

NUS CENTRE FOR INTERNATIONAL LAW  
COLLECTION OF ARTICLES ON AN  
APPELLATE BODY IN ISDS

*The Challenge of Establishing a Multilateral  
Investment Tribunal at ICSID*

N. Jansen Calamita<sup>1</sup>

---

**Abstract**—In its recent bilateral treaties, the European Union (EU) has established a new, court-like model of investor-State dispute settlement (ISDS). This new model is a radical departure from existing processes of investor-State arbitration. Beyond its bilateral treaties, the EU, working with Canada, has indicated its intention to multilateralize this new system of ISDS. If successful, these efforts would fundamentally change the manner in which investor-State disputes are resolved.

This article proceeds from the premise, explained herein, that the EU's new system of ISDS is not compatible with the ICSID Convention and asks whether, nevertheless, a new multilateral system based broadly on that model can be designed to work at the Centre without amending the Convention. Is it possible, for example, for ICSID to serve as a forum for the negotiation of an instrument that would create a new multilateral ISDS mechanism outside of the ICSID Convention? Or, considered differently, in the event that negotiations for a new mechanism occur in some other forum, can ICSID and its secretariat nevertheless serve as the international organization onto which the new mechanism might be docked? These questions are of existential importance to ICSID as an institution. For if states agree to establish a multilateral investment court to replace ICSID Convention arbitration, the question must be asked as to what will be left for ICSID as an institution to do, at least with respect to disputes arising under investment treaties.

## I. BACKGROUND: THE EUROPEAN UNION'S NEW MODEL OF INVESTOR–STATE DISPUTE SETTLEMENT

In its recent treaties with Canada<sup>2</sup> and Vietnam,<sup>3</sup> the European Union (EU) has established a new model of investor–State dispute settlement (ISDS). It entails a reworking of existing structures of investor–State arbitration through, *inter alia*, the replacement of *ad hoc* tribunals with standing, treaty-based investment tribunals,

<sup>1</sup> Head, Investment Treaty Law & Policy, Centre for International Law, National University of Singapore; Research Associate Professor (CIL), Faculty of Law, National University of Singapore, Email: n.j.calamita@nus.edu.sg.

<sup>2</sup> European Union–Canada Comprehensive Economic and Trade Agreement (final draft of 29 February 2016) (CETA).

<sup>3</sup> Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (final draft of 1 February 2016) (EU–Vietnam FTA).

staffed with judges appointed by the States parties.<sup>4</sup> It further provides for the establishment of a two-tiered system of tribunals, comprising first instance and appellate bodies, and allows for appellate review as of right on issues of law and fact.<sup>5</sup>

Although the EU's new model contains a host of self-described 'radical' changes<sup>6</sup> to the established procedures of investor–State arbitration, when it comes to the enforcement and recognition of the 'awards' produced through the new model, the EU attempts to rely on tried and tested instruments of the investment treaty regime, such as the ICSID Convention and New York Convention.<sup>7</sup> In its treaties with Canada and Vietnam, the EU and its counterparties have been at pains to characterize dispute settlement under the new EU model as 'arbitration' and, in particular, as arbitration under the ICSID Convention for the purpose of enforcement and recognition of these awards by non-parties to the EU's treaties.<sup>8</sup>

The reasons for these efforts are easy to understand. In order to ensure the effectiveness of its new model of ISDS, it is not sufficient that the dispute settlement obligations created under the EU's treaties be recognized and enforced only by the parties to the individual treaties. As with other kinds of arbitration, the effectiveness of investor–State arbitration depends in large measure upon the willingness of third States to the dispute to give recognition and enforcement to arbitral awards rendered under these treaties. As a result, it has been an understandable priority for the EU and its treaty partners to try to make this new process of ISDS appear to be compatible with the requirements of existing multilateral instruments, such as the ICSID Convention and the New York Convention.

As I have argued elsewhere, however—and as surveyed briefly below—notwithstanding the EU's efforts in this regard, the new EU model of ISDS does not appear to be compatible with the ICSID Convention.<sup>9</sup> The changes made by the EU and its counterparties are simply too fundamental and too many for the awards produced by this new process of ISDS to be classified properly as ICSID Convention arbitral awards.<sup>10</sup> Moreover, it is not within the power of groups of States or disputing parties to modify among themselves fundamental proscriptions of the ICSID Convention, such as the Convention's express

<sup>4</sup> Elsa Sardinha, 'The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement' (2017) 32(3) *ICSID Rev-FILJ* 625.

<sup>5</sup> *ibid.*

<sup>6</sup> 'Radical' is a term of self-description by the European Union (EU) and Canada. See Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and Its Member States, Final Draft (undated) <<http://diepresse.com/mediadb/pdf/cetazusatztext.pdf>> accessed 29 October 2016.

<sup>7</sup> See EU–Vietnam FTA (n 3) art 31(7)–(8); CETA (n 2) art 8.37(5)–(6). Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention); Convention on Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) (New York Convention).

<sup>8</sup> The relevant provision is ICSID Convention (n 7) art 54: '(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.'

<sup>9</sup> N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 *J World Inv & Trade* 585. For different views regarding the compatibility of the EU's new model with the ICSID Convention, see 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* 76; 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?' (3 June 2016) <[http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf)> accessed 15 August 2016.

<sup>10</sup> See Calamita (n 9) 614–18. Reinisch and I appear to agree on this point. See Reinisch (n 9) 781–82.

prohibition on the appellate review of ICSID Convention arbitral awards.<sup>11</sup> A change in this regard requires an amendment to the ICSID Convention, something that the EU and its counterparties have not sought to do. Nevertheless, while the EU's new model may not be compatible with the ICSID Convention, the analysis is different with regard to the New York Convention. As discussed below, it seems as though EU model awards should be subject to the New York Convention's internationalized regime for recognition and enforcement.

## II. THE PROBLEM WITH THE EU MODEL AND THE ICSID CONVENTION

By its terms, the ICSID Convention neither permits appeals, nor does it permit individual States or disputing parties to agree to appellate processes among themselves.<sup>12</sup> The EU's attempt to include, *inter alia*, an appellate process in its new model, and simultaneously to claim that its new model is a form of ICSID Convention arbitration (without an amendment to the ICSID Convention), is thus an attempt to modify the Convention *inter se*.<sup>13</sup> The attempt appears to be impermissible and legally ineffective. The ICSID Convention expressly prohibits appellate review in ICSID Convention arbitration.<sup>14</sup> Under the law of treaties, parties to a multilateral treaty may not modify its provisions where 'the modification in question' is prohibited by the treaty.<sup>15</sup> As a result, the only way to incorporate an appellate process into arbitration under the ICSID Convention is through an amendment to the ICSID Convention, something that the EU and its treaty partners have not attempted to do.<sup>16</sup>

Moreover, even if the EU's attempts to modify the ICSID Convention *inter se* were not impermissible, awards issuing from this new model would not qualify as 'ICSID Convention awards' for the purpose of engaging the obligations of enforcement and recognition owed by other States under Article 54 of the Convention.<sup>17</sup> The new EU model is a fundamental—indeed, 'radical'—reconfiguration and reconceptualization of ISDS to the point that it cannot be said that this new model is still arbitration 'under the ICSID Convention'. The new EU model entails a root-and-branch revision of investor-State arbitration, establishing

<sup>11</sup> See Calamita (n 9) 604–13. But see Kaufmann-Kohler and Potestà (n 9) 83; Reinisch (n 9).

<sup>12</sup> ICSID Convention (n 7) art 53(1): '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.' See also ICSID Convention (n 7) 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 Calamita (n 9) 604–13.

<sup>13</sup> See Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) (VCLT) art 41. For an in-depth treatment of this argument, see Calamita (n 9) 606–13.

<sup>14</sup> The only recourse available with respect to an ICSID award are the procedures provided for in the ICSID Convention (n 7) itself, namely, interpretation (art 50), revision (art 51), and annulment of the award (art 52).

<sup>15</sup> VCLT (n 13) art 41(1)(b).

<sup>16</sup> Because the ICSID Convention requires unanimous approval of any amendment, amending the ICSID Convention has long been treated as the 'third rail' of possible ICSID reform. See ICSID Convention (n 7) art 66: 'Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.' In the European Commission's August 2016 'Inception Impact Assessment' on the possible establishment of a multilateral investment court for investment dispute resolution, however, the Commission seemed to acknowledge that the changes it is proposing require an amendment to the ICSID Convention, stating that 'adding an appeal mechanism to the ICSID Convention (the main forum for ISDS cases) would most likely require the consent of all current 159 members of the ICSID Convention.' European Commission, *Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution* (1 August 2016) 5 (*Inception Impact Assessment*). Obviously, with respect to its treaties with Canada and Vietnam, it has taken a different view.

<sup>17</sup> See Calamita (n 9) 614–18. See also Reinisch (n 9) 781–82.

not only an appellate mechanism but also a standing two-tiered tribunal, the negation of the right to party-appointed arbitrators, the elimination of the role of the ICSID Secretary-General in constituting tribunals and *ad hoc* annulment committees, and so on.<sup>18</sup> In light of the requirements of the ICSID Convention and the extent of the revisions imposed by the EU, it would be inappropriate to conclude that the awards issued through this model have the status of awards to which the ICSID Convention applies.

### III. THE COMPATIBILITY OF THE EU MODEL WITH THE NEW YORK CONVENTION

Incompatibility with the ICSID Convention does not mean incompatibility with the New York Convention. The New York Convention contains a deliberately elastic conception of arbitration such that the awards of the EU's new model are likely to be treated as international commercial arbitral awards for the purposes of enforcement and recognition under its provisions.<sup>19</sup> This is important. For as useful as the 'self-contained' regime for enforcement and review under the ICSID system has been for the effectiveness of investor–State arbitration as a whole, 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.<sup>20</sup> Indeed, ICSID's own Additional Facility has proven effective, especially in arbitrations under the North American Free Trade Agreement (NAFTA), precisely because of the capacity of the New York Convention to facilitate, internationalize, and regularize the process of investor–State arbitration.<sup>21</sup>

One wrinkle in the analysis of the compatibility of the EU's new model with the New York Convention stems from the EU's efforts to insulate awards under the

<sup>18</sup> First, under the EU model, the provisions of the ICSID Convention guiding the procedure and constitution of tribunals are replaced by provisions establishing a two-tiered tribunal system. Whereas the ICSID Convention provides specific rules with respect to the constitution of tribunals, affording the arbitral parties the right to appoint arbitrators to the tribunal, 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. Compare ICSID Convention (n 7) art 37–40 and Transatlantic Trade and Investment Partnership (draft dated 12 November 2015) (TTIP) art 9; EU–Vietnam FTA (n 3) art 12; CETA (n 2) art 8.27. Second, whereas under the ICSID Convention, review of tribunal awards takes place through *ad hoc* annulment committees appointed by the chairman of the Administrative Council from the ICSID Panel of Arbitrators, under the new EU model, the role of ICSID is removed and appeals are heard through tribunals by judges selected by the parties to the treaty in which the appeals mechanism is contained. There is no scope for judges not selected by the parties to the EU's treaties to sit on the tribunals. Compare ICSID Convention (art 52(3)) and TTIP (art 10); EU–Vietnam FTA (n 3) art 13; CETA (n 2) art 8.28. Third, the new EU model replaces the exclusivity of the remedies against awards established in art 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 the ICSID Convention (n 7) arts 52 and 53 in favour of the appellate review provided for in those treaties. See TTIP (art 29(1)); EU–Vietnam FTA (art 28(1)); CETA (art 8.37).

<sup>19</sup> See Calamita (n 9) 618–21.

<sup>20</sup> See generally Kaj Hober and Nils Eliasson, 'Review of Investment Treaty Awards by Municipal Courts' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements* (OUP 2010) 635; 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. Indeed, according to the United Nations Conference on Trade and Development (UNCTAD), there have been only 12 known cases in which an investment award has been fully or partially annulled or denied enforcement in proceedings before national courts. See UNCTAD, *ISDS Navigator* (as of January 2017).

<sup>21</sup> Indeed, in order to ensure the effectiveness of Additional Facility arbitration awards, art 19 of the ICSID Arbitration (Additional Facility) Rules (April 2006) (ICSID AF Arbitration Rules) requires that Additional Facility arbitration proceedings 'shall be held only in States that are parties to the 1958 UN Convention of the Recognition and Enforcement of Foreign Arbitral Awards.' North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA).

new model from any national court review. In its treaty with Vietnam, and its proposal in the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the USA, the EU has included provisions that attempt to preclude national court review of EU model awards under Article V of the New York Convention.<sup>22</sup> The EU and its counterparties cannot of course bind third State courts regarding the application of the New York Convention within their territories.<sup>23</sup> Instead, the EU treaties attempt to foreclose challenges to enforcement and recognition by including language that may serve as a waiver by the disputing parties of their rights to make challenges under Article V.<sup>24</sup> Regardless of the effectiveness of such language *vis-à-vis* the rights of the disputing parties, however, the language of the New York Convention seems to indicate that there are at least certain grounds of review that a national court may raise on its own initiative, whether or not the parties have done so or indeed, have sought to waive them.<sup>25</sup> Given that the application of the New York Convention is entrusted to each of its 151 States parties, ultimately, it will be for each State that is presented with an EU model award to determine for itself whether, and to what extent, a private waiver may serve to foreclose its own review.<sup>26</sup>

#### IV. THE EU-CANADA INITIATIVE FOR A MULTILATERAL INVESTMENT DISPUTE SETTLEMENT MECHANISM

In the wake of the EU's conclusion of bilateral agreements containing its new model of ISDS, the EU, working with Canada, has begun efforts to multilateralize this new investment tribunal system.<sup>27</sup> The object of the initiative is to establish a 'multilateral investment dispute settlement mechanism' with the aim of 'increasing the legitimacy and acceptance of the international investment regime'.<sup>28</sup> As of the writing of this article, no concrete proposals have emerged, but it is evident from the statements of Canada and the EU that the essential model for the new multilateral mechanism is the multilevel structure found in the EU's treaties with Canada and Vietnam—that is, a two-tiered system of tribunals, comprising first-instance and appellate bodies, staffed with judges appointed by the States parties.<sup>29</sup> Moreover, it is clear that the goal of the European/Canadian initiative is

<sup>22</sup> See EU-Vietnam FTA (n 3) art 31(1)–(2); TTIP (n 18) art 30(1). CETA (n 2) contains no such provision.

<sup>23</sup> See Barton Legum, 'Visualizing an Appellate System' in Federico Ortino, Audley Sheppard and Hugo Warner (eds), *Current Issues in Investment Treaty Law*, vol 1 (BIICL 2006) 123.

<sup>24</sup> See Calamita (n 9) 621–22.

<sup>25</sup> *ibid* 622–23.

<sup>26</sup> *ibid*.

<sup>27</sup> See *Inception Impact Assessment* (n 16). At the same time, the EU has continued to negotiate bilaterally with States on additional international investment agreements (IIAs), all of which the EU proposes should contain its new model of ISDS. See eg Council of the European Union, General Secretariat, *Meeting Document – "Investment Court System" text for negotiations of a Modernized Global Agreement with Mexico*, Doc WK 1412/2017 INIT (8 February 2017).

<sup>28</sup> European Commission and Government of Canada, *The Case for Creating a Multilateral Investment Dispute Settlement Mechanism*, Informal Ministerial Meeting, World Economic Forum (20 January 2017) para 6.

<sup>29</sup> See *Inception Impact Assessment* (n 16). Despite the evident similarities between the EU's new ISDS model and the ideas mooted by the EU and Canada regarding a multilateral investment court, the EU and Canada have stated publicly that 'it is not the intention of the European Commission nor of the Government of Canada to propose it as a model for the current discussions on the establishment of a permanent multilateral investment dispute settlement system.' European Commission and Government of Canada, *Establishment of a Multilateral Investment Dispute Settlement System*, Expert Meeting Discussion Paper (13–14 December 2016) para 3 (*Multilateral Investment Dispute Settlement System*).

for this new multilateral mechanism eventually to replace the use of *ad hoc* tribunals in the resolution of disputes under all international investment agreements (IIAs).<sup>30</sup>

Although the goal of the EU and Canada is to replace *ad hoc* investment treaty arbitration, there are aspects of the existing regime that they intend for the new system to emulate. The EU and Canada have made it clear, for example, that any new system ‘should be designed to ensure enforceability of decisions in a way comparable to arbitral awards under current investment treaties’.<sup>31</sup> In other statements, the EU and Canada have gone further and taken the position that a future multilateral tribunal system should include a mechanism of enforcement ‘comparable to that of ICSID (that is, with no review at the domestic level given the appellate mechanism)’.<sup>32</sup>

While the EU and Canada have identified the ICSID regime as the ‘gold standard’ of enforcement and recognition, with respect to the actual design of a new multilateral mechanism, both States have indicated that they are willing to look beyond the ICSID Convention and the International Centre for Settlement of Investment Disputes (ICSID) to achieve this end. As the parties noted in December 2016, ‘[a]n important structural question relates to the relation of the multilateral investment dispute settlement system to existing international organisations and institutions. A choice arises between establishing a new international mechanism completely independent from existing institutions or docking it onto an already existing framework’.<sup>33</sup> According to the EU and Canada, whereas docking the multilateral mechanism onto an existing international organization would provide the new mechanism with ‘the organisation’s acquired experience in dispute resolution, its expertise in international investment law, its existing membership and voting rules, its resources, its public perception, etc.’,<sup>34</sup> creating an entirely new international framework for the mechanism ‘may grant negotiators more freedom to design an effective system without needing to fit such a system into an existing system or to take into account other potential policy considerations resulting from the existing frameworks’.<sup>35</sup>

A further issue identified by the EU and Canada regarding the modalities of establishing a new multilateral dispute settlement system is ‘where and when to conduct negotiations, as well as how such negotiations are to be conducted’.<sup>36</sup> In particular, the issue has been raised whether discussions should be held within an institutionalized framework or in an *ad hoc* setting. As observed by the EU and Canada, while an institutionalized framework for negotiations ‘could offer some practical advantages in terms of facilities and logistics...the public perception of any such framework must be carefully considered too’.<sup>37</sup> Moreover, while the forum for negotiation and the international organization with which the

<sup>30</sup> *Multilateral Investment Dispute Settlement System* (n 29) paras 11–15.

<sup>31</sup> European Commission and Government of Canada, *Reforming Investment Dispute Settlement: Considerations on the Way towards A Multilateral Investment Dispute Settlement Mechanism*, OECD-hosted Investment Treaty Dialogue (17 October 2016), [http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc\\_155265.pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155265.pdf).

<sup>32</sup> *Multilateral Investment Dispute Settlement System* (n 29) para 39: ‘Applying and retaining the successful and effective system of enforcement comparable to that of ICSID (ie with no review at domestic level given the appellate mechanism) should be an important policy objective.’

<sup>33</sup> *Multilateral Investment Dispute Settlement System* (n 29) para 17.

<sup>34</sup> *ibid* para 18.

<sup>35</sup> *ibid* para 19.

<sup>36</sup> *ibid* para 49.

<sup>37</sup> *ibid* para 50.

mechanism might be docked are related questions, the EU and Canada have not ruled out the possibility that negotiations might take place in one forum and the mechanism be docked onto another.<sup>38</sup>

## V. THE CHALLENGE POSED TO ICSID BY A MULTILATERAL INVESTMENT TRIBUNAL

This article proceeds from the premise outlined above that a system of ISDS like the EU model is not compatible or compliant with the ICSID Convention and asks whether, nevertheless, a new multilateral system based broadly on that model can be designed to work at ICSID without amending the Convention.<sup>39</sup> Is it possible, in other words, for ICSID to serve as a forum for the negotiation of an instrument that would create a new multilateral ISDS mechanism outside of the ICSID Convention? Or, considered differently, in the event that negotiations for a new mechanism occur in some other forum or in an *ad hoc* way, can ICSID and its Secretariat nevertheless serve as the international organization onto which the new mechanism might be docked? If so, what limits might there be on the role the Centre could properly play? These questions are of existential importance to ICSID as an institution. For if States agree to establish a multilateral investment tribunal to replace ICSID Convention arbitration (and all other forms of *ad hoc* investor–State arbitration for that matter), the question must be asked as to what will be left for ICSID as an institution to do, at least with respect to disputes arising under investment treaties.

## VI. CONSIDERING THE OPTIONS FOR ICSID: LESSONS FROM THE CENTRE’S HISTORY AND PRACTICE

In considering the challenges faced by ICSID, lessons may be taken from the Centre’s history and practice: the Administrative Council’s adoption of the Additional Facility in 1978; the Centre’s consideration of a possible Appeals Facility in 2004–05; and the evolving scope of the Secretariat’s competence to administer non-ICSID proceedings. Looking at these episodes, it becomes evident that there is flexibility in ICSID’s constitutional structure and that this flexibility provides several options for ICSID as an institution if there is the political will to pursue them.

### A. AN ICSID PROTOCOL FOR THE ESTABLISHMENT OF A MULTILATERAL TRIBUNAL: LESSONS FROM THE CREATION OF THE ICSID ADDITIONAL FACILITY

Throughout 1977–78, while the Administrative Council was drafting and finalizing the Additional Facility, there was a suggestion by some that the adoption of the

<sup>38</sup> *ibid.*

<sup>39</sup> This article proceeds from the assumption that opening the ICSID Convention for amendment is not a practical option either for addressing the question of appellate review of ICSID Convention awards or for effecting the kind of wholesale revision of ICSID arbitration envisioned by the EU’s new model. There appears to be no political support for undertaking the effort to try to amend the Convention, which would require unanimity among the existing States parties. See ICSID Convention (n 7) art 66.

Additional Facility properly required an amendment of the ICSID Convention and that by acting through a resolution of the Administrative Council, the Council was exceeding its powers.<sup>40</sup> According to the argument, the establishment of the Additional Facility was, in effect, an extension of the jurisdiction of the Centre and, consequently, could only be effected by an amendment to the Convention, which would require the unanimous consent of the contracting parties rather than a majority vote in the Council.<sup>41</sup>

Aron Broches disagreed with this position strongly. Broches took the view that the proposal for the Additional Facility:

envisages that the Additional Facility would be established by decision of the Administrative Council in the exercise of its power to administer the Centre and, in particular, to adopt the administrative and financial regulations of the Centre (Convention, Article 6(1)(a)). *This power could admittedly not be used to extend the applicability of the Convention to parties or to disputes not falling within the jurisdiction of the Centre as defined in Article 25 of the Convention. If this were desired, an amendment of the Convention would be required. However, the proposal does not contemplate an extension of the jurisdiction of the Centre, but merely an extension of the activities of its Secretariat and this would appear to be within the powers of the Administrative Council.*<sup>42</sup>

As Broches put the matter in his final report on the proposal, ‘to hold that the Administrative Council has no power to authorize an extension of the activities of the Centre’s Secretariat appears to me an unduly restrictive interpretation of the Convention. The creation of the Additional Facility presents a question of policy rather than law’.<sup>43</sup>

A majority of the voting members of the Administrative Council followed Broches’ view: establishing the Additional Facility did not go beyond the Administrative Council’s powers under Article 6, the object and purpose of the Convention, or the permissible activities of the Centre because the application of the Convention was expressly excluded in relation to proceedings under the Additional Facility.<sup>44</sup> Moreover, because the costs of Additional Facility proceedings were to be borne entirely by the parties to the dispute, the adoption of the

<sup>40</sup> A number of States, such as Belgium, the Netherlands, and the United Kingdom, expressed concerns that an amendment was required for the contemplated changes. See International Centre for Settlement of Investment Disputes (ICSID), Doc AC/77/7 Summary Proceedings of the Eleventh Annual Meeting (29 September 1977) 4; Doc AC/78/17 Summary Proceedings of the Twelfth Annual Meeting (27 September 1978) 3. The background to the Administrative Council’s decision and the arguments against the Council’s exercise of power are covered in detail in Pierluigi Toriello, ‘The Additional Facility of the International Centre for Settlement of Investment Disputes’ (1978–79) 4 *Italian YB Intl L* 59; Antonio R Parra, *The History of ICSID* (OUP 2012) 141–49.

<sup>41</sup> ICSID (n 40).

<sup>42</sup> Doc AC/77/5 Administration of Proceedings Outside the Scope of Article 25 of the Convention by the Secretariat of the Centre: Report and Recommendations of the Secretary-General (6 September 1977) (*Administration of Proceedings*) para 3 (emphasis added) [quoted in Parra (n 40) 144]. Note how the decision to adopt the Additional Facility relied upon the Administrative Council’s power to adopt the administrative and financial regulations of the Centre under art 6(1)(a). It was not based upon an argument that the Council was exercising ‘necessary’ powers for the implementation of the ICSID Convention. See ICSID Convention (n 7) art 6(3). The suggestion by Schreuer and colleagues that this served as the basis for the Administrative Council’s decision would seem to be misplaced. Christoph Schreuer and others, *The ICSID Convention: A Commentary* (CUP 2009) 27.

<sup>43</sup> Doc AC/78/7 Additional Facility, Report and Recommendations of the Secretary-General (15 August 1978) 3 [quoted in Toriello (n 40) 67, n 25] (*Additional Facility, Report and Recommendations*).

<sup>44</sup> See Aron Broches, ‘The “Additional Facility” of the International Centre for Settlement of Investment Disputes (ICSID)’ in Pieter Sanders (ed), *IV Yearbook of Commercial Arbitration* (1979) 373, 375. 51 of the then 71 Contracting States were represented at the meeting. 26 voted in favor, two against, and 24 abstained. See Parra (n 40) 148–149 (providing the voting roll call).



Additional Facility raised no possibility of costs impermissibly accruing either to the Centre, to non-participating States, or to the World Bank.<sup>45</sup>

By keeping the Additional Facility expressly and deliberately apart from the coverage of the Convention and the Centre's Convention-based jurisdiction, Broches and the Administrative Council justified the exercise of power to create the Additional Facility and to authorize the Centre's administration of proceedings under it. A necessary consequence of this separateness, however, was that '[w]ith respect to arbitration proceedings [under the Additional Facility] this means, e.g., that awards, unlike awards rendered pursuant to the Convention, are not insulated from national law and that their recognition and enforcement will be governed by the law of the forum, including applicable International Conventions'.<sup>46</sup>

While the adoption of the Additional Facility prompted questions about the permissibility of the Administrative Council's actions at the time, nearly 40 years later there is general acceptance that the Additional Facility has come to form 'an integral part of the ICSID machinery'.<sup>47</sup> In technical terms, as a matter of the law of treaties, the decision of the Administrative Council to adopt the Additional Facility, together with the subsequent lack of objection by ICSID State parties to the Centre's administration of Additional Facility cases, and the widespread inclusion of Additional Facility arbitration as an option in IIAs, all serve as strong examples of recognized 'subsequent practice' in the application of Article 6(1) of the ICSID Convention, which would appear to 'establish[] the agreement of the parties regarding its interpretation'.<sup>48</sup>

The Administrative Council's creation of the Additional Facility demonstrates the broad power of the Council acting under Article 6(1) of the ICSID Convention. Based on this experience, it is at least arguable that the Administrative Council has the power to act under Article 6(1) to bring forward an optional, standalone protocol to the ICSID Convention providing for the establishment of a multilateral investment tribunal.<sup>49</sup> The protocol would be in essence a new treaty, proposed through the Council, for the creation of a standing tribunal mechanism (with first instance and appellate chambers) for use in the settlement of disputes under those IIAs to which

<sup>45</sup> See *Additional Facility, Report and Recommendations* (n 43) 3 [cited in Toriello (n 40) 67].

<sup>46</sup> Broches (n 44) 375 (commentary to art 3). See also ICSID AF Arbitration Rules (n 21) art 3: 'Since the proceedings envisaged [by the ICSID AF Arbitration Rules] are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.' Indeed, in order to ensure that Additional Facility arbitration awards will be subject to the application of such 'International Conventions,' art 19 of the ICSID AF Arbitration Rules requires that Additional Facility arbitration proceedings 'shall be held only in States that are parties to the 1958 UN Convention of the Recognition and Enforcement of Foreign Arbitral Awards'.

<sup>47</sup> Schreuer and others (n 42) 27, n 16.

<sup>48</sup> VCLT (n 13) art 31(3)(b).

<sup>49</sup> De Figueiredo has expressed doubts about the Administrative Council's authority to adopt a decision establishing an 'appellate system' under ICSID Convention (n 7) art 6. 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) 506, 523. The difficulty with De Figueiredo's argument is that he seems to misapprehend the basis upon which the Administrative Council acted when it adopted the Additional Facility. As noted above, the basis for the Council's creation of the Additional Facility was ICSID Convention (n 7) art 6(1), which establishes the Council's power to adopt the administrative and financial regulations of the Centre. It was not based upon an argument that the creation of the Additional Facility was an exercise of powers 'necessary' for the implementation of the ICSID Convention under art 6(3). See *Administration of Proceedings* (n 42) para 3 (emphasis added) [quoted in Parra (n 40) 144]. Thus, the question as to whether the Administrative Council would have the power under art 6(3) to adopt an appellate mechanism or establish a multilateral investment tribunal is somewhat off the mark. The real question is whether the Council may take such action pursuant to art 6(1). As discussed above, in light of the nearly 40 years of acceptance of the Council's exercise of power under art 6(1) to establish the Additional Facility, there is reason to think that the Council has similar power to adopt an appeals or investment tribunal facility today.

States might decide to make it applicable. The content of the protocol could be expected to provide rules addressing the operation of the tribunal mechanism, such as the procedure for staffing the new tribunal chambers, qualifications and requirements for tribunal members, the scope of appellate review, and so forth.<sup>50</sup> In addition, the protocol could provide further that proceedings under its provisions would be administered and registered by the Centre and its Secretariat, thereby taking advantage of ICSID's established expertise in the resolution of investment disputes and its existing infrastructure in Washington and Paris.

In opening a new protocol for agreement, the Council would not be endeavouring thereby to amend or modify the existing ICSID Convention. Rather, the Council, through a decision of its members, would be acting within its powers under Article 6(1) to authorize an extension of the activities of the Centre's Secretariat by providing for a new mechanism of investor-State dispute resolution to be docked onto existing structures of the Centre. Like the Additional Facility, the process of dispute resolution provided for in the protocol would not be arbitration under the ICSID Convention, but something new. As was done with the Additional Facility, therefore, it would seem prudent to include language in the new protocol indicating that, notwithstanding the involvement of the Centre and the Secretariat, the protocol does not (and, indeed, could not) serve to extend the provisions of the Convention to the proceedings of the new multilateral investment tribunal.

Since proceedings under the new protocol would not be covered by the provisions of the ICSID Convention, they could not benefit from the Convention's provisions with respect to enforcement. Consequently, in drafting a new protocol, it might be decided that the new protocol should contain a provision analogous to Article 54 so that, as among the parties to the protocol, the awards issued through the new mechanism would benefit from similar non-reviewable enforcement. That said, because such a provision could only operate as among the parties to the new protocol, the New York Convention would continue to be relevant for the recognition and enforcement of protocol awards in States not yet parties to the protocol. Over time, however, as adoption of the protocol became more widespread, the need to rely upon the New York Convention could be expected to wane and reliance upon the protocol's own enforcement provisions would take on a widespread application similar to that enjoyed by the ICSID Convention.<sup>51</sup>

<sup>50</sup> See *Multilateral Investment Dispute Settlement System* (n 29) (identifying key design issues for a multilateral investment tribunal).

<sup>51</sup> A further issue for consideration regarding any instrument establishing a new multilateral investment tribunal is the relationship between the new tribunal and existing IIAs. As has been recognized and discussed elsewhere, an instrument establishing a new system for investor-State settlement disputes (ISDS) would not in and of itself reform the IIA regime. The challenge for systemic reform, therefore, is to ensure that it is applied, not only to future treaties (which might reference it directly) but also to the great mass of existing treaties. In principle, of course, States could amend each of their bilateral IIAs to incorporate a new multilateral ISDS mechanism, but, in practical terms, the prospect is unlikely. Therefore, mechanisms by which States could amend all of the treaties in their portfolios with a single action have been much considered. The approach under the Mauritius Convention in Treaty-based Investor-State Arbitration (opened for signature 17 March 2015, entered into force 18 October 2017) is frequently cited as a model for the amendment of arbitral procedures in large numbers of pre-existing investment treaties. In the context of ICSID's role with respect to a multilateral investment tribunal, the Mauritius mechanism might either be incorporated directly into a new protocol by the Administrative Council or it might stand alongside as a separate instrument (in much the same way that it does in relation to UNCITRAL's rules on transparency). In either case, there would seem to be nothing about the Mauritius mechanism that would affect the analysis of ICSID's competence regarding a new multilateral ISDS mechanism contained above. For further discussion of the application of the Mauritius Convention approach in the context of IIA reform, see eg UNCTAD, *Tools for Modernizing the IIA Network: Treaty Re-negotiation, Treaty Expiration and Related Challenges*, Report of Rapporteur, N Jansen Calamita (25–27 February 2015) 2; Kaufmann-Kohler and Potestà (n 9) 78–82; Calamita (n 9) 623–27.

## B. ICSID AS THE FORUM FOR NEGOTIATIONS: LESSONS FROM THE CENTRE'S PRIOR CONSIDERATION OF A POSSIBLE APPELLATE MECHANISM

Although the possibility of establishing a multilateral system for the resolution of investor–State disputes has been mooted from time to time,<sup>52</sup> the present initiative by the EU and Canada has concretized the discussion in a way not previously seen. The closest analogue to the current consideration of a multilateral tribunal system is the process undertaken by ICSID in 2004–05 with respect to the possible creation of an appellate mechanism by the Administrative Council. As is well known, in October 2004, in connection with the Administrative Council's consideration of various revisions to the ICSID Arbitration Rules and the Additional Facility Rules, the ICSID Secretariat prepared a discussion paper in which it outlined the possible features of an appellate mechanism for use in investor–State arbitration, a so-called 'ICSID Appeals Facility'.<sup>53</sup> As the Appeals Facility was conceived by the Secretariat in that paper, it would have been created and functioned under a set of optional ICSID Appeals Facility Rules adopted by the Administrative Council, following the model established by the adoption of the Additional Facility in 1978.<sup>54</sup> 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.<sup>55</sup>

The ICSID Secretariat's 2004 paper provided a fairly detailed overview of how an appellate mechanism might be designed and operated, including how the appeals panel would be staffed, the scope of appellate review, and so forth.<sup>56</sup> On the central legal question, however, of whether the creation of an appellate mechanism was within the power of the Administrative Council or would require an amendment of the ICSID Convention, the Secretariat was circumspect. It did not address the question of the Administrative Council's power at all.<sup>57</sup> With

<sup>52</sup> See eg Organisation for Economic Co-operation and Development (OECD), Negotiating Group on the Multilateral Agreement on Investment, *Selected Issues on Dispute Settlement*, Doc DAF/MAI(98)12 (13 March 1998).

<sup>53</sup> See ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper (22 October 2004). 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, and disclosure requirements for arbitrators, mediation, and training. *ibid.* See also Parra (n 40) 249–53 (describing the background to the preparation of the discussion paper). ICSID Rules of Procedure for Arbitration Proceedings (April 2006) (ICSID Arbitration Rules).

<sup>54</sup> ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper (22 October 2004), annex, para 1 (stating that 'the Facility might be established and operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID').

<sup>55</sup> See ICSID Secretariat (n 54) Annex, para 1.

<sup>56</sup> 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. *ibid.* para 5. 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 (para 6), and appellate proceedings under the Appeals Facility would have been administered by the ICSID Secretariat, regardless of the rules of the original arbitration (para 12). 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 art 52 of the ICSID Convention (para 7). Serious errors of fact could also serve as a basis for appeal (*ibid.*). The appeals tribunal would have had the power to uphold, modify or reverse the challenged award, or annul it in whole or part (*ibid.* para 9). 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 (para 13).

<sup>57</sup> One of the only commentators to raise the issue at the time was Patrick Julliard. See Patrick Julliard, 'Variation in the Substantive Provisions and Interpretation of International Investment Agreements' in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 81, 100 [arguing that 'resorting to a decision of the Administrative Council might be questioned as a matter of law, since such decisions are

respect to whether the adoption of the Appeals Facility might require an amendment of the Convention—because of the incompatibility of appellate review with ICSID arbitration—the paper simply noted that in the absence of such an amendment, in order for the proposal to be permissible, it would be necessary to satisfy the requirements of the law of treaties regarding the *inter se* modification of a multilateral treaty.<sup>58</sup> Beyond enumerating the general criteria for such an analysis, however, the Secretariat offered no view on whether it believed that such an *inter se* modification of the ICSID Convention would satisfy these requirements.<sup>59</sup> These issues were left for consideration by the Administrative Council.

In the end, of course, ICSID did not adopt an Appeals Facility. Most members of the Administrative Council ‘considered it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper’.<sup>60</sup> Nevertheless, the episode illustrates the capacity of ICSID, the Administrative Council, and the ICSID Secretariat to serve as a productive forum for negotiation with respect to the EU’s and Canada’s proposal for a multilateral dispute settlement mechanism. Not only does ICSID have obvious experience and expertise in the resolution of disputes and in international investment law, its membership of more than 150 States provides a broadly representative body within which discussion and negotiation can occur. Further, with respect to support for the development of a proposal for a multilateral investment tribunal, and subsequent negotiations, no other institution can match the depth and strength of the human resources of the ICSID Secretariat in the field of investor–State dispute settlement.<sup>61</sup>

Whether ICSID serves as the forum for the negotiation of a new multilateral system of ISDS will depend ultimately on political considerations extending beyond questions of experience, expertise, and legal competence. As noted by the EU and Canada, ‘public perception’ of possible institutional fora is also likely to play an important role.<sup>62</sup> It is beyond the scope of this article to explore in depth the public perception of the various institutions that have been mooted as possible fora for negotiation.<sup>63</sup> Suffice it to say that every institution comes within its own set of ‘perceptions’, usually both positive and negative.

---

solely intended to “implement” the Convention, and not to ensure consistency through additional facilities entrusted with functions that might go beyond the delegation granted by Article 6(3)].

<sup>58</sup> See ICSID Secretariat (n 54) annex, para 2. Commentators at the time took differing views as to whether the adoption of an Appeals Facility would require an amendment to the Convention. See eg Asif H Qureshi and Shandana Gulzar Khan, ‘Implications of an Appellate Body for Investment Disputes from a Developing Country Point of View’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 267, 274: ‘The introduction of such a Facility would necessitate amendment of ICSID’; Christian J Tams, ‘An Appealing Option? The Debate about an ICSID Appellate Structure’ (2007) 4(5) *Transnatl Disp Mgmt* (September 2007), 17 (arguing that no amendment would be necessary).

<sup>59</sup> Reinisch seems to read too much into the ICSID Secretariat’s consideration of the issue in its 2004 Discussion Paper. ICSID Secretariat (n 54); Reinisch (n 9) 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.

<sup>60</sup> ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat (12 May 2005) para 4. See also Parra (n 40) 253–54.

<sup>61</sup> ICSID, ‘The ICSID Caseload-Statistics (Issue 2017-1)’ 9 <[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf)> accessed 29 October 2016 (*ICSID Caseload*).

<sup>62</sup> *Multilateral Investment Dispute Settlement System* (n 29) para 18.

<sup>63</sup> Among the institutions that have been mentioned are the OECD, UNCITRAL, and the G20.

*C. ICSID AS THE PROVIDER OF ADMINISTRATIVE SUPPORT TO A NEW MULTILATERAL TRIBUNAL: LESSONS FROM THE EXPANSION OF THE SECRETARIAT'S ROLE IN NON-ICSID, NON-ADDITIONAL FACILITY PROCEEDINGS*

Following the Administrative Council's adoption of the Additional Facility, one might have concluded that Council action was required in order for the Secretariat to extend its administrative activities to other non-ICSID Convention arbitrations, such as the administration of cases under the United Nations Commission on International Trade Law's (UNCITRAL) Arbitration Rules.<sup>64</sup> Broches, after all, had justified the Council's action with regard to the Additional Facility on the grounds that it did 'not contemplate an extension of the jurisdiction of the Centre, but merely an extension of the activities of its Secretariat'.<sup>65</sup> In light of the subsequent practice of the Centre, such a conclusion would have been wrong.

Beginning in 2000 and continuing to the present, the ICSID Secretariat has provided administrative support in dozens of cases heard under non-ICSID rules (for example, UNCITRAL, the London Court of International Arbitration, Permanent Court of Arbitration) similar to the support provided by the Secretariat to ICSID Convention and Additional Facility proceedings.<sup>66</sup> Most of these cases have arisen under investment treaties, especially under Chapter 11 of the NAFTA, while a small number of cases have not involved investment disputes at all. Indeed, the first non-ICSID Convention, non-Additional Facility case that the Secretariat administered arose under the 1982 UN Convention on the Law of the Sea.<sup>67</sup>

The broad scope of the Secretariat's administrative activities beyond those matters in which it has been authorized expressly to act is instructive. At the request of various States from time to time, and without apparent objection by other States, the Secretariat has expanded the scope of its activities beyond cases arising under the ICSID Convention and the Additional Facility. Based on this practice, it is arguable that the Secretariat could provide administrative services to parties in proceedings under a new instrument for the establishment of a multilateral investment tribunal, regardless of whether the instrument is brought forward through the Administrative Council or by some other means. In other words, if an instrument for the establishment of a multilateral investment tribunal were to be drafted and brought into force by States acting through a forum other than ICSID (for example, through UNCITRAL or the Organisation for Economic Co-operation and Development), there would appear to be nothing to prohibit the

<sup>64</sup> Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) (1976).

<sup>65</sup> *Administration of Proceedings* (n 42) para 3 (quoted in Parra (n 40) 144).

<sup>66</sup> See Parra (n 40) 243. For the most recent statistics on the Secretariat's involvement in non-ICSID cases, see *ICSID Caseload* (n 61).

<sup>67</sup> See *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, Award on Jurisdiction and Admissibility (4 August 2000) para 8. The tasks performed by the Secretariat were spelled out: 'ICSID would serve as Registrar; be the official channel of communication between the Parties and the Arbitral Tribunal; make arrangements for keeping a record (including verbatim transcripts) of the hearing on jurisdiction; make other arrangements as necessary for the hearing on jurisdiction; and, from the funds advanced to it by the Parties, pay the fees of the members of the Arbitral Tribunal, reimburse their travel and other expenses in connection with the proceedings, and make other payments as required' (para 9). The Secretariat has also administered matters under the 1960 Indus Waters Treaty (India and Pakistan) (signed 19 September 1960, entered into force as of 1 April 1960) and the 2006 Softwood Lumber Agreement (United States and Canada) (signed 12 September 2006, entered into force 12 October 2006). See *ICSID Caseload* (n 61). United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994).

ICSID Secretariat from acting as the administrator and registrar of that new body. That said, it would be imperative that in so acting the Centre did not exceed the scope of its competence. Thus, for example, it would be important for the Centre to make clear (as it did with the Additional Facility) that even though the Secretariat is providing administrative services and acting as the registrar for this new multilateral tribunal, there should be no doubt that the cases are not covered by the ICSID Convention.<sup>68</sup> For the Centre to register non-ICSID Convention cases as though they arose under the ICSID Convention would be an *ultra vires* act.<sup>69</sup>

## VII. CONCLUDING THOUGHTS

As of the date of this article, it is not clear whether the EU's and Canada's proposal for a multilateral investment tribunal will generate significant support among States. What is clear is that if States agree to establish a multilateral investment tribunal to replace ICSID Convention arbitration and without the participation of the Centre and its Secretariat, there will be very real questions as to what is left for ICSID as an institution to do, at least with respect to disputes arising under investment treaties. As illustrated above, however, ICSID's history and practice indicate that there are legal options for ICSID to participate in the establishment and administration of a new tribunal. The question that remains is whether there is the political will to pursue them.

<sup>68</sup> See ICSID AF Arbitration Rules (n 21) 3: 'Since the proceedings envisaged [by the Additional Facility Rules] are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.'

<sup>69</sup> In this respect, in light of the incompatibility of the investment tribunal model found in the EU's new bilateral agreements, difficult questions about the appropriate exercise of power 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 2) art 8.23(7)(a); EU-Vietnam FTA (n 3) art 7.