 10(7) (emphasis added).

48 ibid art 10(5).

49 ibid art 9(1). See TTIP Proposal (n 14) art 6.

> 2. A claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:
> (a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);
> (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to paragraph (a) do not apply;
> (c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,
> (d) any other rules agreed by the disputing parties at the request of the claimant. In the event that the claimant proposes a specific set of dispute settlement rules and if, within 30 days of receipt of the proposal, the disputing parties have not agreed in writing on such rules, or the respondent has not replied to the claimant, the claimant may submit a claim under one of the set of rules provided for in paragraphs (a), (b) or (c).

Under the process envisioned in the TTIP proposal, the Tribunal of the First Instance will issue 'awards' with respect to the claims brought before it. All awards of the First Instance Tribunal will be 'provisional,' meaning that they are subject to appeal to the Appeal Tribunal by either disputing party as of right.[50] An award will become final either in the event that neither party pursues an appeal or that an appeal is taken and the appellate process has been completed.[51]

The appellate jurisdiction proposed for the Appeal Tribunal is substantial. The grounds of appeal from a provisional award of the First Instance Tribunal are:

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

50 ibid art 28(7).

51 ibid art 28(6)-(7).

52 ibid art 29(1).

Finally, the TTIP proposal contains provisions with respect to the finality and enforcement of awards. In particular, Article 30 provides:

> 2. Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.
> …
> 5. For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.
> 6. For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).

1.2 *EU-Vietnam FTA*

The EU-Vietnam FTA mirrors the provisions in the TTIP proposal by providing for an investment tribunal system with a Tribunal (Article 12) and a permanent Appeal Tribunal (Article 13). The Tribunal is to be made up of nine 'Members' (rather than the 'Judges' provided for in the TTIP proposal) selected by a Trade Committee:[53] three nationals of Member States of the EU, three nationals of Vietnam, and three nationals of third countries.[54] Members of the Tribunal are subject to similar requirements with respect to qualifications,[55] expertise[56] and are subject to provisions on ethics and a compulsory Code of

53 The available text of the EU-Vietnam FTA does not contain details about the composition or function of this specialized committee. The institutional arrangements under CETA, however, likely provide a reasonable indication of what the EU has in mind. See infra Section 1.3.

54 EU-Vietnam FTA (n 15) art 12(2).

55 Tribunal Members are required to possess 'the qualifications required in their respective countries for appointment to judicial offices, or be jurists of recognized competence.' ibid art 12(4).

56 Tribunal Members are required to have 'demonstrated expertise in public international law' and '[i]t is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.' ibid.

Conduct.[57] In a slight departure from the TTIP proposal, the Members of the Tribunal are appointed for four years (renewable once).[58]

The EU-Vietnam Appeal Tribunal is composed of six Members: two nationals of a Member State of the EU, two nationals of Vietnam, and two nationals of third States. The qualifications required of Members of the Appeal Tribunal are the same as for the Tribunal, except that Appeal Tribunal Members are required to possess 'the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognized competence.'[59] Members of the Appeal Tribunal are also appointed for four years (renewable once)[60] and are subject to provisions on ethics and a compulsory Code of Conduct.[61]

As with the TTIP proposal, the jurisdiction of the EU-Vietnam FTA Tribunal is limited to deciding claims submitted by covered investors with respect to alleged breaches of the investment chapter.[62] Like the TTIP Proposal as well, a claim may be submitted to the Tribunal under one of several identified 'sets of rules on dispute settlement': the ICSID Convention; the Rules of the ICSID Additional Facility (where the conditions for proceedings under the ICSID Convention do not apply); the UNCITRAL Rules; or 'any other rules on agreement of the disputing parties.'[63]

Under Article 27, the Tribunal is to issue 'awards' with respect to the claims brought before it. All awards of the Tribunal are 'provisional,' meaning that they are subject to appeal to the Appeal Tribunal by either disputing party as a matter of right.[64] An award will become final either in the event that neither party pursues an appeal or that an appeal is taken and the appellate process has been completed.[65]

The jurisdiction of the Appeal Tribunal mirrors that outlined in the TTIP proposal. Grounds for appeal from a provisional award of the Tribunal are: (a) error of law; (b) manifest error of fact, including the misapprehension of relevant domestic law; and (c) the grounds for annulment contained

57 EU-Vietnam FTA (n 15) art 14(1), which is the same as art 29(1) of the TTIP Proposal.
58 EU-Vietnam FTA (n 15) art 12(5).
59 ibid art 13(7).
60 ibid art 13(5).
61 ibid art 14(1).
62 TTIP Proposal art 12(1). See EU-Vietnam FTA (n 15) art 7.
63 EU-Vietnam FTA (n 15) art 7(2).
64 ibid art 27(7).
65 ibid art 27(6)-(7).

in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).[66]

Likewise, the EU-Vietnam FTA contains provisions similar to the TTIP proposal with respect to the finality and enforcement of awards. In particular, Article 31 provides:

> 2. Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.
> ...
> 7. For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.
> 8. For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).[67]

1.3 *CETA*

The original, negotiated text of the CETA released on 5 August 2014 did not provide for an investment tribunal system.[68] Rather, the dispute settlement mechanism under the CETA reflected the approach to investor-State arbitration which has underpinned Canadian treaty practice since its 2004 Model Foreign Investment Protection Agreement.[69] When, however, the EU released the 'revised investment chapter and annexes resulting from the fine-tuning of the agreement' on 29 February 2016, the CETA text had been modified to adopt

66 ibid art 28(1).

67 Article 31 of the EU-Vietnam FTA contains transitional provisions with respect to the recognition and enforcement of final awards in respect of dispute where Vietnam is the respondent. See ibid art 31(3)-(4).

68 See European Commission, DG Trade, 'Note for the Attention of the Trade Policy Committee' (5 August 2014) (appending the 1 August 2014 'consolidated version of all chapters, annexes, declarations, understandings as well as side letters' of CETA) <www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf> accessed 24 July 2016.

69 See generally Canada Model Foreign Investment Protection Agreement (2004) art 20–47.

the new EU model.[70] The final CETA text provides for a permanent investment Tribunal (Article 8.27), as well as for an Appellate Tribunal (Article 8.28).

The Tribunal is to be made up of fifteen 'Members,' appointed for five-year terms (renewable once), selected by the CETA Joint Committee:[71] five nationals of a Member State of the European Union, five nationals of Canada, and five nationals of third countries.[72] Members of the Tribunal (and the Appellate Tribunal) are made subject to identically phrased qualification criteria[73] and similar ethics obligations[74] as contained in the EU-Vietnam FTA and the TTIP Proposal.

Like the TTIP Proposal and the EU-Vietnam FTA, the jurisdiction of the CETA Tribunal is limited to deciding claims submitted by covered investors with respect to alleged breaches of the investment chapter.[75] And as with both of those texts, a claim may be submitted to the Tribunal under one of several identified 'sets of rules on dispute settlement,' although the language used is slightly different:

70 European Commission, DG Trade, 'Note for the Attention of the Trade Policy Committee (Services and Investment): CETA – Investment Chapter and Annexes Resulting from Fine-tuning' Trade B2/F2/1129243 (Brussels, 29 February 2016) <www.eduskunta.fi/FI/vaski/Liiteasiakirja/Documents/EDK-2016-AK-55259.pdf> and <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> both accessed 15 August 2016.

71 The CETA Joint Committee is established under Article 26.1. It comprises representatives of the European Union and representatives of Canada and meets annually, or at the request of either party. CETA (n 16) art 26.1(1)-(2). The decision-making of the Joint Committee is consensual: 'The CETA Joint Committee shall make its decisions and recommendations by mutual consent.' ibid art 26.3(3). In the event of the parties' failure to reach agreement, it is not clear how, or whether, decisions can be made. Given that the parties are required to select the members of the Tribunal through the CETA Joint Committee, it may be that if the parties are not able to agree on those members, that the matter would need to be referred to the State-State dispute settlement mechanism (ch 29) or that the Tribunal would not be established.

72 CETA (n 16) art 8.27(2).

73 ibid art 8.27(4), art 8.28(4).

74 ibid art 8.30(1). Unlike the EU-Vietnam FTA, the CETA does not make Members subject to a treaty-specific Code of Conduct. Instead, 'They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted…' ibid art 8.30(1).

75 ibid art 8.27(1). See ibid art 8.23.

> A claim may be submitted under the following rules:
> (a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;
> (b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply;
> (c) the UNCITRAL Arbitration Rules; or
> (d) any other rules on agreement of the disputing parties.[76]

Unlike the TTIP proposal and the EU-Vietnam FTA, the CETA does not provide significant details on the constitution of the Appellate Tribunal, apart from the fact that it is to be appointed by a decision of the CETA Joint Committee.[77] The jurisdiction of the Appellate Tribunal, however, mirrors in sum and substance the broad appellate jurisdiction provided in both the TTIP proposal and the EU-Vietnam FTA.[78] Like both of those texts, the CETA contains provisions with respect to the finality and enforcement of awards, although, again, the CETA text differs somewhat from the others. Article 8.37 provides:

> 2. Subject to paragraph 3, a disputing party shall recognise and comply with an award without delay.[79]
> ...
> 5. A final award issued pursuant to this Section is 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.
> 6. For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention.

1.4 *Summary*

The new EU model entails what may be fairly characterized as a radical revision of ISDS in international investment treaties.[80] The new EU model

76 ibid art 8.23(2) (emphasis added).

77 ibid art 8.28.

78 ibid art 8.28(2).

79 Article 8.37(3) contains provisions on the timing for a disputing party to seek enforcement of an award, which varies depending upon whether the award has been issued 'under the ICSID Convention' or under the ICSID Additional Facility Rules, the UNCITRAL Rules or any other rules to which the parties may have agreed.

80 Indeed, as this article was being finalized, a document between Canada and the EU was leaked on 6 October 2016 in which the EU and Canada self-describe the new EU model for ISDS in the CETA as a 'radical change'. See 'Final Draft, Joint Interpretative Declaration

replaces the IIA regime's familiar ad hoc arbitral structures with standing tribunals established specifically to decide claims and hear appeals under each of the EU's new treaties. State party control over members of the tribunals and appellate bodies is heightened, especially compared to existing investor-State arbitration, as the EU model establishes new requirements for nationality, qualifications, and ethical obligations. Recourse to the EU's new system of ISDS is made exclusive – there is no escaping the system of investment tribunals and appellate bodies under the EU's new model, even though the treaties do continue to allow investors some choice as to the procedural rules which will be used. In this regard, it is noteworthy that the EU model treats arbitration under the ICSID Convention as one of several 'sets of rules on dispute settlement'[81] rather than the singular form of arbitration pursuant to an international convention that it is.[82]

The scope of review provided for under the new EU model is broad, encompassing not only errors of law, but also manifest errors of fact, together with the grounds for annulment found in ICSID Convention Article 52. Moreover, appeal under the EU's treaties is granted as of right; there is no need to apply for leave.

With respect to the awards produced through its new ISDS process, the EU clearly seems concerned that the awards will received positive treatment under existing multilateral dispute settlement conventions, namely the New York Convention and the ICSID Convention. Thus the EU's new model contains provisions which seek to foreclose challenges to the applicability of the ICSID Convention and the New York Convention to EU model awards. These provisions are designed to ensure that third States to the EU's treaties will carry out their obligations under ICSID Convention, Article 54, when presented with an EU model award, and will feel constrained in their ability to refuse recognition and enforcement of such awards under Article V of the New York Convention. The effectiveness of these provisions is assessed in Parts 2 and 3 below.

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on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States' (undated) <http://diepresse.com/mediadb/pdf/cetazusatztext.pdf> accessed 25 April 2017. See also Janyce McGregor, 'Joint Statement Leaks as Canada, EU Try to Overcome Trade Deal Critics' Canadian Broadcasting Corp. News (6 October 2016) <www.cbc.ca/news/politics/ceta-canada-eu-trade-leak-interpretative-declaration-1.3794013> accessed 25 April 2017.

81 EU-Vietnam FTA (n 15) art 7(2).

82 See infra Part 2.

2 The (In)Compatibility of Appellate Mechanisms and the ICSID Convention

As a practical matter, ensuring the applicability of the ICSID Convention to investor-State arbitral awards rendered pursuant to an appellate mechanism may be seen as a central challenge to the efficacy of a proposed system of appellate review. The ICSID Convention establishes a closed system with respect to the review of arbitral awards rendered under it, meaning that no review of ICSID Convention awards is permitted outside of that which is permitted pursuant to the Convention itself. This closed character finds expression in Article 54, which is designed to facilitate the enforcement of ICSID Convention awards by creating obligations not only for the State involved in the actual arbitration but for all ICSID Convention State parties:

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

The closed character of the ICSID regime finds similar expression in Article 53, whereby the review of ICSID Convention awards under the Article 52 annulment procedure is deemed to be exclusive: 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.'[83]

The central issue, therefore, for any treaty-based appellate mechanism seeking to produce awards which come within the scope of the ICSID Convention is whether it is possible to avoid the application of the prohibition on the appellate review of ICSID awards under Article 53, while at the same time ensuring that such appellate-mechanism awards are treated as 'ICSID Convention awards' for the purposes of third-State recognition and enforcement under Article 54.

2.1 *The Incompatibility of Appeals with the ICSID Convention*

Any attempt to harmonize the inclusion of an appellate mechanism with arbitration under the ICSID Convention must confront an unambiguous difficulty: the mechanism of appeal is incompatible with the text of the ICSID

83 See also ICSID Convention art 26: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'

Convention, which expressly excludes it. As noted above, Article 53 of the 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*' (emphasis added). Commenting on Article 53, Schreuer observes that '[t]he Convention provides for its own *self-contained system* of review of awards. The idea that this review system should be exclusive was expressed repeatedly in the course of the Convention's drafting.'[84] Indeed, Schreuer goes further, taking the view that even if the disputing parties wish to agree to special appellate processes for their particular dispute, the ICSID Convention does not permit it: 'Art. 53 is not open to modification by the parties. Therefore, the parties may not agree on appeals procedures beyond those provided by the Convention.'[85]

The ICSID Convention is subject to amendment, of course. But such an amendment requires the consent of all States parties to the Convention,[86] which is not thought to be politically possible at the current time.[87] In the alternative, the question arises whether it may be possible for groups of States parties to the ICSID Convention to agree to a modification inter se. Through an inter se modification the goal would be both to avoid the application of Article 53's prohibition and to facilitate the treatment of awards produced through an appellate mechanism as coming within the coverage of the ICSID Convention for the purposes of enforcement-enhancing provisions, such as Article 54.[88]

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84 Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 1102, para 18 (emphasis added).

85 ibid 1103, para 19.

86 ICSID Convention art 66(1). See generally Aron Broches, 'Some Observations on the Finality of ICSID Awards' in Aron Broches (ed), *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 351.

87 This is the long-held conventional wisdom. See Reinisch (n 17) 769.

88 The possibility of inter se modification of the ICSID Convention generally first seems to have been suggested by Reisman in 1987 in response to the concerns raised by the *Klöckner* and *Amco* annulment sagas. See *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2; *Amco Asia Corp and others v Republic of Indonesia*, ICSID Case No ARB/81/1. In that context, Reisman proposed that in the absence of the political consensus necessary to amend the Convention, Article 52 might be modified inter se to make clear that 'only the five grounds of nullification listed in its first sub-paragraph' could serve as grounds for annulment and that ad hoc Committees should only nullify awards 'in case of a material violation and not in case of a technical discrepancy.' See W Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) Duke L J 739, 806. Broches, it should be noted, rejected Reisman's suggestion of possible inter se modification, although the basis for his critique appears to have been a misunderstanding of the

2.2 *The (Im)Possibility of inter se Modification of the ICSID Convention to Allow for Appellate Review of ICSID Awards*

In considering the possibility of an inter se modification of the ICSID Convention for appellate review of ICSID awards, one begins with the prior work of the ICSID Secretariat. In 2004, in connection with its consideration of a host of possible revisions to the ICSID system, the ICSID Secretariat addressed the idea of establishing a separate appeals facility as an inter se modification of the ICSID Convention by State parties wishing to adopt the proposed mechanism of appeal.[89] Although the Secretariat provided a fairly detailed overview of what an appeals facility might look like, it noted at the outset that that in order to be permissible under the law of treaties, the inter se modification of a multilateral treaty like the ICSID Convention would be required to satisfy certain criteria under the law of treaties.[90] Beyond enumerating those general criteria, however, the Secretariat offered no view on whether it believed that any such attempted inter se modification of the ICSID Convention would satisfy these requirements.[91]

The rules with respect to the inter se modification of a multilateral treaty are addressed in Article 41 of the Vienna Convention on the Law of Treaties (VCLT). Although the VCLT does not apply to the ICSID Convention as such,[92] the provisions of Article 41 addressing the permissibility of inter se

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distinction in the law of treaties between treaty amendment and inter se modification. See Broches (n 86) 351–52.

89 ICSID Secretariat (n 12) paras 7, 20–23.

90 The Secretariat noted: 'In accordance with the general treaty law rules reflected in Article 41 of the 1969 Vienna Convention of the Law of Treaties, the treaty with the submission to the Appeals Facility might also modify the ICSID Convention to the extent required, as between the States parties to that treaty, provided that the modification was not prohibited by the ICSID Convention, did not affect the enjoyment of rights and performance of obligations of the other Contracting States under the ICSID Convention and was compatible with the overall object and purpose of the ICSID Convention.' ICSID Secretariat (n 12) annex para 2.

91 Reinisch appears to read too much into the ICSID Secretariat's consideration of the issue in its 2004 Discussion Paper. Reinisch (n 17) 780 (arguing that 'the fact that the establishment of an appeals mechanism was already ventured by ICSID itself a few years ago militates in favour of the argument that such a system is not squarely contrary to the concept of ICSID ISDS'). As discussed in the text, in fact, the ICSID Secretariat seems to have made a deliberate point of not addressing the substance or merits of the inter se modification issue in its paper.

92 The VCLT only applies to treaties concluded by States after the VCLT entered into force with respect to such States. VCLT art 4.

modifications represent customary international law, as is made clear in the travaux preparatoires of the VCLT.[93] Article 41 provides in relevant part:

> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
> (a) the possibility of such a modification is provided for by the treaty; or
> (b) the modification in question is not prohibited by the treaty and:
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does 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.

Article 41 is phrased in the disjunctive. An inter se modification is permissible only if either (a) or (b) is true. Article 41(1)(a) provides that the inter se modification will be permissible if the subject treaty provides for the possibility of such a modification, 'in other words, if "contracting out" was contemplated

93 Prior to the codification of the VCLT, there was a considerable body of opinion that the default rule of international law required that any modification or amendment of a treaty obligation be by unanimous consent of the State parties. The International Law Commission (ILC)'s review of State practice, however, demonstrated that as multilateral treaties had become more prevalent States had begun to resort to inter se modification of multilateral obligations in certain circumstances, owing to the frequent difficulty of obtaining unanimity of consent. As the Commission's Special Rapporteur, Humphrey Waldock, observed: '[R]eliance on the inter se technique for the revision of general multilateral treaties is almost inevitable owing to the improbability that all the parties to the original treaties will take the necessary steps to ratify or otherwise give their consent to the new treaty.' Humphrey Waldock, Special Rapporteur, International Law Commission, Third Report of the Law of Treaties, A/CN.4/167, reprinted in 1964 Yearbook of International Law Commission, vol II, 49. See generally Edwin Hoyt, *The Unanimity Rule in the Revision of Treaties – A Re-Examination* (Martinus Nijhoff 1959) (providing a comprehensive study, relied upon heavily by the ILC, of the evolution of State practice and opinion juris regarding inter se modification).That said, it may be open to question whether the technical, procedural requirements of VCLT art 41(2) are also reflective of a customary rule. See Joost Pauwelyn, *Conflicts of Norm in Public International Law* (CUP 2003) 305; Anne Rigaux and Denys Simon, 'Article 41 of the Convention of 1969' in Oliver Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol II (OUP 2011) 994. See infra n 131.

in the treaty.'[94] In the case of the ICSID Convention, nothing in the treaty provides for the possibility of a modification allowing for appellate review of ICSID Convention arbitral awards.[95] To the contrary, Article 53 plainly states that Convention awards 'shall *not* be subject to any appeal or to any other remedy except those provided for in this Convention' (emphasis added). This clear prohibition can be contrasted with other provisions of the ICSID Convention in which the possibility of party modification – 'contracting out' – is provided for expressly. In provisions addressing the jurisdiction of the Centre,[96] the constitution of conciliation commissions,[97] the conduct of conciliation proceedings,[98] the constitution of arbitral tribunals,[99] the powers and functions of arbitral tribunals,[100] the costs of proceedings,[101] and the place of proceedings,[102] the ICSID Convention gives clear grant for party modification. Article 53 is precisely to the contrary: it is an express prohibition on what States may never do under the Convention.

License for an inter se modification is no more availing when analysed under Article 41(b). Article 41(b) requires (1) that the inter se 'modification in question is not prohibited' by the subject treaty; (2) that it does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and (3) that it is not incompatible with the effective execution of its object and purpose as a whole.[103] Article 41(b) is phrased

94 International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries', 1966 Yearbook of International Law Commission, vol II, 235.

95 cf C F Amerasinghe, 'Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes' (1973–1974) 5 J Mar L & Com 211, 244–45.

96 ICSID Convention art 25(2)(b); art 25(3); art 25(4).

97 ibid art 29(2)(a); art 30; art 31.

98 ibid art 33; art 35.

99 ibid art 37(2); art 38; art 39; art 40; art 56(1).

100 ibid art 42(1); art 42(3); art 43; art 44; art 46; art 47.

101 ibid art 60(2).

102 ibid art 63.

103 In a recent paper, Kaufmann-Kohler and Potestà analyse the question of an inter se modification of the ICSID Convention, incorrectly, on the basis that Article 41(b) contains only two substantive conditions, namely that the modification does not affect the enjoyment or performance by the other parties of their rights and obligations and that it is not incompatible with the effective execution of the treaty's object and purpose. See Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' (Geneva Centre for International Dispute Settlement, 3 June 2016) 83 <www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf> accessed 25 April 2017. Missing from their analysis is the

in the conjunctive. All of the conditions found in Article 41(b) must be satisfied in order for the modification to be permissible under its terms.[104]

The first condition of Article 41(b) requires that the modification inter se is not prohibited by the subject treaty. It is not necessary that the subject treaty specifically refers to inter se modification as such in its textual prohibition. It is enough that the subject treaty provides a clear prohibition of the modification sought to be undertaken.[105] An example of the kind of prohibition covered by Article 41(b) is provided by Rigaux and Simon in their recent commentary on the VCLT. Citing the Treaty Establishing the European Coal and Steel Community, the Treaty on the Functioning of the European Union, and the Euratom Treaty, the authors point to the provisions in those treaties prohibiting derogation from the treaties' systems of dispute resolution as an example of the kind of prohibition covered by Article 41(b): 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.'[106] The prohibition found in these European treaties is remarkably similar to the prohibition contained in Article 53 of the ICSID Convention requiring that disputes settled under the Convention 'shall not be subject to any appeal or to

additional requirement of the chapeau of Article 41(b) that 'the modification in question is not prohibited by the treaty.' It is not clear why Kaufmann-Kohler and Potestà do not acknowledge this fundamental condition of Article 41(b), but in any case, given that the ICSID Convention does indeed prohibit 'the modification in question,' this omission is a serious flaw in their analysis of the issue and fundamentally undermines their conclusions on the subject.

104 See International Law Commission (n 94) 235.

105 Reinisch appears to misread Article 41(b) when he states that '[s]ince the ICSID Convention does not address inter se modifications at all, it also does not prohibit them.' Reinisch (n 17) 772–73. The phrasing of Article 41(b) is quite distinct from Article 41(a). Whereas Article 41(a) asks whether the possibility of 'such a modification,' ie, inter se modifications in general, are permitted by the subject treaty, Article 41(b) asks more specifically whether 'the modification in question,' ie, the specific inter se modification being proposed, is prohibited by the treaty. The fact that a treaty contains no text one way or the other with respect to inter se modifications in general is dispositive of the question asked by Article 41(a), but it is not dispositive of the question asked by Article 41(b). As discussed in the text, it is entirely possible that a specific proposed inter se modification may be prohibited by a treaty even though the treaty contains no language with respect to the issue of inter se modifications as a general matter.

106 Treaty Establishing the European Coal and Steel Community (1951), art 87; Euratom Treaty (1957), art 193; Treaty on the Functioning of the European Union (2009), art 344, cited in Rigaux and Simon (n 93) 1002.

any other remedy except those provided for in this Convention.'[107] As Rigaux and Simon observe in their commentary, where the parties to a treaty 'have expressed without ambiguity their opposition in principle to such a modification, then it cannot be lawfully permitted.'[108] Consequently, with respect to the ICSID Convention, the proposed modification falls at the first hurdle: it is prohibited by the subject treaty.[109]

The ICSID Convention's plain prohibition with respect to appeals renders it unnecessary in principle to evaluate whether an inter se modification establishing an appellate mechanism for ICSID Convention arbitration would also affect the enjoyment by the other parties of their rights under the Convention, the performance of their obligations, or otherwise be incompatible with the effective execution of the Convention's object and purpose as a whole. Nevertheless, as a matter of thoroughness, it is worth considering whether such an inter se modification would satisfy or contravene these additional elements of Article 41(b) of the VCLT.

One might begin by looking at the Convention's object and purpose. Given the structure and phrasing of the ICSID Convention, there is good reason to think that the express exclusion of any manner of appeal or additional remedy against an award in Article 53 of the ICSID Convention is closely intertwined with the Convention's object and purpose as a whole.[110] At the time the ICSID Convention was drafted, the New York Convention had already been concluded. With its reliance on State court implementation of a multilateral convention on dispute settlement procedure, the New York Convention provided one particular model for internationalizing arbitral practice. Yet this was not the

107 While the ICSID Convention contains numerous mandatory provisions, see Schreuer and others (n 84) 806, para 3, the express prohibition on appeals contained in Article 53 is almost unique in the Convention. Only one other article provides for an express prohibition on State conduct under the Convention. See art 27 (diplomatic protection and international claims). There is also an express prohibition on the Centre with respect to the publication of awards without the consent of the parties (art 48(5)).

108 Rigaux and Simon (n 93) 1001. Indeed, not only would the disallowed modification be unlawful, but the conclusion of the inter se agreement could act as a violation of underlying treaty and, as such, authorise the other parties to exercise their rights under Article 60 of the VCLT (ibid). Moreover, in principle at least, the States attempting the disallowed modification may also find their international responsibility engaged for the commission of a wrongful act.

109 cf Schreuer and others (n 84) 1105 ('An appeals mechanism would be incompatible with Art. 53 in its present form. The wording, excluding any appeal or other remedy except those provided for in the Convention, is unequivocal.').

110 For an opposite view on this point see Reinisch (n 17) 775–76.

model chosen by the drafters of the ICSID Convention.[111] Instead, the drafters of the ICSID Convention undertook to establish a 'self-contained' system for the resolution of investor-State disputes[112] in which the system of review of awards would be exclusive and insulated from any outside remedy.[113] Indeed, so important was the exclusivity of the system of review of awards under the Convention that while the Convention contains mandatory provisions on a host of aspects of Convention-based dispute resolution,[114] the express prohibi-

111 Schreuer and others (n 84) 1139–41 (reviewing the drafting history). In addition, the drafters took steps to ensure that the Convention's State-State dispute settlement mechanism, which eventually became Article 64, would not conflict with the arbitral proceedings of ICSID tribunals. See eg ICSID, *The History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* vol II-1 (1968; reprinted 2009) 274, 439, 906. The point is made clearly in the Report of the Executive Directors that Article 64 does not 'empower a State to institute proceedings before the [International Court of Justice] in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.' International Bank for Reconstruction and Development, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (18 March 1965) para 45.

112 See ICSID Convention art 26 ('Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'). See also eg ICSID (n 111) 424 (quoting Aron Broches at a meeting of legal experts in 1964 in connection with what would become Article 53, stating that 'the object was to draw up within the framework of the draft Convention a self-contained system').

113 Schreuer and others (n 84) 1102, para18.

114 See eg ICSID Convention art 36 (prescribing the procedures for instituting arbitration proceedings under the Convention); art 37(2)(a) (prescribing that the tribunal must consist of a sole arbitrator or an uneven number of arbitrators); art 37(2)(b) (providing that the 'third arbitrator' shall be the tribunal's president); art 39 (prescribing that the majority of arbitrators must not be nationals or co-nationals of the parties, except where each arbitrator is appointed by agreement of the parties); art 40(2) (providing that arbitrators appointed from outside the Panel of Arbitrators must possess the qualities required of persons on the Panel); art 41(1) (providing that the arbitral tribunal shall be the judge of its own competence); art 45(1) (providing that the failure of a party to appear shall not be deemed an admission of the other party's assertions); art 48(1) (prescribing that the tribunal shall decide questions by majority vote); art 48(2) (prescribing that the award of the tribunal shall be in writing and shall be signed by all members); art 48(3) (providing that the award shall deal with every question submitted to the tribunal and shall state the

tion on appeals contained in Article 53 is only one of two such provisions in the entire treaty.[115] Where, as here, the underlying treaty contains an express prohibition with respect to the subject of the proposed inter se modification, it becomes fairly clear that modification of such a provision goes against the object and purpose of the treaty. As Pauwelyn has noted in another context, 'If the *inter se* agreement is prohibited by the treaty itself, with reference, inter alia, to the "object and purpose" of the treaty (a reference required pursuant to rules on treaty interpretation), then subjective assessment of whether the agreement goes against the "object and purpose" in the sense of the "spirit" of the treaty is not a problem.'[116] That is the situation here with respect to Article 53 of the ICSID Convention.[117]

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reasons upon which it is based); art 49(1) (prescribing the date on which an award shall have been deemed to have been rendered). In addition, while the parties may agree on the proportion of the costs of arbitration to be borne by each of them, they cannot reduce or remove their overall financial obligation towards the Centre. See art 59 ('The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.'). Other provisions, such as art 25 addressing jurisdiction under the Convention, contain mandatory requirements, although given the lack of definition of key terms in those requirements the parties' interpretations will carry significant weight in determining their meaning. See Schreuer and others (n 84) 82.

115 Notably, the other provision also addresses the self-contained character of the ICSID system. See ICSID Convention art 27(1): 'No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.'

116 Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 Eur J Intl L 907, 915. cf International Law Commission (n 94) 235 ('an *inter se* agreement incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty').

117 Kaufmann-Kohler and Potestà reach the opposite conclusion. Relying in part on Article 1(2) of the Convention, they note that it provides that '[t]he purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes …'. On their reading, an inter se modification with respect to an appellate mechanism would simply not be incompatible with this objective. See Kaufmann-Kohler and Potestà (n 103) 84–85. The difficulty with this analysis, however, is that it does not take into account the rest of Article 1(2). Article 1(2) states in full: 'The 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*' (emphasis added). In other words, the purpose of the Convention, if

With respect to the performance of third-State obligations under the ICSID Convention, it would seem in addition that the inter se modification proposed under the new EU model is an attempt to modify the obligations of all other States to the ICSID Convention. As discussed in more detail below in Part II.3, the EU's proposals to modify the ICSID Convention inter se to adopt an appellate mechanism also seek to ensure the continued coverage of ICSID Convention Article 54, which places significant obligations on non-disputing States with respect to awards rendered under the Convention. To the extent that awards produced through an inter se modification are to be treated as having been rendered 'under the Convention,' this would appear to broaden the scope of disputes which come within the scope of the Article 54 obligations of non-parties.[118]

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one assimilates the purpose of the Centre to the purpose of the Convention overall (as Kaufmann-Kohler and Potestà do) is to provide a facility for a 'self-contained' system for the resolution of covered investor-State disputes in which the system of review of awards is exclusive and insulated from any outside remedy.

Reinisch also relies on Article 1(2). He addresses the full text of the article and argues that '[t]he fact that Article 1(2) ICSID Convention speaks of dispute settlement 'in accordance with the provisions of this Convention' should not be regarded as limiting the object and purpose of the Convention to ISDS in the form of conciliation and arbitration as exactly provided for in the ICSID Convention.' Reinisch (n 17) 776. On Reinisch's view, if Article 1(2) were to require that arbitration and conciliation under the Convention take place 'exactly' as provided for in the Convention, it would 'make any inquiry into the compatibility of modifications of the Convention superfluous' (ibid). While the scope of Reinisch's argument is sweeping, it is not the intent of the present article to offer a pronouncement on the permissibility of the wide universe of conceivable inter se modifications to the ICSID Convention. The focus here is simply on the modifications found in the EU's investment treaties and, in particular, on the establishment of an appellate mechanism. On that point it seems enough to suggest that Reinisch's broad conclusion is not ineluctable; there may well be a distinction to be drawn between a proposal to adopt an appellate mechanism, which runs contrary to one of two express prohibitions in the entire treaty, see supra n 115, and other, less fundamental proposals for inter se modifications which do not implicate the object and purpose of the Convention. See eg NAFTA art 1125 (Agreement to Appointment of Arbitrators).

118 For a further point of objection to the permissibility of an inter se modification of the ICSID Convention based upon ICSID's character as an international organization, see Roberto Castro de Figueiredo, 'Fragmentation and Harmonization in the ICSID Decision-Making Process' in Jean Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff 2015) 522. I take no position on this particular objection in this article.

2.3 *The Applicability of the ICSID Convention to Appellate Mechanism Awards*

Even if one were to assume, arguendo, that the inter se modification of the ICSID Convention to establish appellate review is otherwise permissible, a serious question would remain as to whether awards rendered through such a process of appellate review should be treated as 'ICSID Convention awards' by States which are parties to the ICSID Convention but not parties to the inter se modification. As noted, Article 54 of the ICSID Convention creates obligations not only for the States involved in an ICSID Convention arbitration but for all ICSID Convention State parties. The question is whether these obligations would be applicable vis-à-vis an 'appellate mechanism' award.

Article 54(1) of the ICSID Convention provides that '[e]ach 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…' (emphasis added). In order for the obligations under Article 54 to apply, therefore, the contracting State in which an award is presented must determine that the award in question has been 'rendered pursuant to' the ICSID Convention.

All of the EU's new treaties, as well as the TTIP Proposal, contain language indicating that the EU and its treaty partners intend that awards rendered under these treaties should be treated as though they have been rendered pursuant to the ICSID Convention. Article 31(8) of the EU-Vietnam FTA, for example, provides 'For greater certainty … where a claim has been submitted to dispute settlement pursuant to Article 7(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID)' (emphasis added). Similar provisions are contained in CETA[119] and the TTIP Proposal.[120]

At the same time, in its operative provisions, the new EU model does not treat ICSID arbitration as a special form of arbitration conducted pursuant to the terms of an international convention, but merely lists it as a form of dispute

119 'For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention.' CETA (n 16) art 8.41(6).

120 TTIP Proposal (n 14) art 30(6): 'For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).'

resolution conducted pursuant to one of a number of 'sets of rules on dispute settlement' which may be chosen in an investor-State dispute.[121] Arbitration under the ICSID Convention is not, of course, simply another form of dispute resolution under a 'set of rules on dispute settlement,' but is a form of arbitration pursuant to the terms of an international treaty, which establishes obligations not only for the State party to the arbitration, but for all parties to the ICSID Convention in relation to that arbitration. The EU model text thus, at least in places, seems to discount the treaty character of arbitration conducted pursuant to the ICSID Convention, perhaps reflecting the view, evidenced in the EU's approach more generally, that the parties to the EU's treaties are free to choose some of the ICSID Convention's provisions while rejecting others – regardless of the terms of the ICSID Convention itself.

It is of course not possible for the parties to an inter se modification to bind non-parties to their modification or their interpretation as to how that modification relates to the obligations under the main agreement. Not only is Article 41(1) express in this regard, but principles of treaty law establish the proposition more generally: *pacta tertiis nec nocent nec prosunt*.[122] Instead, it falls to each party to the ICSID Convention, which is not a party to the modification, to determine for itself whether the awards rendered pursuant to the appellate mechanism are ICSID Convention awards which trigger their obligations under, inter alia, Article 54 of the Convention.

Given the significant reworking of the ISDS process under the new EU model, it is doubtful that awards rendered pursuant to the EU's treaties are sufficiently attached to the ICSID Convention so as to be treated as ICSID Convention awards.[123] As noted above, the new EU model goes well beyond simply establishing an appellate mechanism as a bolt-on to existing mechanisms of investor-State arbitration (whether pursuant to the ICSID Convention or otherwise), but contains a root-and-branch reworking of ISDS.

First, under the EU model, the provisions of the ICSID Convention guiding the procedure and constitution of arbitral tribunals are replaced by provisions

121 For example, Article 7(2)(a) of the EU-Vietnam FTA investment chapter states that '[a] claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement: the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).' The same language appears in the TTIP Proposal (n 14) art 6.

122 cf VCLT art 34 ('A treaty does not create either obligations or rights for a third state without its consent.').

123 Reinisch, although using more equivocal language, appears to reach the same conclusion. Reinisch (n 17) 761, 781–82.

establishing a two-tiered tribunal system. Whereas the ICSID Convention provides specific rules with respect to the constitution of arbitral tribunals, affording the arbitral parties the right to appoint arbitrators to the tribunal,[124] the new EU model replaces these rules entirely – even when the parties have in principle agreed to ICSID Convention arbitration – by establishing first instance tribunals constituted from judges or members selected *ex ante* by the State parties to the investment treaty.[125]

Second, whereas under the ICSID Convention, review of tribunal awards takes place through ad hoc annulment committees appointed by the Chair of the Administrative Council from the ICSID Panel of Arbitrators,[126] under the new EU model, the role of ICSID is removed and appeals are heard through appellate tribunals by judges selected by the parties to the treaty in which the appeals mechanism is contained.[127] There is no scope for judges not selected by the parties to the EU's treaties to sit on the appellate tribunals.

Third, as noted already, the new EU model replaces the exclusivity of the remedies against awards established in Article 52 of the ICSID Convention with a broader range of remedies in the nature of appeal. Thus the parties to the new treaties exclude the application of Articles 52 and 53 of the ICSID Convention in favour of the appellate review provided for in those treaties.[128]

There is, thus, reason for doubt as to whether the awards issued pursuant to the EU's new model – even if they were not made pursuant to an impermissible inter se modification – would qualify as 'ICSID Convention awards,' given the scope of changes made by those treaties to the ICSID arbitration process. As noted, given the mechanics of the ICSID Convention, it will rest with each State party to the ICSID Convention, which is not a party to the EU's treaties, to determine for itself whether the awards rendered pursuant to that process are 'ICSID Convention awards' which trigger their obligations under, inter alia, Article 54 of the Convention. In most States the issue of applicability will likely arise and be determined in the judicial branch with reference to the State's domestic conception of international law and its national legislation.[129] In the

124 See ICSID Convention art 37–40.

125 See TTIP Proposal (n 14) art 9; EU-Vietnam FTA (n 15) art 12; CETA (n 16) art 8.27.

126 ICSID Convention art 52(3).

127 See TTIP Proposal (n 14) art 10; EU-Vietnam FTA (n 15) art 13; CETA (n 16) art 8.28.

128 See TTIP Proposal (n 14) art 29(1); EU-Vietnam FTA (n 15) art 28(1); CETA (n 16) art 8.37.

129 Whether awards qualify as ICSID Convention awards in the territory of non-party States to the new EU treaties could, in principle, be the subject of separate agreements with those States and the EU and its treaty partners. Negotiating and concluding such agreements, however, is undoubtedly impractical.

event that non-party States to the EU treaties were to decide that EU model awards do not qualify as ICSID Convention awards, and thus do not require treatment under the terms of Article 54, there remains the possibility that one of the parties to the EU's treaties might raise the issue under the ICSID Convention's State-State dispute settlement process.[130] Under Article 64 of the ICSID Convention, 'Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.' This would be a far from ideal means of resolving the issue, but nevertheless would be an option in the event of a decision by a non-party State that the EU model awards are not ICSID Convention awards. On the present analysis, however, it is not a dispute in which the parties to the EU's treaties would seem to have strong arguments.[131]

130 At the time of writing, the status of the EU's treaties with Canada, Vietnam, and other States, such as Singapore, is the subject of constitutional challenge within the EU legal order to determine whether the EU may enter into these agreements on behalf of its Member States or whether the Member States themselves must also become parties. With respect to CETA, the European Commission has stated that it will proceed as if both the Union and the Member States need to ratify the agreement, although it has done so without prejudice to the more general constitutional question. In any case, for the purposes of this paper, it is worth simply bearing in mind that the European Union is not a party to ICSID Convention and is not capable of becoming one, absent an amendment to the Convention pursuant to Article 66. Similarly, not all EU Member States are parties to the ICSID Convention, eg, Poland, and, indeed, Vietnam is not a party either.

131 One final technical point may be raised in connection with proposals for the inter se amendment of the ICSID Convention with respect to appellate mechanisms. Under Article 41(2) of the VCLT, 'the parties [to the proposed modification] shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides,' except where the treaty under modification otherwise provides. The reason for the inclusion of this rule was the ILC's belief that 'the other parties ought to have a reasonable opportunity of satisfying themselves that the inter se agreement does not exceed what is contemplated by the treaty.' International Law Commission, 'Report of the International Law Commission to the General Assembly' A/6309/Rev.1, reprinted in 1966 Yearbook of International Law Commission, vol II, 235–6. Whether this rule has a customary character is beyond the scope of this paper; however, given the debate on the issue in the Commission, it is questionable whether the rule represented custom at the time it was adopted. In any event, assuming the applicability of the rule for the purposes of argument, it is not evident that the EU and its treaty partners have fulfilled their obligations and undertaken the requisite process of notifying the more than 150 parties to the ICSID Convention about their intended modification. See generally ICSID Secretariat

2.4 *Summary*

The prohibition of appeals under the ICSID Convention and the impermissibility of inter se modification of that prohibition mean that attaching appellate review to awards rendered under the ICSID Convention is impermissible without a proper amendment of the Convention. Having said that, as useful as the 'self-contained' character of the ICSID system has been for the effectiveness of investor-State arbitration, it is also the case that investor-State arbitration has proven effective outside of the ICSID system as a result of the strength of the New York Convention.[132] Indeed, ICSID's own Additional Facility Rules have proven effective, especially in arbitrations under the North American Free Trade Agreement, because of the capacity of the New York Convention to facilitate, internationalize, and regularize the process of investor-State arbitration across States. As consequence, subject to the analysis in Part 3 below, merely because an appellate mechanism is incompatible with ICSID Convention arbitration does not mean that appellate mechanism arbitration is incompatible with effective investor-State arbitration more generally.

3 The Applicability of the New York Convention to 'Appellate Mechanism' Awards

Beyond the ICSID Convention, proposals for appellate mechanisms must also consider the applicability of the New York Convention to awards rendered through them. Not only are not all States parties to the ICSID Convention,[133] but in the event that a national court might determine that an 'appellate mechanism' award did not qualify as an ICSID Convention award, it would likely still consider whether to apply the New York Convention in proceedings for recognition and enforcement.

(n 12) annex para 2 (stating the Secretariat's view that '[t]he modification would have to be notified to the other Contracting States before the conclusion of the modifying treaty.').

132 See generally Kaj Hober & Nils Eliasson, 'Review of Investment Treaty Awards by Municipal Courts' in Katia Yannica-Small (ed), *Arbitration under International Investment Agreements* (OUP 2010) 635–69; Carolyn Lamm and Eckhard Hellbeck, 'The Enforcement of Awards' in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill/Nijhoff 2014) 462–96.

133 As noted, the EU itself is not a party to the ICSID Convention, nor is EU Member State Poland. Similarly, Vietnam is not yet a party to the ICSID Convention.

3.1 *Appellate Mechanism Awards as 'Arbitral Awards'*

A first issue to consider is whether awards rendered pursuant to an appellate mechanism, particularly under the new EU model, will qualify as 'arbitral awards' for the purposes of the New York Convention. To the extent that the appellate mechanism under consideration is in the nature of a bolt-on to existing modes of investor-State arbitration, and not as part of a more general reshaping of ISDS through the establishment of an investment tribunal system as per the new EU model, there is little reason to doubt that awards rendered through that mechanism should qualify for coverage under the New York Convention. The New York Convention (as well as the UNCITRAL Model Law on International Commercial Arbitration) have long been held applicable to treaty-based investor-State arbitral awards.[134] If the parties to an agreement to arbitrate decide to include a treaty-based mechanism of appeals within their procedure, there would seem to be no issue with respect to the application of the New York Convention to the resulting award.[135]

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134 For a general review see Kaj Hobér and Nils Eliasson, 'Review of Investment Treaty Awards by Municipal Courts' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements* (OUP 2010) 669. For a recent example, see *Republic of Argentina v BG Group PLC*, 764 F Supp 2d 21 (DDC 2011), reversed by 665 F3d 1363 (DC Cir 2012), reversed by 134 S Ct 1198, 1204 (2014). See also *United Mexican States v Metalclad Corp.*, 2001 BCSC 664 (British Columbia Sup Ct 2001) para 44 (holding the Canadian International Arbitration Act, based on the UNCITRAL Model Law, applied to the annulment challenge of an award under chapter 11 of NAFTA).

135 Internal institutional appeals were addressed specifically during the drafting of the New York Convention and the Convention has been used to give effect to awards which have been rendered through such two-tiered arbitral processes. See Gary Born, *International Commercial Arbitration*, vol II (Kluwer Law International 2014) 2823 (citing 'Summary Record of the Seventeenth Meeting of the United Nations Conference on International Commercial Arbitration' E/CONF.26/SR.17 (1958) 3). The issue that can arise in such situations is whether and when the award has become binding. cf New York Convention, art V(1)(e). Is it after the decision of the first arbitral tribunal or after the appellate arbitral tribunal? As a rule, '[i]t is relatively clear that (absent contrary agreement) the possibility of review of an award by another arbitral tribunal or an appellate authority within the relevant arbitral institution will generally prevent an award from being "binding."' (Born, ibid 2822). With respect to the new EU model, the TTIP Proposal, the CETA and the EU-Vietnam FTA each contain provisions expressly providing that a first instance award does not become final until either 90 days have elapsed after it has been issued and neither disputing party has appealed the award or an appeal is taken and the appellate process has been completed. TTIP Proposal (n 14) art 28(6)-(7); EU-Vietnam FTA (n 15) art 27(6)-(7); CETA (n 16) art 8.28.9.

The new EU model raises a somewhat different set of issues. As noted above, the new EU model departs from ordinary arbitral practice in a number of respects, including through the establishment of permanent tribunals, the absence of party-selection of tribunal members (at least by the investor), and the designation of these tribunals and their members as 'courts' and 'judges' in some instances. The question which might be raised, therefore, is whether the new dispute settlement mechanism under the EU model is, indeed, 'arbitration.'

Although the New York Convention contains no definition of 'arbitration,' Article I(2) defines the term 'arbitral awards' to '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.'[136] Such permanent arbitral bodies can include tribunals on which all of the members are approved by the State party or parties. So, for example, the fact that all of the members ('judges') of the Iran-US Claims Tribunal – a standing tribunal established by international agreement – were appointed by Iran and the United States raised no issue with respect to the enforcement of its awards under the New York Convention.[137] Similarly, the New York Convention was found to apply

136 In his commentary on the UNCITRAL Model Law, Aron Broches noted, with reference to Article I(2) of the New York Convention, that 'arbitration' means 'any arbitration whether or not administered by a permanent arbitral institution.' Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Springer 1986) 38, para 2.

137 See eg *Ministry of Defense of Islamic Republic of Iran v Gould, Inc*, 887 F2d 1357 (9th Cir 1989), *cert. denied*, 110 S Ct 1319 (1990). cf *Iran Aircraft Industries v Avco Corp*, 980 F2d 141 (2d Cir 1992) (denying enforcement under New York Convention pursuant to Article V(1)(b)). The principal issue confronted with respect to the enforceability of awards of the Iran–US Claims Tribunal concerned whether there was a valid agreement of arbitration under the then applicable 1838 Dutch Code of Civil Procedure. See David P. Stewart, 'The Iran-United State Claims Tribunal: A Review of Developments 1983–84' (1984) 16 Law & Poly Intl Bus 677, 750–51 (citing Dutch Code of Civil Procedure, Book III, Title 1, Sec 1–5, arts 620–57 (1838)); Albert Jan van den Berg, 'Proposed Dutch Law on the Iran-US Claims Settlement Declaration' (1984) Intl Bus Law 341. Although it might have been thought that valid agreements to arbitrate between claimants and respondent States were formed through the claimants' invocation of the tribunal's jurisdiction, much in the same way as an agreement to arbitrate forms under modern IIAs, there was some issue as to whether this would be so under the antiquated Dutch law in force at the time. See *Dallal v Bank Mellat*, 1 QB 441, 455 (1985) (refusing to apply the New York Convention on the grounds that there was no valid agreement to arbitrate under Dutch law, but nevertheless recognizing the award on other grounds). As it happened, the Dutch courts were never called upon to finally resolve the issue. See David D Caron, 'The Nature of the Iran-United States

to awards rendered by the Courts of Arbitration attached to Chambers of Commerce in Comecon States[138] in which arbitrators could be chosen solely from a list drawn up by the (State-controlled) Chambers of Commerce in advance and made up entirely of nationals of that country.[139] Thus, regardless of the nomenclature used in the EU model, and in spite of the method of selection of the members of the standing tribunals, it seems that what counts for the purpose of enforcement under the New York Convention is that there is the agreement of the parties to settle their dispute before the particular tribunal.[140] As a result, while the new EU model departs from classic international commercial arbitral practice in some respects, this should not be a significant issue for the effectiveness of the EU model with respect to the New York Convention.[141]

3.2 *Party Limitation of Grounds for Review Under New York Convention Article V*

A further issue of compatibility with the New York Convention is raised specifically by the new EU model. Under Article V(1) of the New York Convention, a court is entitled to refuse recognition and enforcement of a foreign arbitral award in the event that the party against whom the award is invoked furnishes proof of one of five categories of procedural deficiency addressed to the fairness of the arbitral proceedings.[142] Further, under Article V(2) the court is entitled to refuse enforcement and recognition where it finds that the arbitral award before it deals with a subject matter not capable of settlement by arbitration under the law of that country or that the recognition or enforcement of the award would be contrary to the public policy of that country.[143] Seeking to insulate the awards rendered through its new model from any national court

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Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 Am J Intl L 104, 143–46.

138 Comecon (the Council for Mutual Economic Assistance) was an economic organization under the leadership of the Soviet Union in existence from 1949 to 1991 that comprised the countries of the Eastern Bloc along with a number of socialist States elsewhere in the world. See generally Marcel-Alfons-Gilbert van Meerhaeghe, *International Economic Institutions* (Kluwer Academic 1987) 206–23.

139 See Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer International 1981) 378–79.

140 See Gary Born, *International Commercial Arbitration*, vol I (Kluwer International 2014) 250–52.

141 Similarly, Kaufmann-Kohler and Potestà (n 103) 54–59; Reinisch (n 17) 782–83.

142 New York Convention art V(1)(a)-(e).

143 ibid art V(2)(a)-(b).

review, the EU has included provisions which attempt to act as a waiver of the grounds for review in Article V of the Convention.[144] Article 30(1) of the EU-Vietnam FTA, for example, indicates that final awards rendered under that treaty 'shall not be subject to appeal, review, set aside, annulment or any other remedy.' Given that non-parties to the EU's treaties cannot be bound with respect to their obligations under the New York Convention (or the application of their national law),[145] the question which arises is whether the parties to an agreement to arbitrate can agree to waive the applicability of the grounds for review under Article V of the New York Convention and whether the language in the new EU model acts as an effective waiver.

With respect to the question of waiver, Article V(1) of the Convention States that recognition and enforcement of an award may be refused 'at the request of the party against whom it is invoked.' This formulation suggests that parties are free to refrain from raising the grounds set out in Article V(1), which in turn suggests that courts may not, or at least should not, raise those grounds *sua sponte*. However, Article V(2) of the Convention provides that recognition and enforcement of an award may be refused '*if the competent authority* in the country where recognition and enforcement is sought *finds*' that the underlying dispute is non-arbitrable or that its recognition or enforcement would be contrary to public policy (emphases added). This language suggests that the court where recognition or enforcement is sought may raise either of the Article V(2) grounds on its own initiative, whether or not the parties have done so, or indeed, sought to waive them.

The effectiveness of the New York Convention is built upon the principle that its provisions will be interpreted and applied by national courts.[146] There is no process for the issuance of binding interpretations of the Convention's provisions. As a consequence, the effectiveness of the EU's efforts to insulate the awards rendered through its new model from national court review under the New York Convention depends upon how national courts treat the issue of the prospective waiver of Article V grounds of review. In a forthcoming review of the application of the New York Convention by domestic courts, Berman finds a lack of consistency among States on the issue of waiver under Article V.

144 See EU-Vietnam FTA (n 15) art 31(1)-(2); TTIP Proposal (n 14) art 30(1). The CETA contains no such provision.

145 cf Barton Legum, 'Visualizing an Appellate System' in Ortino, et al (n 35) 123.

146 See van den Berg (n 139) 5.

> A healthy number of jurisdictions evidently allow the advance waiver of grounds. While some of these jurisdictions permit waiver of the grounds without distinction among them, most allow only some – but not all – grounds to be waived. The grounds that are waivable tend, understandably, to be those set out in Article V(1) of the Convention, to the exclusion of the grounds set out in Article V(2). But there are variations on that theme.
>
> A lesser number of country reports describe the grounds for denying recognition or enforcement of foreign arbitral awards under the Convention as not in any circumstance subject to advance waiver by the parties. To that extent, the Convention grounds would be in effect mandatory.[147]

As a result, given the decentralized nature of the interpretation and application of the New York Convention, it seems highly unlikely that the new EU model will serve as an effective waiver across all of the 151 States parties to the New York Convention. Each State which is presented with an EU model award will have to determine for itself whether, and to what extent, prospective waivers of grounds for refusal of enforcement and recognition are permissible in its jurisdiction. Moreover, as there is no mechanism in the New York Convention through which States may compel the settlement of disputes as to the meaning or application of its provisions, to the extent that the EU and its treaty partners take issue with particular interpretations or applications, there is no clear cut way to resolve these differences.

4 The Applicability of a Multilateral Appellate Mechanism to Existing IIAs

Whereas a bilateral appellate mechanism, such as is contained in the CETA and EU-Vietnam FTA, seeks to ensure the review and correctness of awards

147 George Berman (ed), *Recognition and Enforcement of Foreign Arbitral Awards: Application of the New York Convention by National Courts* (pre-publication draft, forthcoming, Springer) 40–41. Born takes a stronger view with respect to the non-waivability of grounds under Article V(2)(b), arguing that these grounds are not subject to waiver because they are examinable by the enforcing court on its own determination. Born (n 135) 3365–3370. Berman's survey suggests at least that there are a significant number of States in which this is not the rule.

rendered under a specific treaty, a multilateral approach has greater ambitions. A central purpose of a multilateral appellate mechanism is the application of appellate review across all treaties in order to promote consistency and correctness for the IIA regime as a whole. Given the 2,650 or so IIAs presently in force, however, a fundamental challenge of a multilateral treaty would be to facilitate its application, not only with respect to future treaties (which might reference it directly), but to the great mass of existing treaties.[148] In principle, of course, States might amend each of their bilateral IIAs to incorporate the new multilateral mechanism, but in practical terms, especially for States with large portfolios of existing IIAs, the prospect of amending dozens of agreements bilaterally is not feasible. Indeed, for States with limited capacity, even amending only a few treaties may be beyond reasonable expectation.

As noted above, both US treaty practice and the new EU model recognize the possibility of a multilateral appellate mechanism, although neither addresses the modalities which might be involved.[149] ICSID's 2004 proposal also contemplated a multilateral approach, imagining a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID. As conceived, the Appeals Facility would have been open for use in conjunction with ICSID Convention arbitration, ICSID Additional Facility arbitration, UNCITRAL Rules arbitration and any other form of arbitration provided for in the investor-to-State dispute-settlement provisions of investment treaties.[150] All that would have been required would have been for States to 'opt-in' to the Appeals Facility through an investment or other treaty (including a treaty amending an earlier one) which provided that awards made in cases covered by the treaty would be subject to review in accordance with the Appeals Facility Rules.[151]

There is presently no concrete proposal on the table for a multilateral approach to the establishment of an appellate mechanism for use in investor-State arbitration. UNCITRAL's recent Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration, however, provides an example of a multilateral instrument designed to facilitate the amendment of

148 In addition, of course, to the issues raised with respect to the compatibility of appellate review with the ICSID Convention.

149 See 2012 US Model BIT art 28(10). See eg Singapore-US FTA (n 10) art 15.19(10) and Exchange of Letters on the Possibility of Bilateral Appellate Mechanism; Chile-US FTA (n 10) art 10.19(10) and annex 10-H; CAFTA (n 10) art 10.20(10) and annex 10-F; CETA (n 16) art 8.29; TTIP Proposal (n 14) art 12; EU-Vietnam FTA (n 15) art 15.

150 ICSID Secretariat (n 12) annex para 1.

151 ibid para 1. The ICSID Secretariat's proposal did not indicate precisely whether States would have needed to been parties to the ICSID Convention in order to opt-in to the Appeals Facility.

arbitral procedures under pre-existing investment treaties. Using the Mauritius Convention as a model for designing other instruments to facilitate the large-scale amendment of existing IIAs is not an especially new idea. It has been raised in discussions at UNCTAD since at least the beginning of 2015.[152] In the present context, the Mauritius Convention model, when combined with a rules-based approach similar to the one outlined by the ICSID Secretariat in 2004, provides a potentially useful technical approach to the challenge of giving a future appellate mechanism application to existing IIAs.

Following the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration in 2013,[153] UNCITRAL set forth drafting the Mauritius Convention in order to facilitate application of the new Transparency Rules to arbitration provisions in investment treaties in force prior to the Rules' effective date (1 April 2014).[154] The Mauritius Convention, which opened for signature on 17 March 2015, but is not yet in force, provides two mechanisms for the application of the new Transparency Rules to IIAs in force prior to 1 April 2014: 'bilateral agreement' and 'unilateral offer.' 'Bilateral agreement' refers to the situation in which the respondent State and the investor's State under a particular IIA are each parties to the Mauritius Convention.[155]

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152 See eg UNCTAD, Expert Meeting, 'Tools for Modernizing the IIA Network: Treaty Renegotiation, Treaty Expiration and Related Challenges' Report of Rapporteur, N Jansen Calamita (Geneva, 25–27 February 2015) 2 (raising the Mauritius Convention as a potential model for large-scale amendment of existing IIAs). In their recent paper, Kaufmann-Kohler and Potestà explore and endorse a 'Mauritius-like' approach to implementing an appellate mechanism across a wide number of pre-existing investment treaties. See Kaufmann-Kohler and Potestà (n 103) 78–82.

153 United Nations General Assembly, Resolution 68/109, United Nations Commission on International Trade Law Rules on Transparency in Treaty-Based Investor-State Arbitration and Arbitration Rules (16 December 2013). The adoption of the Rules on Transparency was followed by a revision of the UNCITRAL Arbitration Rules in order to expressly incorporate the transparency provisions for the purpose of treaty-based investor-State arbitration.

154 The goal of the Convention is two-fold: (1) to make UNCITRAL's Rules on Transparency in Treaty-based Investor-State Arbitration applicable to investment treaties in force prior to the Rules' effective date and (2) to provide a mechanism to give the Rules application not only to UNCITRAL investor-State arbitration, but to all investor-State arbitration under a State party's investment treaties. See N Jansen Calamita and Ewa Zelazna, 'The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention' (2016) Austrian YB Intl Arb 271.

155 United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (signed 10 December 2014, not yet in force) (the Mauritius Convention on Transparency) art 2(1).

In that situation, assuming that neither State has entered a permitted reservation, the UNCITRAL Transparency Rules will apply to *any* investor-State arbitration brought under the relevant investment treaty, whether pursuant to the UNCITRAL rules or some other arbitral rules.[156] 'Unilateral offer' refers to the situation in which the respondent State under the relevant IIA is a party to the Convention but the investor's State is not. In that situation, assuming no relevant reservation, the UNCITRAL Transparency Rules will apply only if the claimant investor agrees.[157]

Following the model of the Mauritius Convention, a multilateral instrument on appeals in investment treaty arbitration could be conceived. The instrument would be made open to all States and would either contain rules for appellate review itself or refer to a set of rules otherwise established, as is done by the Mauritius Convention.[158] As suggested in the ICSID Secretariat's 2004 proposal, the appellate rules could be drafted in such a way as to be open for application to all investment treaty arbitral awards, regardless of the particular form of the original arbitration.[159] Such an approach would not replace the current system of multiple ad hoc tribunals, but would introduce a unified appeals facility competent to review awards across IIAs.[160]

While such a 'Mauritius Convention' approach would potentially serve as a means of facilitating the application of an appellate mechanism facility to

156 The Convention provides three permissible reservations which States may make with respect to their acceptance of the Convention. Firstly, a State may indicate specific investment treaties to which the Convention will not apply (ibid art 2(2)). Secondly, a State may declare that the Transparency Rules will not apply to arbitrations conducted under rules other than the UNCITRAL Rules (eg, ICSID, SCC, etc) (ibid art 3(1)(a)). Thirdly, a State may declare that the UNCITRAL Transparency Rules will not apply in investor-State arbitrations in which it is a respondent (ibid art 3(1)(c)).

157 ibid art 2(2).

158 The advantage of the latter approach is that rules are often easier to revise and amend than international agreements. Compare, for example, the inability to amend the New York Convention to address long-standing issues regarding the meaning of 'in writing' with the revision of the UNICTRAL Arbitration Rules in 2010 to remove the requirement altogether. See New York Convention art II(1)-(2); UNICTRAL Arbitration Rules art 1(1) (1976); UNICTRAL Arbitration Rules art 1 (2010). A similar dynamic has been seen in ICSID practice where the inability to amend the Convention stands in contrast to the successful effort to modify the ICSID Arbitration Rules in 2006 and to establish the Additional Facility in 1978.

159 ICSID Secretariat (n 12) annex para 3.

160 ibid para 23 ('Efficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms.').

large numbers of existing IIAs, it would not, of course, be able to overcome the issue of the incompatibility of appellate review with ICSID Convention arbitration and the incompatibility of inter se modification of the ICSID Convention on this point. Nevertheless, that would not prevent the parties to a multilateral instrument giving effect to the new appeals facility from also agreeing among themselves that awards which have been rendered through the appellate process will not be subject to any further review in their jurisdictions and will be given enforcement on the same terms as domestic court judgments (much as Articles 53 and 54 do under the ICSID Convention). Nor would the incompatibility of appeals with arbitration under the ICSID Convention, prohibit the ICSID Secretariat from serving as the secretariat for the new appellate body, provided that it is clear that the Secretariat is not treating cases under the new facility as though they were cases arising under the ICSID Convention itself.[161] Nor would it prevent having the Centre serve as the administrative home of a new appellate body,[162] or having the Administrative Council act as its appointing authority[163] with the ICSID Secretary General appointing individual appeals panels.[164] Indeed, given the complexity of the substantive issues raised in designing and implementing a multilateral appellate mechanism and ICSID's experience and capacity with respect to the issues raised, it may well be that the Centre and its Secretariat are best placed to undertake the work required to develop a new mechanism from start to finish. At the same time, coming out of its experience with the successful drafting and adoption of new rules on transparency and the promulgation of the Mauritius Convention, UNCITRAL has similarly expressed interest in pursuing work in this area. How such developments proceed and the results they produce are matters for a future article.

161 ibid para 12. In this respect, in light of the incompatibility of the EU's new investment tribunal model with the ICSID Convention, difficult questions would be raised if the ICSID Secretary-General were to register requests for arbitration brought under the CETA and the EU-Vietnam FTA (as both of those treaties contemplate that she do). See CETA (n 16) art 8.23(7)(a); EU-Vietnam FTA (n 15) art 7.

162 ICSID Secretariat (n 12) annex para 1 ('If ICSID undertakes the creation of a single Appeals Facility, as an alternative to multiple mechanisms under treaties providing for the appeal of awards made in investor-to-State arbitrations, the Facility might be established and operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID.').

163 ibid para 5.

164 ibid para 6.