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*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*

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Abstract— CETA and the EU–Vietnam FTA are the first treaties to specify new rules governing the identity, requisite qualifications and tenure of arbitral members, and provide a more extensive review function through a two-tiered investment tribunal system (ITS). These treaties signal a shift towards a more public and judicialized system, akin to that of many national legal systems and the WTO. The ITS creates a permanent first instance Tribunal and an Appeal Tribunal, featuring a pre-selected roster of tribunal members, competent to review the Tribunal’s decisions for errors of law and fact, in addition to Article 52 ICSID Convention grounds—making it a novel ‘one-stop-appellate-shop’. This analysis assesses the operation of, and reasons for, key provisions of the EU’s model by comparing and contrasting the ITS in CETA and the EU–Vietnam FTA. The discussion draws analogies to, and distinctions between, other treaties and relevant jurisprudence which have influenced the negotiators. Among the most striking features of the new EU-led approach to investor-State arbitration is its removal of disputing party involvement in the selection of the tribunal in favour of a standing tribunal appointed by the treaty Parties (which results in a considerable amount of the disputing investor’s autonomy being stripped away), its purported modification of existing arbitral rules in a number of substantial ways, and its short deadlines within which the Tribunal must render final awards.

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I. INTRODUCTION

The Comprehensive Economic and Trade Agreement (CETA)² between Canada and the European Union (EU) was signed on 30 October 2016. The initial text was released by Canada and the European Commission (EC) in September 2014 and, following legal scrubbing, a new text, featuring an investment tribunal system (ITS),³ was issued in February 2016. The ITS provides for the creation of a permanent first instance Tribunal and an Appeal Tribunal, featuring a pre-selected roster of tribunal members, competent to review the Tribunal's decisions for errors of law and fact, in addition to the grounds stipulated in Article 52 of the ICSID Convention. The final draft of the EU–Vietnam Free Trade Agreement (the EU–Vietnam FTA)⁴ was also released in February 2016, and similarly includes an ITS. The ITS represents the most notable revision to the investment chapters in CETA and the EU–Vietnam FTA. Each of these treaties effectively replaces the investor–State dispute settlement (ISDS) system of *ad hoc* arbitral tribunals—employed in nearly all bilateral investment treaties (BITs) to date⁵—with a two-tier ITS, providing appellate review as of right in investment treaty disputes for the first time in any treaty.

This chapter analyses the operation of, and reasons for, key provisions of the ITS in CETA and the EU–Vietnam FTA.⁶ The discussion examines the main substantive and procedural features of the ITS, the origins of certain provisions, and the implications for future disputes conducted pursuant to these treaties. The discussion begins with an overview of the chief innovations that permeate the EU's new approach to ISDS, before undertaking a closer examination of the ITS' main components, and highlighting points of convergence and divergence between the two treaties where relevant.⁷ In tracing the reasons for changes to the traditional formulation of certain aspects of the dispute resolution mechanism, the discussion also examines the extent to which the ITS addresses criticisms and lessons learned from the experience of arbitrating complex investor–State disputes under NAFTA⁸ and other 'open textured' international investment agreements (IIAs). Where appropriate, the discussion draws analogies and distinctions between other IIAs and to relevant jurisprudence which seems to have influenced the European,

² Canada–EU Comprehensive Economic and Trade Agreement (signed 30 October 2016, entered into force provisionally 21 September 2017); investment chapter not yet in force (final text published 29 February 2016) <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> accessed 26 October 2017 (CETA).

³ 'ITS' will be used in this chapter to refer to CETA and EU–Vietnam's ISDS provisions. The ITS was first proposed as an 'investment court system' in September 2015 in the context of the EU–US TTIP negotiations. Transatlantic Trade and Investment Partnership Agreement (draft text published 14 July 2016) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>> accessed 26 October 2017 (TTIP). The term 'investment tribunal system' is not mentioned anywhere in CETA, but it is expressly included in the EU–Vietnam FTA, below. Both Canada and Vietnam have avoided referring to the ITS as a 'court' in the text of their respective treaties, as well as in their press releases on their respective government websites.

⁴ Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (draft text published 1 February 2016) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 26 October 2017 (EU–Vietnam FTA).

⁵ Including the existing BITs between certain EU Member States and Canada and Vietnam, respectively.

⁶ Specifically, s F of CETA's investment chapter: *Resolution of Investment Disputes Between Investors and States*; and the investment chapter of EU–Vietnam FTA: ch 8(II), s 3(4): *Investment Tribunal System*.

⁷ Whilst the EU–Vietnam FTA was the first treaty to include the ITS in its first public draft of December 2015, CETA negotiations progressed more quickly to arrive at a final scrubbed text that formally adopted the ITS. CETA's ITS is formulated in slightly different terms from that of the EU–Vietnam FTA, but the legal scrubbing process might see further changes made to the latter before it is finalized which bring it closer in line with CETA.

⁸ North American Free Trade Agreement between Canada, the US, and Mexico (signed 17 December 1992, entered into force 1 January 1994) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> accessed 22 June 2017 (NAFTA).

Canadian, and Vietnamese treaty negotiators. In addition to assessing the added-value of the EU's reworking of familiar ISDS structures, the discussion also contends with the potential incongruities arising from the formulation of certain provisions. One such contradiction—which will need to be resolved in the multilateralization of the ITS concept—relates to how the ITS simultaneously continues, yet radically modifies and supplements, long-established arbitral rules with regard to the enforcement and recognition of awards rendered under these treaties.⁹

II. COMPLICATIONS: 'MIXED AGREEMENT', TERMINATION OF PRE-EXISTING BITS, AND BREXIT

Before turning to an overview of the EU's new approach to ISDS, it warrants noting three intriguing aspects of the treaties under study. First, both CETA and the EU–Vietnam FTA are characterized as 'mixed agreements'.¹⁰ The Court of Justice of the EU (CJEU) recently rendered its long-awaited ruling that the EU–Singapore FTA (which is also a mixed agreement) cannot be ratified by the EU alone, and must be concluded jointly by the EU and its Member States' parliaments.¹¹ This characterization means that CETA's investment chapter will only enter into force upon the approval of the Council of the EU, the European Parliament, and the national Parliaments of all the EU Member States.¹² Complicating this ratification process is Belgium's request, on 6 September 2017, for an opinion from the CJEU regarding the compatibility of certain aspects of CETA with European IIAs. Specifically, the CJEU has been asked to opine on the compatibility of the ITS with the exclusive competence of the CJEU to provide definitive interpretation of EU law, the general principle of equality and the 'practical effect' requirement, the right of access to the courts, and the right to an independent and impartial judiciary. CETA provisionally entered into force on 21 September 2017. However, the dispositions on which Belgium is requesting the CJEU's opinion have been excluded from CETA's provisional application, and will only enter into force when all EU Member States have ratified CETA. The EU–Vietnam FTA, albeit still subject to legal revision, will have to undergo the same internal approval process in the EU and in Vietnam's National Assembly.

Second, the effect of these agreements will be significant. CETA and the EU–Vietnam FTA, when in force, purport to replace and supersede all BITs between individual EU Member States and Canada and Vietnam, respectively, as well as extend investment protection coverage in Canada and Vietnam to those EU Member States that had not previously entered into such BITs, and *vice versa*.¹³

⁹ 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, 772–73; N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 J World Inv & Trade 585 (Calamita): argues that the new EU model of ISDS does not appear to be compatible with the ICSID Convention.

¹⁰ In May 2016, the Council of the EU (where national government ministers from each EU Member State meet to coordinate policies and discuss, amend, and adopt laws) and Canada decided that CETA is a 'mixed agreement'.

¹¹ EU–Singapore FTA Opinion of the Court of Justice, Opinion 2/15, 16 March 2017 <<http://curia.europa.eu/juris/liste.jsf?num=C-2/15#>> accessed 6 June 2017. Draft EU–Singapore Free Trade Agreement (authentic text published May 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> (EU–Singapore FTA).

¹² Canada already ratified the agreement with its signature on 30 October 2016.

¹³ EU–Vietnam FTA art 20 (*Relationships with other Agreements*), s 2 (*Investment Protection*).

Third, due to the ‘Brexit’¹⁴ vote in the United Kingdom (UK), a EU comprising 27 Member States, rather than 28, is more likely to be called upon to ratify CETA (and almost certainly so for the EU–Vietnam FTA).¹⁵ However, while the UK remains in the EU, it is subject to the parts of CETA which are now in provisional effect. If the UK has left the EU by the time CETA is fully ratified (that is, by the time its investment chapter becomes operational), the situation is not entirely clear.

III. THE NEW EU-LED APPROACH TO INVESTOR-STATE ARBITRATION

The stated aim of the establishment of a permanent Tribunal and an Appellate Tribunal in CETA and the EU–Vietnam FTA is to provide ‘a modern and reformed investment dispute resolution mechanism’, which ‘strikes the right balance between protecting investors and safeguarding the right of a state to regulate’.¹⁶ Self-described by the EU and Canada as a ‘radical’ change to the prevailing system of investor-State arbitration,¹⁷ the ITS is one of the hallmarks of the EU’s broader proposed reforms in response to various criticisms facing ISDS.¹⁸ The ITS seeks to address issues such as the alleged lack of independence and impartiality of party-appointed arbitrators, expertise in international law and an ethical code for arbitrators, consistency and coherence of arbitral awards, and transparency. In addressing these challenges, CETA and the EU–Vietnam FTA contain new rules on ethics for Members of the Tribunal and Appellate Tribunal, transparency in the proceedings, and investors’ disclosure obligations with regard to third-party funding.

The ITS also serves as the foundation for a multilateral effort to develop a standing multilateral appellate mechanism. Both treaties include an express undertaking by the Parties to strive to establish a permanent multilateral investment tribunal with their other trading partners.¹⁹ Animating recent discussions regarding the creation of a multilateral model is a recognition of the ITS as ‘an important step in increasing the legitimacy and acceptance of the international investment regime’.²⁰ Akin to the process which initially brought the ITS concept to the fore, in December 2016, the EU announced its call for public input on further reforms to ISDS and, specifically, on the proposed multilateralization of

¹⁴ See eg Brian Wheeler and Alex Hunt, ‘The UK’s EU Referendum: All You Need to Know’ (*BBC News* 24 June 2016) <<http://www.bbc.com/news/uk-politics-32810887>> accessed 19 July 2016: A referendum was held on 23 June 2016 to decide whether the UK should leave or remain in the European Union. The ‘leave’ vote won by 52% to 48%.

¹⁵ Brexit also produces uncertainty as to how the UK will renegotiate its IIAs.

¹⁶ Delegation of the EU to Vietnam, *Guide to the EU–Vietnam Free Trade Agreement* (7 June 2016) 54 <http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf> accessed 16 June 2016.

¹⁷ Council of the EU, ‘Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States’, 13541/16 (Brussels, 27 October 2016) <<http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf>> accessed 27 October 2017.

¹⁸ See Elsa Sardinha, ‘The Impetus for the Creation of an Appellate Mechanism’ (2017) 32(3) *ICSID Rev—FILJ* 503; UNCTAD, *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II* (UN 2014) 25–29; OECD, *Investor-State Dispute Settlement, Public Consultation: 16 May–9 July 2012* (OECD 2012) <<http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>> accessed 19 October 2016; European Commission (EC), ‘Investment in TTIP and beyond—the path for reform’ (May 2015), 4 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 19 October 2016.

¹⁹ CETA art 8.29; EU–Vietnam FTA art 15; EC, ‘EU and Canada agree a new approach on investment in trade agreement’ (29 February 2016) <http://europa.eu/rapid/press-release_IP-16-399_en.htm> accessed 18 June 2016.

²⁰ EC and Government of Canada, ‘The case for creating a multilateral investment dispute settlement mechanism’, Informal ministerial meeting, World Economic Forum (20 January 2017) (Davos, Switzerland) 1 <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf> accessed 6 June 2017.

the ITS.²¹ With the deadline for comments having closed in March 2017,²² and on 13 September 2017 the Council of the EU having authorized the EC to formally open negotiations for the establishment of a ‘multilateral investment court’, the EU’s discussions with its trading partners is gaining momentum; albeit some countries have expressed their opposition to the project.²³

CETA and the EU–Vietnam FTA are innovative in that they not only introduce the possibility for appeals of first instance arbitral awards, but also alter the way in which these first instance decision-makers are appointed. Both treaties establish a standing roster of adjudicators. In some ways, the ITS more closely resembles an international court proper, rather than ISDS as traditionally understood. It signals a shift away from the long-standing tradition of party-appointed arbitrators and the ‘one-kick-at-the-can’ nature of arbitration, towards a two-tiered system more akin to that of many national legal systems. In so doing, the ITS moves ISDS away from a regime where the parties have substantial involvement in selecting the arbitrators who determine their dispute, and there is no possibility for review for error of law and of fact in awards. The ITS results in a considerable amount of party autonomy being stripped away, by virtue of the choice of adjudicators being taken out of the control of the disputing parties, claimant investor and respondent State alike. That said, the ITS confers upon the treaty Parties power at a more fundamental level, that is over the initial constitution of the Tribunal and Appeal Tribunal. Investors are therefore deprived of any say in the appointment of the roster.

Interestingly, after CETA underwent legal scrubbing, the adjudicators of the ITS were no longer referred to anywhere in the investment chapter as ‘arbitrators’, but instead as ‘Members of the Tribunal’/‘Members of the Appellate Tribunal’²⁴ (the term ‘judges’ was initially used in the draft Transatlantic Trade and Investment Partnership²⁵). This deliberate change in the prevailing lexicon was initially seen in the first publically issued draft of the EU–Vietnam FTA in December 2015.

It is also notable that Tribunal Members will start off on an on-call basis and eventually move to full-time, judge-like tenure once the Tribunal and Appellate Tribunal, respectively, have a fuller caseload. During the initial period, Tribunal Members may not ‘double-hat’ as counsel or expert in any investment treaty arbitrations.²⁶ In contrast, national court judges are full-time from the beginning, and do not have an ‘initial period’ of appointment.

²¹ EC, ‘Questionnaire on options for a multilateral reform of investment dispute resolution’ (27 December 2016) <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233> accessed 27 December 2016. For the questionnaire, see <<https://ec.europa.eu/eusurvey/runner/multilateralinvestmentcourt>> accessed 22 June 2017.

²² Results of the questionnaire received pursuant to the open consultation regarding a multilateral investment court can be found here: <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233> accessed 13 April 2017.

²³ EC, *Recommendation for a Council Decision authorising the opening of negotiation for a Convention establishing a multilateral investment court for the settlement of investment disputes*, COM(2017) 493 final (13 September 2017) <<http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-493-F1-EN-MAIN-PART-1.PDF>> accessed 28 September 2017. In December 2016, Argentina, Brazil, India, Japan and other nations reportedly met and rejected the multilateral investment court initiative: Investment Treaty News, ‘European Union and Canada co-host discussions on a multilateral investment court’ (13 March 2017) <<https://www.iisd.org/itm/2017/03/13/european-union-and-canada-co-host-discussions-on-a-multilateral-investment-court/>> accessed 6 June 2017.

²⁴ In contrast to CETA’s State-to-State dispute resolution provisions in ch 29, which retain the term ‘arbitrators’.

²⁵ TTIP (n 3).

²⁶ CETA art 8.30(1).

The ITS contemplates arbitral proceedings unfolding under existing arbitral rules—ICSID²⁷, ICSID Additional Facility²⁸, UNCITRAL²⁹, or other rules agreed by the Parties³⁰—which apply throughout the proceedings *except* as modified. Existing arbitral rules strongly reflect party autonomy in the constitution of the tribunal, the disputing parties' ability to shape the arbitral process, and so on. They also limit party autonomy to the extent they conflict with the applicable arbitral regime—eg by virtue of its self-contained nature, arbitrations conducted under the ICSID Convention or Additional Facility Rules may only be subject to annulment proceedings, and not to judicial review.

The ITS is essentially a hybrid of new institutional elements, grafted onto the different sets of existing arbitral rules, in that it simultaneously continues, yet radically modifies and supplements, long-established arbitration rules. First, the ITS purports to override the implicit, and sometimes explicit, prohibition on appeals in each set of arbitral rules to allow appellate review for error of law and manifest error of fact. This stands in stark contrast to the limited review of arbitral awards contemplated by existing arbitral rules. Second, the ITS prohibits the amendment of claims after the submission of a Request for Consultations.³¹ In contrast, the ICSID Convention Arbitration Rules,³² ICSID Additional Facility³³ and UNCITRAL Arbitration Rules³⁴ all allow the submission of ancillary claims at later points in the proceedings. Third, the final award rendered by the standing Tribunal (and reviewable by the Appeal Tribunal) is characterized as an arbitral award, enforceable like an ICSID award or a non-ICSID award under the New York Convention.³⁵ In so doing, the EU, Canada and Vietnam are attempting to modify obligations that might affect third-party States, whilst retaining certain key enforcement mechanisms of the prevailing ISDS system intact under the new regime. Whether this modification succeeds will, of course, depend on the extent to which non-party States are prepared to treat CETA and EU–Vietnam FTA awards in this manner.³⁶

Assuming CETA and the EU–Vietnam FTA enter into force, it will take several years' experience to see whether these agreements will, in practice, 'represent a

²⁷ ICSID Rules of Procedure for Arbitration Proceedings, 10 April 2006 <<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Arbitration-Rules.aspx>> (ICSID Arbitration Rules).

²⁸ The Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, as amended effective 10 April 2006 are reprinted in *ICSID Additional Facility Rules*, Doc ICSID/11 (April 2006) <https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> accessed 22 June 2017 (ICSID Additional Facility Rules).

²⁹ *United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules*, UN Doc A/3/17, as adopted in 1976 <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>> (1976 UNCITRAL Rules); revised in 2010 <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>> accessed 22 June 2017 (2010 UNCITRAL Rules).

³⁰ CETA art 8.23(2).

³¹ CETA art 8.22(1): 'An investor may only submit a claim pursuant to Article 8.23 if the investor: ... (d) has fulfilled the requirements related to the request for consultations; (e) does not identify a measure in its claim that was not identified in its request for consultations'. EU–Vietnam FTA art 7(3): 'All the claims identified by the claimant in the submission of its claim pursuant to this Article must be based on measures identified in its request for consultations pursuant to Article 4(1)(c).'

³² ICSID Arbitration Rules r 40 (*Ancillary Claims*).

³³ ICSID Additional Facility Rules art 47 (*Ancillary Claims*).

³⁴ UNCITRAL Rules art 22.

³⁵ Convention on Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959), 330 UNTS 38 (New York Convention) art V. CETA art 8.41(6): 'For greater certainty, if a claim has been submitted pursuant to art 8.23.2(a) (under the ICSID Convention Arbitration Rules), a final award issued pursuant to this s shall qualify as an award under s 6 of the ICSID Convention'; EU–Vietnam FTA art 31(8).

³⁶ Calamita (n 9); 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.

significant break with the past', as the EC believes.³⁷ The authority of an appellate tribunal might offer a partial solution to issues such as inconsistent awards within the jurisprudence emanating under each treaty, but, in the absence of a multilateral appellate mechanism, one cannot predict how or whether the distinct appellate tribunals under CETA and the EU–Vietnam FTA will influence arbitrators deciding cases under other treaties.

IV. THE INVESTMENT TRIBUNAL SYSTEM (ITS)

With these key features of the EU approach to ISDS in mind, the discussion turns now to a more technical dissection of the ITS in CETA and the EU–Vietnam FTA, with a view to canvassing its main features, as well as any differences between the EU-model adopted by Canada and Vietnam, respectively. Further linkages will also be drawn between the new provisions in these treaties and possible reasons underlying their adoption.

A. *Joint Committee/Trade Committee*

Both CETA and the EU–Vietnam FTA provide for the creation of a committee and sub-committee tasked with overseeing all questions concerning trade and investment between the Parties and the implementation and application of the respective agreements,³⁸ including the constitution and functioning of the Tribunal and Appellate Tribunal.³⁹ The Joint Committee in CETA and Trade Committee in the EU–Vietnam FTA will include an equal number of representatives of the Parties, and are chaired jointly by the Canadian Minister of International Trade or Vietnam's Minister for Trade and Industry, respectively, and the EC Commissioner for Trade. Neither treaty stipulates how many representatives will make up these committees.⁴⁰

Since NAFTA, it has become common for States to create a joint committee in their FTAs.⁴¹ CETA and the EU–Vietnam FTA continue this trend, with the Joint Committee and Trade Committee set up as a forum for the Parties to consult on issues related to the implementation of, and possible improvements to, the ITS. In this regard, the Joint Committee/Trade Committee is given considerable authority to refine the investment chapter's operation. Where concerns arise with respect to issues of interpretation that might affect matters relating to the investment chapter—including with respect to the standards of treatment or applicable law—both treaties provide that the Joint Committee/Trade Committee shall, upon

³⁷ EC, 'Investment provisions in the EU–Canada free trade agreement' (CETA) (February 2016) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> accessed 16 June 2016 (CETA Guide).

³⁸ The Trade Committee is intended to ensure that the EU–Vietnam FTA 'operates properly', will 'seek to solve' problems which might arise in areas covered by the FTA or resolve disputes that may arise regarding its interpretation or application. EU–Vietnam FTA Chapter XX (*Institutional, General and Final Provisions*), art X.1(3)(a) and (e).

³⁹ CETA art 8.44(3)(e).

⁴⁰ CETA ch 26, art 26(1); EU–Vietnam FTA art 34 (*Role of Committees*); Chapter XX (*Institutional, General and Final Provisions*) art X.1(1).

⁴¹ See eg Dominican Republic–Central America–United States Free Trade Agreement (signed 5 August 2004) <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> accessed 26 October 2017 (CAFTA-DR); EU–Republic of Korea Free Trade Agreement (signed 15 October 2009, entered into force 1 July 2011) <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2011:127:TOC>> accessed 26 October 2017.

recommendation from their respective sub-committees,⁴² adopt interpretations of the agreement, which will be binding on the Tribunal and Appellate Tribunal.⁴³ The EU has characterized this ability to adopt binding interpretations provisions as ‘a safety valve in the event of errors by the tribunals (the likelihood of which is in any event greatly reduced by the clear drafting of the relevant investment protection standards).’⁴⁴ This power is not new, and was first included in NAFTA some 23 years ago.⁴⁵ These treaties do, however, introduce a novel refinement, not expressly addressed in NAFTA: the respective Committees have the power to set the point of time—immediate or prospective—from which such interpretations are binding.⁴⁶ It will be interesting to see whether the Parties will interrupt a pending arbitral dispute to seek a binding interpretation of the treaty.

Among other things, the Joint Committee/Trade Committee decides on the appointment of Members of the Tribunal and Appeal Tribunal, increases or decreases the number of Members, decides on the removal of Members, determines the Members’ monthly retainer fees or salary (as the case may be) and sets out the administrative and organizational matters regarding the functioning of the Appellate Tribunal.⁴⁷ CETA’s Committee on Services and Investment must also adopt a code of conduct for the Members of the Tribunal, which will address disclosure obligations, the independence and impartiality of the Members of the Tribunal and confidentiality.⁴⁸ The EU–Vietnam FTA does not currently specify this additional duty for its Committee on Trade in Services, Investment and Government Procurement. This might be because, unlike CETA,⁴⁹ the EU–Vietnam FTA already includes a detailed code of conduct for Members of the Tribunal.⁵⁰

The establishment of a supervisory committee therefore reserves to the Parties a substantial range of powers and means by which they can shape the development and operation of the ITS, in ways far beyond those of a respondent party in a particular case. By controlling the appointment and removal of the Members of the Tribunal and Appeal Tribunal, the Parties are able to ensure that Members meet the stringent qualifications for appointment set out in the respective treaties,

⁴² Services and Investment (CETA); Committee on Services, Investment and Government Procurement (EU–Vietnam FTA).

⁴³ CETA art 8.31(3) (*Applicable Law and Interpretation*); art 16(4) (*Applicable Law and Rules of Interpretation*).

⁴⁴ CETA Guide (n 37).

⁴⁵ See eg US–Oman FTA (signed 19 January 2006, entered into force 1 January 2009) <fta/final-text> accessed 27 October 2017, art 10.21.3(b): ‘a decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 19.2.3(b) (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.’

⁴⁶ *ibid.* See also EU–Vietnam art 34(2)(b) (*Role of Committees*). Canada learned from the Note of Interpretation experience under NAFTA. On 31 July 2001, the NAFTA FTC issued a Note of Interpretation on the minimum standard of treatment pursuant to art 1131, which gives the three NAFTA Trade Ministers authority to issue interpretations of the treaty that are binding on NAFTA tribunals. See eg *Pope & Talbot Inc v. Government of Canada*, UNCITRAL (2000). Subsequent NAFTA cases have uniformly applied the FTC Note, thereby establishing a fairly consistent test for NAFTA art 1105 (minimum standard of treatment).

⁴⁷ CETA art 8.27 (*Constitution of the Tribunal*): (2) appoint 15 Members of the Tribunal; (3) may increase/decrease number of Members; (12) monthly retainer fee, (14) other fees and expenses of the Members of the Tribunal, (15) power to transform the retainer fee and other fees and expenses into a regular salary; art 8.28 (*Appellate Tribunal*): (3) appoint Members of the Appellate Tribunal, (7) set out administrative and organizational matters regarding the functioning of the Appellate Tribunal. EU–Vietnam arts 12, 13.

⁴⁸ CETA art 8.44(2).

⁴⁹ Although it will not be dissimilar to the ethics rules at art 30 and the Code of Conduct for arbitrators and mediators contained at annex 29-B (for State-to-State dispute resolution). CETA art 8.44(2) provides that the Parties must ‘make best efforts to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement, as the case may be, and in any event no later than two years after such date.’

⁵⁰ EU–Vietnam FTA annex II.

and are bound by the ethical standards the Parties have deemed appropriate under the FTA. The EU expressly acknowledges the use of binding interpretations as a means of ‘government control of interpretation’ through which the States will be able to ensure that the proper meaning of their treaty provisions is given effect.⁵¹

B. *The Tribunal*

Both CETA and the EU–Vietnam FTA create a permanent investment tribunal of first instance (the Tribunal), which will have exclusive competence to hear claims of alleged breach of the investment protections contained in the investment chapter.⁵² The ITS departs from the long-standing practice of allowing each disputing party to appoint one arbitrator, and generally to have a say in the appointment of the third and presiding arbitrator. This exercise of party autonomy in the dispute resolution process has been seen by some experienced practitioners in the field to raise the risk of ‘moral hazard’, for fear that arbitrators will exhibit a predisposition towards the party that appointed them or have conflicts of interest.⁵³ The change in the appointments process is, in part, the EU’s response, agreed to by its trading partners, to some of the perceived shortcomings of ISDS.⁵⁴ The symbolic effect of the Parties’ decision to remove all mention of the term ‘arbitrator’ throughout the investment chapters in both treaties, and replace it with the more neutral title of ‘Members of the Tribunal’, should not be underestimated. It is likely an attempt to address some of the legitimacy concerns expressed about party-appointed arbitrators by various stakeholders and members of the public.⁵⁵

Under CETA, 15 Members shall be appointed to the Tribunal, each sitting for a 5-year term, once renewable.⁵⁶ In contrast, the EU–Vietnam FTA calls for the appointment of only 9 Members to the Tribunal, who shall be appointed for a 4-year once renewable term.⁵⁷ Presumably in order to facilitate the retention of institutional knowledge and experience with the workings of the ITS, under both treaties, the terms of seven out of the 15 Members of the Tribunal (under CETA), and five out of the nine Members of the Tribunal (under the EU–Vietnam FTA) shall extend to 6 years.⁵⁸ This extension is only for the first set of Members appointed immediately after the entry into force of the FTA, and is to be determined by lot.⁵⁹ Under CETA, five of the Members of the Tribunal must be nationals of an EU Member State (appointed by the EU), five shall be nationals of Canada (appointed by Canada), and five shall be nationals of third-countries (appointed by the Joint Committee).⁶⁰ Under the EU–Vietnam FTA, of the nine

⁵¹ EC, ‘European Commission—Fact Sheet: Reading Guide’ (16 September 2015) s 2(B)(ii) <http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm> accessed 30 June 2016.

⁵² CETA art 8.27(1); EU–Vietnam FTA art 12(1).

⁵³ Jan Paulsson, ‘Moral Hazard in International Dispute Resolution’ (2010) 25 ICSID Rev—FILJ 339; Albert Jan van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration’ in Mahnouch Arsanjani et al (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2011) ch 42.

⁵⁴ See Elsa Sardinha, ‘The Impetus for the Creation of an Appellate Mechanism’ (2017) 32(3) ICSID Rev—FILJ 503.

⁵⁵ *ibid.*

⁵⁶ CETA art 8.27(5). Note that whilst CETA provides for 15 Members of the Tribunal, it is silent as to the number of Appellate Tribunal Members, which it instead stipulates shall be determined by the Joint Committee promptly after the Agreement enters into force (art 8.28(7)(f)).

⁵⁷ EU–Vietnam FTA art 12(5).

⁵⁸ CETA art 27(5); EU–Vietnam FTA art 12(5).

⁵⁹ *ibid.*

⁶⁰ CETA art 8.27(2).

Members, three shall be nationals of an EU Member State (appointed by the EU), three shall be nationals of Vietnam (appointed by Vietnam) and three shall be nationals of third countries (appointed by the Trade Committee).⁶¹ This approach is different from the party-appointed arbitrator procedure provided for by many arbitral rules, whereby a different *ad hoc* tribunal is formed in each case.

Both treaties provide that the number of Members of the Tribunal may be increased or decreased by multiples of 3 (appointed on the same equal national representation basis between the EU, Canada/Vietnam and third-country neutrals).⁶² Both treaties also provide that either Party may nominate up to three non-nationals, who will then be considered to be nationals of that State, and thus not eligible to serve as Chair of a Division or President/Vice-President of the Tribunal.⁶³ This suggests that any reference to ‘nationals of third-countries’ in the provisions relating to the operation of the Tribunal would not include third-country nationals appointed *in place of* the Parties’ nationals.

Under CETA and the EU–Vietnam FTA, from this roster of 15 or 9 Members, respectively, three Members will be selected by the President of the Tribunal to form a ‘Division’ to hear each case: one Member from the EU, one from Vietnam or Canada, and the presiding Member from a neutral third-country.⁶⁴ The President of the Tribunal must constitute the Division within 90 days of the submission of a claim, by way of a randomized rotation procedure.⁶⁵ In making the appointments, the President must also give equal opportunity to all Members to serve.⁶⁶ However, it is difficult to see how, over time, these appointments can be entirely unpredictable in light of the President’s duty to extend an equal opportunity to all Members of the Tribunal to serve (particularly if the Tribunal has a relatively active caseload).

This structure means that neither the claimant nor the respondent can directly appoint any Member of the panel of adjudicators formed to hear their dispute. Whilst the Parties (and, thus, the respondent) do appoint the Members of the Tribunal at the time of the roster’s constitution, when a dispute arises, they have no control over which Members will serve in any particular case. This change in the appointment practice stands in marked contrast to all existing ISDS regimes, with the exception of the ICSID *ad hoc* committee, which are chosen by the Chair from the ICSID Panel.

In the event of a Member’s replacement, both treaties provide that an incoming replacement Member must retain his/her office for the remainder of the predecessor’s term.⁶⁷ It is not clear if this successor could seek a second term as a Member of the Tribunal. Further, an outgoing Member of the Tribunal (namely, one whose term has expired) who is still serving as an adjudicator on a case pursuant to these treaties may continue to serve on that panel until a final award is issued.⁶⁸ These extensions in term ensure that, during a membership transition, newly appointed Members will be able to work with more experienced Members and that the continuity of Members serving on a particular case is not unduly interrupted.

⁶¹ *ibid.*

⁶² CETA art 27(3); EU–Vietnam FTA art 12(3). The Joint Committee (CETA) and Trade Committee (EU–Vietnam) exercise this function.

⁶³ CETA art 8.27, fn 9; EU–Vietnam FTA art 12(2), fn 25.

⁶⁴ CETA art 8.27(6); EU–Vietnam FTA art 12(6).

⁶⁵ CETA art 8.27(7); EU–Vietnam FTA art 12(7).

⁶⁶ *ibid.*

⁶⁷ CETA art 8.27(5); EU–Vietnam FTA art 12(5).

⁶⁸ *ibid.*

The most notable deadline for the Tribunal is that applicable to the making of the award. A Division has 24 months from the filing date of the claim to render its final award.⁶⁹ It may take additional time, but it must inform the disputing parties and give reasons for the delay.⁷⁰ The deadline under the EU–Vietnam FTA is 6 months shorter. There, the Tribunal must issue its ‘Provisional Award’ (on the merits or on jurisdiction) within 18 months (or provide reasons for its delay), which if not appealed within 90 days will become the final award.⁷¹ Twenty-four and 18 months, respectively, are very short time periods within which to issue a final award, and get it ‘right’ on the facts and the law. Such a short deadline is particularly unrealistic, when considering investor-State arbitration experience over the last 30 years, the increased detail in which the Parties have drafted the investment protections, and the new threat to tribunals’ reputations of appellate review. The EC itself acknowledged that the average duration of arbitral proceedings under existing investment treaties is 3 to 4 years.⁷² ICSID reports that the average duration of its arbitral proceedings from the date of constitution of the tribunal to an award is 39 months.⁷³ If bi- or tri-furcation of the proceedings is requested by one of the disputing parties or ordered on the Division’s own initiative, this will delay the proceedings even further. The process of preparing two rounds of pleadings, together with witness statements and expert reports, along with requests for document production, not to mention the time in which the tribunal requires to digest the evidence and the parties’ submissions in order to formulate its award, will almost certainly take the case beyond the time limits prescribed under these treaties.

CETA includes an additional provision, not yet included in the EU–Vietnam FTA, which provides that if its Joint Committee fails to appoint 15 Members to the Tribunal within 90 days from the date that a claim is submitted to the ITS, either disputing party⁷⁴ may request that the ICSID Secretary General appoint the Division of 3 Members of the Tribunal, unless the disputing parties have agreed on a sole arbitrator.⁷⁵ In such circumstances, the ICSID Secretary General must make the appointment by random selection from the existing nominations, and cannot appoint as Chair a national of either Canada or an EU Member State unless the disputing parties agree otherwise.⁷⁶

Under both treaties, the Tribunal’s President and Vice-President are responsible for organizational issues, and will each serve a 2-year term in their respective roles.⁷⁷ They must be drawn by lot from among the Members of the Tribunal who are nationals of third-countries, and will be appointed on a rotational basis by the Joint Committee/Trade Committee.⁷⁸ Therefore, all non-national members will have served as President or Vice-President by the end of each of their terms.

⁶⁹ CETA art 8.39(7).

⁷⁰ *ibid.*

⁷¹ EU–Vietnam FTA art 27(6).

⁷² EC, ‘Fact Sheet: Why the New EU Proposal for an Investment Court System in TTIP is Beneficial to Both States and Investors’ (12 November 2015) <http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm> accessed 26 October 2017.

⁷³ ICSID Annual Report 2015, 31 <<https://icsid.worldbank.org/en/Pages/resources/ICSID-Annual-Report.aspx>> accessed 31 December 2016. The 2016 and 2017 Annual Reports do not provide any update to this figure.

⁷⁴ CETA art 8(1): ‘disputing party means the investor that initiates proceedings pursuant to Section F or the respondent. For the purposes of Section F and without prejudice to Art. 8.14, an investor does not include a Party.’

⁷⁵ CETA art 8.27(17).

⁷⁶ *ibid.*

⁷⁷ CETA art 8.27(8); EU–Vietnam FTA art 12(8).

⁷⁸ *ibid.*

Unsurprisingly, whenever the President is unavailable, the Vice-President must assume the position of acting President.⁷⁹

The constitution of the Tribunal under these treaties is quite different from that provided for by the ICSID regime. By way of illustration, under ICSID, each Contracting State has the right to designate four individuals to the Panel of Arbitrators, who may, *but need not be*, its nationals; and the Administrative Council's Chairman is required to designate 10 persons, each of a different nationality, to the Panel.⁸⁰ The disputing parties under ICSID have the right to appoint arbitrators from outside the Panel of Arbitrators, but if the President of the Administrative Council has to appoint one or more arbitrators to a tribunal, that person must be selected from the Panel of Arbitrators.⁸¹ With respect to the nationality requirements for arbitrators, the ICSID Convention contemplates a limited role for nationals of the Contracting State party to the dispute and the Contracting State whose national is a party to the arbitration, providing that the majority of the arbitrators must not be nationals of the Contracting State party or investor's State.⁸² The ICSID Convention further provides that the nationality restrictions do *not* apply if each member is appointed by agreement of the disputing parties.⁸³ CETA and the EU–Vietnam FTA do not similarly seek to restrict the nationality of Tribunal Members.

Candidates for membership of the ITS Tribunal under both CETA and the EU–Vietnam FTA must 'possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence'.⁸⁴ In order to be on the ICSID Panel of Arbitrators or appointed to an ICSID tribunal, candidates must have 'competence in the fields of law, commerce, industry or finance', and do not specifically require competence in public international law. In contrast, under both CETA and the EU–Vietnam FTA, Tribunal Members must have 'demonstrated expertise in public international law'.⁸⁵ Further, it is 'desirable' that they have expertise in international investment law, international trade law, as well as in the resolution of disputes in these fields.⁸⁶ Note that whilst 'demonstrated expertise in public international law' is required, expertise in international investment law is only stated to be 'desirable'. The broader import of this provision is that both treaties place more emphasis, as compared to the ICSID Convention and other IIAs, on expertise in international law. Similar experience requirements are found in the draft EU–Singapore FTA, which provides that all arbitrators⁸⁷ appointed to hear disputes must have 'specialised knowledge of or experience in public international law and international investment law, or in the settlement of disputes under international investment agreements'.⁸⁸

⁷⁹ *ibid.*

⁸⁰ ICSID Convention arts 12–13 (emphasis added).

⁸¹ ICSID Convention art 40(1).

⁸² ICSID Convention art 39. See JC Thomas and HK Dhillon, 'The ICSID Convention, Investment Treaties and the Review of Arbitration Awards: The Evolution of Investment Treaties and Arbitration' (2017) 32(3) ICSID Rev—FILJ 459.

⁸³ ICSID Convention art 39.

⁸⁴ CETA art 8.27(4); EU–Vietnam FTA art 12(4).

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ EU–Singapore FTA retains the prevailing ISDS approach (not the ITS), and thus employs the term 'arbitrators'.

⁸⁸ EU–Singapore FTA art 9.18(6).

After appointment to the roster, CETA requires that Members ensure that they are available and able to perform their functions.⁸⁹ The EU–Vietnam FTA frames this requirement in more specific language, demanding that Members ‘be available at all times and on short notice, and shall stay abreast of dispute settlement activities under this Agreement’.⁹⁰ To ensure their availability, each Member will be paid a monthly retainer fee, to be determined by the Joint Committee/Trade Committee, which will later be converted into a regular salary.⁹¹ Under both treaties, the Joint Committee/Trade Committee is tasked with determining the applicable modalities and conditions of the transition from a retainer fee to a regular salary.⁹² The Members would then serve on a full-time basis and would not be permitted to engage in any outside occupation, whether gainful or not, unless an exemption is exceptionally granted by the President of the Tribunal.⁹³ This formulation arguably means that *prior* to receiving a regular salary, despite being required to remain available at all times and on short notice, Members would be free to take on other employment. Yet, by reason of the ethical standards in CETA and code of conduct in the EU–Vietnam FTA imposed on Members of the Tribunal, such part-time employment could potentially be limited due to the requirement that Members maintain their actual and apparent independence.⁹⁴

The somewhat novel focus in both CETA and the EU–Vietnam FTA on international law expertise appears to be a policy decision on the part of the Parties. These competence requirements might preclude the appointment of some experienced commercial arbitrators and/or retired national judges who are unlikely to have public international law expertise. The litmus test of the credibility of the ITS will, to a certain extent, be the identities and standing of the Members of the Tribunal. However, given the prohibition against Members acting as counsel and party-appointed experts (so-called ‘double-hatting’) and the obligation to ensure that they are available, it may be that at least some Members will be retired national court judges, academics, or less experienced arbitrators, rather than those who are in high demand in the investment treaty area. One foreseeable reason for this might be that the terms of appointment to the CETA and EU–Vietnam FTA tribunals might not be sufficiently attractive to those with active arbitration practices. Considering the high degree of expertise required of Members, it also remains to be seen whether the salaries subsequently paid will be sufficient to attract high caliber candidates who might find their portfolio of work significantly reduced due to the commitments they assume as Members. Whilst there might be initial interest amongst potential candidates for the post, it is not inconceivable that the desirability of the role could diminish once the Tribunal has a full-time case load.

Turning back to the issue of fees, unless and until the Joint Commission/Trade Committee adopts a decision on the transformation of the initial part-time to full-time appointment, the amount of the fees and expenses of the Members of the Tribunal, other than the retainer fee, will be determined pursuant to the financial regulations promulgated pursuant to Regulation 14(1) of the Administrative and

⁸⁹ CETA art 8.27(11).

⁹⁰ EU–Vietnam FTA art 12(13).

⁹¹ CETA art 8.27(12); EU–Vietnam FTA art 12(14).

⁹² CETA art 8.27(15); EU–Vietnam FTA art 12(17).

⁹³ *ibid.*

⁹⁴ CETA art 8.20; EU–Vietnam FTA annex II.

Financial Regulations of the ICSID Convention.⁹⁵ Accordingly, both treaties provide that the ICSID fee structure will govern the determination of the fees and expenses of the Members of the Tribunal, irrespective of the claimant's choice of arbitration rules.⁹⁶ ICSID arbitrator fees are lower than those typically used in UNCITRAL and other *ad hoc* arbitrations. Some commentators have noted that the application of the ICSID fee structure to UNCITRAL arbitrations initiated under CETA might lead to a reduction in arbitrators' fees.⁹⁷

Under both treaties, the monthly retainer fee must be paid by the State Parties into an account, and if one Party fails to pay the fee, the other Party may make a substitute payment (with any such arrears by a Party to remain payable, with interest).⁹⁸ For CETA, the account will be managed by the ICSID Secretariat; for the EU–Vietnam FTA, the account is to be managed by either the ICSID Secretariat *or* the Permanent Court of Arbitration (PCA)—the choice of institution will likely be determined during the legal scrubbing process.⁹⁹ Notably, the cost of covering the Tribunal's fees and salaries is to be shared by the EU and Vietnam 'taking into account their respective levels of development'.¹⁰⁰ If one Party fails to pay, the other Party may elect to cover their share, but any such arrears will remain payable, with appropriate interest.¹⁰¹ This is a significant change from all extant forms of investment treaty arbitration where it is the disputing parties who are required to make advance deposits to cover the cost of the proceeding (subject to the tribunal's allocation of costs at the end of the proceeding).¹⁰²

In an effort to reduce costs, particularly for small to medium-sized enterprises or in instances where the damages claimed are relatively low, both treaties further provide that the disputing parties may agree that a case be heard by a sole Member of the Tribunal, who will be appointed at random from the third-country nationals.¹⁰³ The respondent is obliged to 'give sympathetic consideration to a request from the claimant to have the case heard by a sole Member of the Tribunal', and the request must be made before the constitution of the Division.¹⁰⁴

With respect to administrative and organizational matters, both treaties provide that the Tribunal is empowered to draft its own working procedures.¹⁰⁵ Accordingly, CETA's Joint Commission does not have to approve the Tribunal's working procedures prior to their implementation, as it does for the Appellate Tribunal.¹⁰⁶ However, the EU–Vietnam FTA provides much greater detail with

⁹⁵ CETA art 8.27(14); EU–Vietnam FTA art 12(16). The fees and expenses will be apportioned between the disputing parties in accordance with CETA art 8.39(5) (*Final Award*) and EU–Vietnam FTA art 27(4) (*Provisional Award*). Administrative and Financial Regulations of the ICSID Convention, reg 14(1) (*Direct Costs of Individual Proceedings*) <<http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partc-chap03.htm#r14>> accessed 26 October 2017; Memorandum on the Fees and Expenses (6 July 2005) <<https://icsid.worldbank.org/en/Pages/icsiddocs/Memorandum-on-the-Fees-and-Expenses-FullText1.aspx>> accessed 26 October 2017.

⁹⁶ CETA art 8.23(2) of CETA; EU–Vietnam FTA art 7(2).

⁹⁷ August Reinisch and Lukas Stifter, 'European Investment Policy and ISDS' (2015) ELTE LJ, 24 (Reinisch and Stifter).

⁹⁸ CETA art 8.27(13); EU–Vietnam FTA art 12(15). It is not clear whether the arrears, as well as the interest would be payable to the Party who made substitute payment, but this is normally the practice of arbitral institutions.

⁹⁹ CETA art 8.27(16); EU–Vietnam FTA art 12(15).

¹⁰⁰ EU–Vietnam FTA art 12(15). The provision is silent as to how this would work in practice.

¹⁰¹ It is not clarified whether the arrears as well as the interest would be paid over to the Party who had paid first.

¹⁰² CETA art 8.39(5) (*Final Award*); EU–Vietnam FTA art 27(4) (*Provisional Award*).

¹⁰³ CETA art 8.27(9) (repeated at 8.23(5)); EU–Vietnam FTA art 12(9).

¹⁰⁴ *ibid.*

¹⁰⁵ CETA art 8.27(10); EU–Vietnam FTA art 12(10).

¹⁰⁶ CETA art 8.28(7) (*Appellate Tribunal*).

respect to how the working procedures of the Tribunal are to be drafted and adopted, and is modelled after the WTO experience.¹⁰⁷ First, it provides the additional stipulation that the working procedures drawn up by the Tribunal must be compatible with the applicable arbitral rules and with the entire ITS section of the investment chapter.¹⁰⁸ Second, in drawing up the working procedures, the President of the Tribunal must do so in consultation with the other Members, and must present the draft to the Committee on Services, Investment and Procurement, which must review it, and make a recommendation to the Trade Committee.¹⁰⁹ Third, the Trade Committee then has 3 months from that time to adopt the draft working procedures ‘on agreement of the Parties’.¹¹⁰ Finally, if the working procedures are not adopted, the President of the Tribunal must then revise the draft working procedures, taking into consideration the Parties’ views, and again present the revised draft to the Committee on Services, Investment and Procurement. The working procedures are considered adopted, unless the Trade Committee rejects them within 3 months after their presentation. It is not immediately clear whether the President of the Tribunal could submit more than one revised draft for consideration. The provision is also silent as to precisely what administrative and organizational matters should be addressed by the working procedures.¹¹¹ It is interesting to note that CETA does not include directions regarding the working procedures akin to those provided for under the EU–Vietnam FTA.

The EU–Vietnam FTA further provides that where a procedural question arises that is not covered within the FTA, any supplemental rules adopted by the Trade Committee or by the working procedures drawn up by the Tribunal, the relevant Division of the Tribunal may adopt an appropriate procedure that is compatible with those provisions.¹¹² A similar provision is not included in CETA; again, perhaps because all of the existing arbitral rules afford the tribunal the power to govern the arbitration as it sees fit for the efficient resolution of the dispute. However, whilst the EU–Vietnam FTA makes clear that the procedural decision would apply to the specific proceedings with which the Division is concerned, it does not clarify whether it would extend to proceedings before *other* Divisions of the Tribunal. Given the propensity of *ad hoc* investment treaty tribunals to look for procedural guidance from prior decisions, it can be expected that a standing tribunal would be even more likely to pay close attention to such prior decisions in the interests of consistency.

The EU–Vietnam FTA also provides that a Division of the Tribunal shall make every effort to make any decision by consensus.¹¹³ CETA does not include this principle in its text. If consensus cannot be reached, the EU–Vietnam FTA provides that the tribunal must proceed by a majority of votes.¹¹⁴ Interestingly, opinions expressed by individual Members of the Tribunal (dissents) ‘shall remain

¹⁰⁷ Canada, Vietnam, and the EU and several of its Members States have been parties to a WTO dispute.

¹⁰⁸ EU–Vietnam FTA s 3 (*Resolution of Investment Disputes*).

¹⁰⁹ EU–Vietnam FTA arts 34(1)(d), 34(2)(g).

¹¹⁰ EU–Vietnam FTA art 12(10).

¹¹¹ In contrast, CETA details several administrative and organizational matters related to the functioning of the Appellate Tribunal for which the Joint Committee must promptly adopt procedures, which will be discussed below under the relevant section—CETA art 8.27(8).

¹¹² EU–Vietnam FTA art 12(11).

¹¹³ EU–Vietnam FTA art 12(12).

¹¹⁴ *ibid.*

anonymous'.¹¹⁵ The requirement of anonymity is derived from WTO practice,¹¹⁶ and is novel in the ISDS context. This is a marked departure from current ISDS practice, where it is not uncommon to see dissenting opinions issued by arbitrators in their own name.¹¹⁷ CETA, in contrast, does not address the issue of whether or not dissents are allowed (presumably they are), and whether or not they must be anonymous.

In addition to managing the account holding the Parties' contributions towards the Tribunal's fees and salaries, under the EU–Vietnam FTA, either the ICSID Secretariat or the PCA shall act as Secretariat for the Tribunal and provide it with appropriate support.¹¹⁸ The expenses for such support shall be allocated by the Tribunal between the disputing parties in accordance with Article 27(4).¹¹⁹ CETA chose the ICSID Secretariat to provide the ITS with 'appropriate support',¹²⁰ but is silent with respect to whether the Parties or the disputing parties will bear the costs of the ICSID Secretariat's administrative support equally or pursuant to the allocation of costs under the Final Award.¹²¹ Both treaties are silent as to the extent of the administrative and legal assistance, if any, the Secretariat will provide to the Tribunal (and the Appellate Tribunal). The lack of detail on this point is particularly troubling in light of the short deadlines which CETA and the EU–Vietnam specify for a Division to hear a case and render its final award (24 and 18 months, respectively).¹²²

It remains to be seen, with the current schedule of fees and costs, whether the ICSID Secretariat or PCA will be selected as the Secretariat under the EU–Vietnam FTA. It would also depend on what support from the Secretariat would be deemed 'appropriate' relative to the respective capacities of each institution. Since ICSID will be serving as secretariat in CETA, it would make sense for it to also act as the secretariat for the EU–Vietnam FTA. Another consideration is that the ITS arbitrations might proceed under a number of arbitral rules. The ICSID Secretariat is able to administer ICSID cases as well as non-ICSID ones, whilst the PCA does not presently administer ICSID Convention or ICSID Additional Facility cases.¹²³ This could be the reason for ICSID being selected to be the Secretariat for the CETA Tribunal. It remains to be seen whether the EU–Vietnam FTA will make the same choice. Whilst Vietnam is not yet a member of

¹¹⁵ *ibid.*

¹¹⁶ WTO DSU art 14(3): 'Opinions expressed in the panel report by individual panellists shall be anonymous.'

¹¹⁷ See dissenting opinions issued by individual Tribunal members under various arbitration rules and under different treaties, eg *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No ARB/08/9, Dissenting Opinion of Santiago Torres Bernardez (2 May 2013); *Mesa Power Group LLC v. Government of Canada*, PCA Case No 2012-17, Concurring and Dissenting Opinion of Judge Charles N Brower (24 March 2016); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc v Government of Canada*, PCA Case No 2009-4, Dissenting Opinion of Professor Donald McRae (17 March 2015).

¹¹⁸ EU–Vietnam FTA art 12(18).

¹¹⁹ EU–Vietnam FTA art 12(18); art 27(4) (*Provisional Award*): allocation of costs of proceedings by the Division at the end of proceedings.

¹²⁰ CETA art 8.27(16).

¹²¹ Subject to the tribunal's allocation of costs at the end of the proceeding.

¹²² CETA art 39(7) (*Final Award*); EU–Vietnam FTA art 27(6) (*Provisional Award*).

¹²³ ICSID Convention art 63: 'Conciliation and arbitration proceedings may be held, if the parties so agree, (a) at the seat of the [PCA] or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose' <<https://icsid.worldbank.org/apps/ICSIDWEB/services/Pages/Case-Administration.aspx>> accessed 16 July 2017.

ICSID, it is a member of the World Bank, and is thus eligible to become a Contracting State to the ICSID Convention.

C. *The Appellate Tribunal*

This section examines the constitution and workings of the appellate tier of the ITS. CETA is the first treaty to adopt, in a final, legally scrubbed form, the EU's appellate mechanism proposal.¹²⁴

(i) *Grounds of appeal*

The powers granted to Divisions of the Appellate Tribunal under both CETA and the EU–Vietnam FTA are broader than those granted to ICSID annulment committees under Article 52 of the ICSID Convention and the judicial review of awards under the UNCITRAL Model Law.¹²⁵ In particular, the Appellate Tribunal has the power to modify or reverse first instance awards, as opposed to simply annulling an award in whole or in part. The scope of remedial power accorded to the Appellate Tribunal is also much expanded, allowing the Appeal Tribunal to intervene on issues of merit. In contrast to the limited grounds for annulment specified in the ICSID Convention, the Appellate Tribunal may uphold, modify, or reverse an award based on: ‘(a) errors in application or interpretation of the applicable law; (b) manifest errors in appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).’¹²⁶ By encompassing the grounds for annulment set out at Article 52 of the ICSID Convention, plus review for error of law and fact, CETA and the EU–Vietnam FTA cover the full gamut of possible challenges to an arbitral award. Combining the possible grounds of appeal in this way helps to relieve the Appeal Tribunal from having to address potentially redundant arguments, as certain grounds for annulment (eg manifest excess of power) might be subsumed in the review for legal or jurisdictional error.

Since the manifest excess of powers ground in Article 52 of the ICSID Convention includes jurisdictional error,¹²⁷ it appears that these treaties also extend the scope of review to alleged jurisdictional error, since this ground is not expressly articulated in (a) or (b). This raises the question of whether the Appellate Tribunal only has jurisdiction over a *final* award, or whether it may entertain applications for leave to appeal a positive award (or in ICSID parlance, a

¹²⁴ Interestingly, unlike EU–Vietnam FTA, CETA does not include the word ‘permanent’ in describing its Appeal Tribunal, as it does in describing its permanent investment Tribunal, but rather simply provides that ‘[a]n Appellate Tribunal is hereby established to review awards rendered under this Section’—EU–Vietnam FTA art 13(1): A ‘permanent’ Appeal Tribunal is to be established to hear appeals of awards issued by the Tribunal. This subtle distinction is perhaps a reflection of the EU and Canada’s agreement to pursue the establishment of a multilateral investment tribunal and appellate mechanism with other trading partners; discussions which are now underway.

¹²⁵ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985*, with amendments (adopted 7 July 2008).

¹²⁶ CETA art 8.28(2); EU–Vietnam FTA art 28(1) is similarly worded.

¹²⁷ *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision on the Application for Annulment (5 June 2007) para 118: ‘the requirement that an excess of power must be “manifest” applies equally if the question is one of jurisdiction. A jurisdictional error is not a separate category of excess of power’; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 86; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v Republic of Peru*, ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) para 101.

‘Decision’) on jurisdiction? Recall that under the ICSID Convention regime, there is only one award and any prior decisions (such as one on jurisdiction) cannot be taken to annulment.¹²⁸ However, under the UNCITRAL Rules, there may be several awards, which, under the normal application of the UNCITRAL Rules, may be challenged in judicial review proceedings before the final award is rendered (albeit this depends on the law of the place of arbitration). If CETA and the EU–Vietnam FTA modify this feature of the UNCITRAL Rules in cases proceeding under those rules, the disputing parties would need to wait until the final award is rendered in order to appeal a positive or mixed jurisdictional award (namely, one accepting some claims but rejecting others) to the Appellate Tribunal. This, in turn, would lead to significant additional costs for the parties should the jurisdictional decision ultimately be overturned. Alternatively, it might be that in non-ICSID proceedings, disputing parties might expect to be able to resort to the appeal procedure more than once.

(ii) *Standards of review*

CETA is notably silent as to the applicable standards of review for an appeal. As a general matter, appellate review for error of law is a ‘correctness’ standard. Prior to the EU’s new agreements, review for error of law has been typically off limits, (except in certain countries whose arbitration law provides a limited review for error of law). This standard has therefore never been applied in the ISDS context. With respect to the review of an award for jurisdictional error, it would make little sense for the more deferential ‘manifest excess of powers’, requiring more than a *de minimus* error, to apply. It would be incongruous to require that the error be ‘manifest’. The excess of powers’ ground would logically be sufficient to reverse that part of the award, considering the Appellate Tribunal’s power to correct legal errors, and the fact that the correctness standard is more stringent than the ‘excess of powers’ standard.

The inclusion of ‘manifest errors in the appreciation of the facts’ ground for review in both treaties follows WTO practice, which essentially allows an appeal on the basis that the tribunal did not make an objectively reasonable assessment of the facts.¹²⁹ The inclusion of the adjectival modifier ‘manifest’ in CETA (‘manifestly’ in the EU–Vietnam FTA) was likely drawn from Article 52 of the ICSID Convention.¹³⁰ If the approach taken by ICSID annulment committees were to be applied, not just any error in the appreciation of the facts would suffice to justify intervention, it must be ‘obvious, clear or self-evident’ and ‘discernable without the need for an elaborate analysis of the award.’¹³¹ Determining whether a

¹²⁸ ICSID Convention art 52(1)(a)–(e).

¹²⁹ WTO DSU art 11; See also WTO Analytical Index: DSU—Understanding on Rules and Procedure, <https://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> accessed 26 October 2017. In *EC Hormones*, the Appellate Body stated that the ‘duty to make an objective assessment of facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel’s duty to make an objective assessment of the facts.’ In *EC–Asbestos*, para 159 and *US–Wheat Gluten*, para 151, the Appellate Body Reports held that ‘[i]n assessing the panel’s appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.’

¹³⁰ CETA art 8.28(2)(b); EU–Vietnam FTA art 28(1)(b).

¹³¹ *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Annulment (1 February 2016) para 173; Background Paper on Annulment for the Administrative Council of ICSID, 10 August 2012, para 84.

manifest appreciation of fact has occurred might prove challenging. For instance, can the failure to give weight to a fact be a manifest error in the appreciation of fact? Some ICSID Annulment Committees have held that in order for the ‘manifest excess of powers’ ground for annulment to succeed, the error must ‘jump off the page’.¹³² Therefore, the standard of review for a ‘manifest’ error is a more deferential one than for mere error.

(iii) *Qualification of Members of the Appeal Tribunal*

Under both agreements, the requisite qualifications for appointment to the Appeal Tribunal are identical to those required of the Members of the Tribunal,¹³³ discussed above.

(iv) *Constitution of the Appellate Tribunal*

The Joint Committee/Trade Committee controls the selection of Members to the Appellate Tribunal. This is similar to the ICSID Convention regime, which completely restricts party involvement in establishing an *ad hoc* annulment committee to review an award.¹³⁴ Like the appointment process for the Members of the Tribunal, under CETA, the Members of the Appellate Tribunal shall be appointed by a decision of the Joint Committee at the same time as they adopt a decision setting out administrative and organizational matters regarding the Appellate Tribunal’s functioning.¹³⁵ In contrast, under the EU–Vietnam FTA, the Trade Committee must appoint the Members of the Appeal Tribunal upon the entry into force of the treaty.

(v) *Length of term of appointment of the Members of the Appellate Tribunal*

CETA does not mention any set term for Members of the Appellate Tribunal; this is left to be determined at a later point in time, along with other administrative and organizational matters.¹³⁶ In contrast, EU–Vietnam provides a 4-year term of appointment, renewable once, with half of the Members appointed for a further 6-years (identical to that of the Members of the Tribunal).¹³⁷

(vi) *Number of Members of the Appellate Tribunal*

Under CETA, the number of Members of the Appellate Tribunal is to be decided by the Joint Committee.¹³⁸ In contrast, the EU–Vietnam FTA provides that the Appeal Tribunal shall comprise 6 Members.¹³⁹ Interestingly, unlike for the

¹³² See eg *Hussein Nuaman Soufiani v United Arab Emirates* (n 127) paras 38-40: ‘The excess of power should at once be textually obvious and substantively serious’; *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Annulment Proceeding (5 February 2002) para 25: ‘The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest’; *Azurix Corp v the Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 September 2009) para 68: ‘manifestly’ in art 52(1)(b) means ‘obvious’ rather than ‘grave’, and the relevant test is thus whether the excess of power can be discerned with little effort and without deeper analysis.

¹³³ CETA art 28(4) (referring to the requirements at arts 8.27(4) (*Constitution of the Tribunal*) and 8.30 (*Ethics*)); EU–Vietnam FTA art 13(7).

¹³⁴ ICSID Convention art 52: The Administrative Council Chairman, not the disputing parties, controls the appointment process and the committee’s members must be appointed from the Panel of Arbitrators.

¹³⁵ CETA arts 8.28(3), (7).

¹³⁶ CETA arts 27(3), (7)(a)–(g).

¹³⁷ EU–Vietnam FTA arts 13(5), (13).

¹³⁸ CETA art 28(7)(f).

¹³⁹ EU–Vietnam FTA art 13(2), fn 26 (in contrast to nine Members of the Tribunal of first instance).

Tribunal, it appears that the Trade Committee may only agree to increase the number of Members of the Appeal Tribunal by multiples of three with equal representation from the EU, Vietnam and a third-party country,¹⁴⁰ with no provision to *decrease* the number of Members of the Appeal Tribunal should there be a change of heart after an increase. CETA does not include any provision to this effect, and presumably such modalities will be set out by the Joint Committee pursuant to Article 28(7)(f).

Like the Tribunal, under both treaties, the Appellate Tribunal will sit in Divisions of 3 randomly appointed Members.¹⁴¹ The Division will be decided on a rotational basis, thereby ensuring that the specific composition is unpredictable. This appears to have been drawn from the WTO Appellate Body process; the idea being that the Parties to a CETA or EU–Vietnam FTA arbitration will not know who their adjudicators will be on a particular case.

(vii) *Nationality of the Members of the Appellate Tribunal*

Unlike the EU–Vietnam FTA,¹⁴² CETA is silent as to whether any nationality restrictions on the arbitrators apply to the Appellate Tribunal as they do to the first instance Tribunal.¹⁴³ This prompts the question of why nationality was deemed to require regulation at the Tribunal level, but not at appellate level. In comparative terms, the provisions dealing with the Tribunal in CETA are much more detailed and elaborate than those regarding the Appellate Tribunal. This suggests that the provisions outlining the Appellate Tribunal will need to be supplemented by the Appellate Tribunal itself and the Joint Committee.

(viii) *Working procedures of the Appellate Tribunal*

Under CETA, the Joint Committee will be responsible for promptly adopting working procedures setting out the administrative and organizational matters regarding the functioning of the Appellate Tribunal with respect to:

- (i) administrative support;
- (ii) procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate;
- (iii) procedures for filling a vacancy on the Appellate Tribunal and on a Division of the Appellate Tribunal constituted to hear a case;
- (iv) remuneration of the Members of the Appellate Tribunal;
- (v) provisions related to the costs of appeals;
- (vi) the number of Members of the Appellate Tribunal;

¹⁴⁰ EU–Vietnam FTA art 13(4).

¹⁴¹ CETA art 8.28(5); EU–Vietnam FTA art 13(8).

¹⁴² EU–Vietnam FTA art 13(4).

¹⁴³ CETA art 8.27(6): the nationality distribution for each three-Member Division of the Tribunal shall be as follows: ‘one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The Division shall be chaired by the Member of the Tribunal who is a national of a third country.’ There is no corresponding provision for the Appellate Tribunal. Article 8.28(5) merely provides that: ‘The Division of the Appellate Tribunal constituted to hear the appeal shall consist of 3 randomly appointed Members of the Appellate Tribunal.’ Article 8.28(7) provides that the: ‘CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal: ... (f) the number of Members of the Appellate Tribunal; and (g) any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal.’

- (vii) any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal.¹⁴⁴

The Joint Committee may revise its decisions regarding administrative and organizational matters.¹⁴⁵ CETA also empowers its Committee on Services and Investment to periodically review the functioning of the Appellate Tribunal, and to make recommendations to the Joint Committee.¹⁴⁶ CETA further provides that its provisions on transparency and non-disputing parties shall also apply to the proceedings before the Appellate Tribunal.¹⁴⁷ The EU–Vietnam FTA does not address these areas.

Under the EU–Vietnam FTA, whilst the Tribunal of first instance ‘may’ draft working procedures as necessary and limited guidance is given, the Appeal Tribunal ‘shall’ draw up its own Working Procedures.¹⁴⁸ These working procedures have to be compatible with Section 3 and Annex IV (Working Procedures for the Appeal Tribunal). Annex IV provides that the procedures should address practical arrangements such as those relating to communications between Members of the Appeal Tribunal as well as procedural aspects such as joinders of appeals relating to the same provisional award.¹⁴⁹ The procedures may also include ‘guiding principles’ for aspects which may subsequently be addressed by procedural orders of the Divisions.¹⁵⁰ The applicable procedure for the drawing up of the draft Working Procedures is the same as that for the Tribunal. The only difference is that the President of the Appeal Tribunal must present the draft Working Procedures within one year after the entry into force of the FTA.¹⁵¹

(ix) *Remuneration of the Members of the Appeal Tribunal*

CETA is silent with respect to the issue of remuneration for Members of the Appeal Tribunal, except to say that this will be promptly decided by the Joint Committee, along with other administrative and organizational matters.¹⁵² Under the EU–Vietnam FTA, like the Tribunal Members, the Members of the Appeal Tribunal are to be paid a monthly retainer in order to ensure their availability.¹⁵³ However, there is no default provision tying such amount to the ICSID Convention’s Administrative and Financial Regulations, similar to the provision governing the Tribunal.¹⁵⁴ Instead, this will be determined by decision of the Trade Committee at the outset, upon entry into force of the FTA.¹⁵⁵

(x) *Time periods for appeals*

Both CETA and the EU–Vietnam FTA provide that either disputing party may appeal the award within 90 days.¹⁵⁶ Under the EU–Vietnam FTA, a disputing

¹⁴⁴ CETA art 8.28(7).

¹⁴⁵ CETA art 8.28(8).

¹⁴⁶ *ibid.*

¹⁴⁷ CETA art 8.28(6); arts 8.36 (*Transparency*), 8.38 (*Non-disputing Party*).

¹⁴⁸ EU–Vietnam FTA art 13(10).

¹⁴⁹ Annex IV(1) (*Working Procedures for the Appeal Tribunal*).

¹⁵⁰ Annex IV(2).

¹⁵¹ EU–Vietnam FTA art 13(10).

¹⁵² CETA art 28(7)(d).

¹⁵³ EU–Vietnam FTA art 13(14).

¹⁵⁴ See CETA art 27(14).

¹⁵⁵ EU–Vietnam FTA art 13(16).

¹⁵⁶ CETA art 8.28(9)(a); EU–Vietnam FTA art 28(1).

party lodging an appeal must provide security, including the costs of appeal, as well as a reasonable amount determined by the Appeal Tribunal in light of the circumstances of the case.¹⁵⁷ CETA does not contain this requirement, although it might be one of the matters to be addressed by the Joint Committee under Article 8.28(7)(e) ('provisions related to the costs of the appeal'). CETA prohibits a disputing party from seeking to review, set aside, annul, or revise an award (except through the procedures in CETA).¹⁵⁸ The EU–Vietnam FTA does not contain this express prohibition, but it is implicit given the self-contained framework of the ITS. An award will only be considered final and capable of enforcement after either:

- (i) 90 days from the issuance of the award by the Tribunal has elapsed and no appeal has been initiated; (ii) an initiated appeal has been rejected or withdrawn; or (iii) 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal.¹⁵⁹

The EU–Vietnam FTA merely provides that appeal proceedings shall not exceed 180 days from the date that a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision (and certainly shall not exceed 270 days, if the tribunal provides reasons for the delay).¹⁶⁰ Similar to CETA, the 'Provisional Award' under the EU–Vietnam FTA will become final if neither disputing party has appealed within 90 days of its issuance.¹⁶¹

D. Establishment of a Multilateral Investment Tribunal and Appellate Mechanism

Both CETA and the EU–Vietnam FTA contain a commitment that the Parties shall pursue the creation of a multilateral investment tribunal and appellate mechanism with other trading partners.¹⁶² However, there is no indication on the face of these treaties how the multilateral mechanism would operate or when and how the pursuit of a multilateral investment tribunal will be undertaken (although, a public consultation has already been initiated by the EU). Nevertheless, this provisions reflects the commitment, at least in principle, by at least two non-EU States, to the EU's plan for a multilateral international investment tribunal.¹⁶³

Both treaties empower their respective Joint/Trade Committee to adopt a decision providing that investment disputes will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements. However, whilst the CETA employs the verb 'shall', the EU–Vietnam FTA merely states that the Committee 'may' adopt transitional arrangements. Such a multilateral mechanism, once established, would obviously have to supersede the ITS established under CETA and the EU–Vietnam FTA, but both treaties are silent as to the consequences of potentially conflicting provisions between the FTA and the multilateral appellate mechanism if the Joint/Trade Committee is unable to decide on a transitional arrangement. The EU–Vietnam FTA merely provides that the 'Parties may consequently agree on the non-application of relevant parts of this

¹⁵⁷ EU–Vietnam FTA art 28(4).

¹⁵⁸ CETA art 8.28(9)(b).

¹⁵⁹ CETA art 8.28(9)(c).

¹⁶⁰ EU–Vietnam FTA art 28(5).

¹⁶¹ EU–Vietnam FTA arts 29(1), 27(1).

¹⁶² CETA art 8.29; EU–Vietnam FTA art 15.

¹⁶³ *ibid.*

Section',¹⁶⁴ and CETA does not address this point at all. Both treaties are also silent about how differently worded provisions of various treaties will be addressed by any eventual multilateral mechanism empowered to adjudicate on claims brought under different treaties.

E. Ethics, Code of Conduct, and Challenges of Tribunal and Appeal Tribunal Members

Another notable feature of both CETA and the EU–Vietnam FTA is their inclusion of strongly worded ethics provisions for the Members of the Tribunal¹⁶⁵ and the Appellate Tribunal, which address several of the legitimacy criticisms advanced against investor-State arbitration in recent years.¹⁶⁶ These provisions establish conditions under which a Member can be removed from a Division in respect of a specific proceeding, or removed from the Tribunal or the Appeal Tribunal generally, when he or she has failed to meet those ethical standards. These provisions distance both treaties from the prevailing mechanisms in ISDS for the challenge and disqualification of adjudicators. Under the ICSID system, arbitrators on the same tribunal must decide (at least initially) on whether a co-arbitrator should be disqualified. The President of ICSID's Administrative Council will get involved only if the two co-arbitrators do not agree on the challenge or if a sole arbitrator, or more than one arbitrator of a three-member tribunal, is being challenged at the same time.¹⁶⁷ Under most other existing arbitral rules, an appointing authority decides challenges to arbitrators, and this decision can be appealed under the law of the seat of the arbitration.

The Parties to these treaties have essentially codified and elaborated upon long-held general notions of independence and impartiality for arbitrators. This builds on past and more recent initiatives in international arbitration, both commercial and investment, to more precisely regulate arbitrators' ethics and conduct. This includes the IBA Guidelines on Conflicts of Interest (IBA Guidelines)¹⁶⁸ and the draft EU–Singapore FTA, which each set out a code of conduct for arbitrators.¹⁶⁹

CETA includes a detailed ethics provision, which, among other things, makes the IBA Guidelines binding on its Tribunal and Appeal Tribunal.¹⁷⁰ This will constitute a significant change for the adjudicators of disputes under these treaties. It is a departure from the usual practice that the Guidelines are only binding if the disputing parties so agree.¹⁷¹ In ICSID arbitrator challenge procedures, for instance, the IBA Rules have been treated as of some relevance, but a far less

¹⁶⁴ EU–Vietnam FTA art 15.

¹⁶⁵ Whilst the independence and impartiality requirement is not expressly stated to apply to CETA's Appellate Tribunal under art 28, it would be illogical if it did not. EU–Vietnam FTA art 14 (*Ethics*) refers to both the Tribunal and Appellate Tribunal in setting out its ethical guidelines.

¹⁶⁶ See Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32(3) ICSID Rev—FILJ 503.

¹⁶⁷ ICSID Convention art 58; See eg *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal (5 May 2014).

¹⁶⁸ IBA Guidelines on Conflicts of Interest in International Arbitration (revised in 2014) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 26 October 2017.

¹⁶⁹ EU–Singapore FTA annex 9-F.

¹⁷⁰ CETA art 30.

¹⁷¹ That said, arbitral institutions look to the Guidelines in determining whether disclosures by arbitrators are automatically disqualifying, border-line requiring further inquiry, or acceptable/no conflict.

important source of guidance than Article 14 of the Convention.¹⁷² Of particular note, CETA includes a ‘best efforts’ obligation on the Parties ‘to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement’, and within a maximum of 2 years.¹⁷³ In light of the fact that CETA entered into provisional effect on 21 September 2017, it has already missed the former deadline, and the latter time limit has begun to run. CETA’s aspirational deadline for the codification of a set of ethical rules to govern the Tribunal Members is a novel feature, and signifies a notable shift in treaty-drafting practice.

The EU–Vietnam FTA contains two sections devoted to the conduct of Members of the Tribunal and Appellate Tribunal: Article 14 (*Ethics*) and Annex II (*Code of Conduct*).¹⁷⁴ Unlike CETA, and similar to the EU–Singapore FTA, the Code of Conduct in the EU–Vietnam FTA is already fully drafted.

(i) *Prohibition on ‘Double-Hatting’*

CETA addresses the issue of so-called ‘double-hatting’, where arbitrators act as counsel or experts in other treaty cases where the issues might be the same as those which they are presented with as arbitrators. One practitioner notes that the ‘problem is exacerbated by the fact that it is accepted practice to act as arbitrator in some cases and counsel in others.’¹⁷⁵ It is, therefore, significant that CETA codifies a prohibition on this practice.¹⁷⁶ Under CETA, the Members of the Tribunal (and presumably the Appellate Tribunal, although CETA is not clear on the point) will be barred from acting as counsel or party-appointed experts or witnesses (but not as arbitrators, provided they remain available to hear CETA cases) in any other investment dispute during their five-year term of appointment to the Tribunal.¹⁷⁷ The rationale behind this restriction is not surprising, as it is one of the long-standing criticisms of investor-State arbitration.

The EU–Vietnam FTA contains a similarly worded prohibition on ‘double-hatting’. The instruction in both CETA and EU–Vietnam that Members refrain from acting as counsel, party-appointed expert, or witness in any pending investment dispute goes *further* than the draft EU–Singapore FTA, which merely provides that arbitrators ‘shall not take instructions from any organisation or government with regard to matters before the tribunal’.¹⁷⁸

¹⁷² *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Decision on the Parties Proposal to Disqualify a Majority of the Tribunal (12 November 2013) para 68; *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (4 February 2014) para 78.

¹⁷³ CETA art 8.44(2).

¹⁷⁴ This Code of Conduct is very similar to that found in annex 9-F of the EU–Singapore FTA. It sets out in greater detail the standards of conduct for Members of the Tribunal and the Appeal Tribunal.

¹⁷⁵ George Kahale III, ‘Is Investor-State Arbitration Broken?’ (December 2012) 9 TDM 7, 8.

¹⁷⁶ EU–Vietnam FTA art 14(1) similarly prohibits ‘double-hatting’, in providing as follows: ‘upon their appointment, Members of the Tribunal shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law’. EU–Singapore FTA (ch 9 Investment and annex 9-F *Code of Conduct for Arbitrators and Mediators*) does not contain an explicit prohibition on arbitrators acting as counsel in other cases.

¹⁷⁷ CETA arts 8.30(1) (*Ethics*), 8.27(5) (*Constitution of the Tribunal*); EU–Vietnam FTA arts 14(1) (*Ethics*), 12(5) (*Tribunal*).

¹⁷⁸ EU–Singapore FTA annex 9-F, s 2.

(ii) Independence and impartiality

Both CETA and the EU–Vietnam FTA elaborate on the ICSID Convention’s requirement that adjudicators must be independent of the parties, by stipulating that they shall not be affiliated with any government.¹⁷⁹ The EU–Vietnam FTA specifically requires that these candidates be individuals ‘whose independence is beyond a doubt’.¹⁸⁰ This is a high standard. A footnote to this provision in both CETA and the EU–Vietnam FTA further stipulates that the fact that a person receives remuneration from a government does not in itself make that person ineligible.¹⁸¹ The provision then outlines specific examples of an inappropriate connection to a government, namely: (i) taking instructions from any organization, or government with regard to matters related to the dispute; and (ii) participating in the consideration of any disputes that might create a direct or indirect conflict of interest.¹⁸²

(iii) Challenges to Members of the Tribunal

Where a Member of the Tribunal is found not to comply with the IBA Guidelines, he or she will be replaced.¹⁸³ In the event of the disqualification or resignation of a Member of the Tribunal, CETA provides that the vacancy ‘shall be filled *promptly*’ from the roster of Members of the Tribunal;¹⁸⁴ the EU–Vietnam FTA simply states that the vacancy shall be filled.¹⁸⁵ Under CETA, challenges to Members will be determined by the President of the International Court of Justice (ICJ).¹⁸⁶ CETA’s challenge procedure stands in contrast to the usual practice of challenges being determined by the authority specified in the arbitral rules under which the claimant chooses to bring its claims¹⁸⁷ or by the remaining Members of the Division, as is the case in the first instance under the ICSID Convention (where the President of the Administrative Council becomes involved only if the two remaining arbitrators disagree on the challenge or if a challenge involves more than one arbitrator). Under the EU–Vietnam FTA, such challenges will be decided by the President of the Tribunal or to the President of the Appeal Tribunal, respectively.¹⁸⁸ Challenges against the presiding arbitrator of a Division tribunal must be determined by the President of the Appeal Tribunal.¹⁸⁹

While there is no formal procedure prescribed for the making of submissions, in coming to his or her decision, the ICJ President (under CETA) or the President of the Tribunal (under the EU–Vietnam FTA) is required to hear both disputing parties and provide the challenged Member an opportunity to submit any

¹⁷⁹ CETA art 8.30(1); EU–Vietnam FTA art 14(1).

¹⁸⁰ EU–Vietnam FTA art 14(1).

¹⁸¹ CETA art 8.30(1), fn 10; EU–Vietnam FTA art 14(1), fn 27.

¹⁸² *ibid.* This language reflects WTO DSU annex 2, art 17.3 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*).

¹⁸³ CETA art 8.30(4); EU–Vietnam FTA art 14(5).

¹⁸⁴ CETA art 8.30(3) (emphasis added).

¹⁸⁵ EU–Vietnam FTA art 14(5).

¹⁸⁶ CETA art 8.30(2); EU–Vietnam FTA art 14(5). ‘If a disputing party considers that a Member of the Tribunal has a conflict of interest, it shall send to the President of the International Court of Justice a notice of challenge to the appointment. The notice of challenge shall be sent within 15 days of the date on which the composition of the Division of the Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the Division. The notice of challenge shall state the grounds for the challenge.’

¹⁸⁷ CETA art 8.23(2).

¹⁸⁸ EU–Vietnam FTA art 14(2).

¹⁸⁹ EU–Vietnam FTA art 14(4).

observations.¹⁹⁰ This reflects standard practice in ISDS. The relevant provisions under each treaty set out the time frames for the challenge procedure.¹⁹¹ The ICJ President/President of the Tribunal has 45 days in which to issue the challenge decision.¹⁹² Both treaties are silent as to whether the President may seek an extension of time to render the decision, and whether the decision must include reasons. Considering it is standard practice in the investment treaty context for challenge decisions to be reasoned, it is likely that reasons will similarly be required under CETA and the EU–Vietnam FTA.

The ethics provisions under both treaties contain two further avenues for removing an arbitrator on the basis of conflicts of interest and/or a lack of independence or impartiality. Under CETA, a Member from the Tribunal may be removed where his or her behaviour is inconsistent with the ethical obligations set out therein, by either: (i) a reasoned recommendation from the President of the Tribunal; or (ii) the Parties' joint initiative for removal, by decision of the Joint Committee.¹⁹³ The equivalent provision under the EU–Vietnam FTA differs slightly. A Member of the Tribunal or the Appeal Tribunal may be removed from office upon either a reasoned recommendation from the President of the Appeal Tribunal (as opposed to the President of the Tribunal, under CETA) or on the Parties joint initiative by decision of the Trade Committee.¹⁹⁴ A Member is subject to removal if his or her behaviour is inconsistent with the ethical obligations set out within the treaty¹⁹⁵ and is incompatible with his or her continued membership. If the individual in question is the President of the Appeal Tribunal, then the President of the Tribunal shall decide on the challenge.

V. PROCEDURAL ASPECTS OF THE ITS

The ITS features various procedural novelties, which will be discussed in this section. Both CETA and the EU–Vietnam FTA reflect a trend towards more detailed treaty text to guide arbitrators' interpretations of certain substantive and procedural provisions and, in so doing, delimit both the scope of the investment treatment obligations and the specific steps claimants must take in order to place a dispute before the Tribunal (and later, before the Appeal Tribunal).

F. *Scope of the ITS's Jurisdiction*

Aside from ensuring that the claimant is an 'investor', and that the claim is in respect of an 'investment', made in accordance with applicable law, and without illegality—all within the meaning of the FTA¹⁹⁶—both CETA and the EU–Vietnam FTA limit the jurisdiction of the ITS to specific treaty and investment contract claims, the effect of which is to preclude claims that fall outside of their

¹⁹⁰ CETA art 80(3); EU–Vietnam FTA art 14(2).

¹⁹¹ CETA art 8.30(2), (3); EU–Vietnam FTA art 14(2), (3).

¹⁹² CETA art 8.30(3); EU–Vietnam FTA art 14(3).

¹⁹³ CETA art 8.30(4).

¹⁹⁴ EU–Vietnam FTA art 14(5).

¹⁹⁵ EU–Vietnam FTA art 14(1).

¹⁹⁶ EU–Vietnam FTA ch II *Investment*, s 2 *Investment Protection*, art 13(1); see also ch I *General Provisions*, art (...) *Objectives, Coverage and Definitions*, art 4(p) 'investment', art 4(q) 'investor'; ch II *Investment*, s 1 *Liberalisation of Investment*, art 1(1); CETA ch 8 *Investment*, s A (definitions and scope), art 8.1: 'covered investment'; see also definitions of 'investor' and 'investment'.

respective *Scope* provisions.¹⁹⁷ Further, tribunals shall dismiss entire cases or certain claims where there is evidence that the investment was obtained fraudulently or in some other unlawful way, or where the investor is seeking to manufacture access to international jurisdiction.¹⁹⁸

Rather than allow *any* dispute relating to an investment, both treaties only allow claims relating to non-discriminatory treatment and investment protection as regards to the operation of investments.¹⁹⁹ CETA's scope provision is more detailed than that of the EU–Vietnam FTA, and provides that claims ‘with respect to the expansion of a covered investment may be submitted only to the extent that the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment’.²⁰⁰ CETA's requirement that the business operations be ‘established’ aims to prevent investors from bringing claims regarding market access. In this regard, CETA explicitly carves out Section B *Establishment of investments* (market access and performance requirements) from the jurisdiction of the ITS, as well as Section C *Non-discriminatory treatment* [national treatment and most-favoured nation (MFN) treatment], to the extent such claims concern ‘the establishment or acquisition of a covered investment’.²⁰¹ CETA further clarifies that Section D *Investment protection* (fair and equitable treatment, compensation for losses during war and emergency, and expropriation) only applies ‘to a covered investment and to investors in respect of their covered investment’.²⁰²

In contrast, the EU–Vietnam FTA provides that the ITS is applicable to claims regarding alleged breaches of investment protection, national treatment, and MFN treatment, ‘as regards the operation of investments’.²⁰³ Both treaties exclude purely contractual claims and claims relating to measures that only have an impact on investors' profits (as opposed to one in which causes loss or damage to the claimant, its investment, or its locally established company).²⁰⁴ Both treaties also specify that claims regarding the restructuring of debt issued by a Party may only be submitted to investor-State arbitration in accordance with certain conditions articulated in an annex to the respective investment chapters.²⁰⁵

G. Consultations

An ‘amicable resolution’ and/or ‘consultations’ clause has become a fairly common feature in many IIAs.²⁰⁶ Both CETA and the EU–Vietnam FTA make it

¹⁹⁷ EU–Vietnam FTA s 3, s-s 1, art 3; CETA art 8.18(5).

¹⁹⁸ As the Tribunals did in eg *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007); *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Decision on Jurisdiction and Admissibility; *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009); *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006).

¹⁹⁹ EU–Vietnam FTA s 3, s-s 1, art 1; CETA art 8.18(1).

²⁰⁰ CETA art 8.18(2).

²⁰¹ CETA art 8.2(4).

²⁰² CETA art 8.2(4).

²⁰³ EU–Vietnam FTA s 3, s-s 1, art 1.

²⁰⁴ EU–Vietnam FTA s 3, s-s 1, art 1; see also s 2 (*Investment Protection*), art 13bis; CETA art 8.18(2).

²⁰⁵ CETA annex 8-B (*Public Debt*); EU–Vietnam FTA annex (*Public Debt*).

²⁰⁶ Eg NAFTA art 1118 (*Settlement of a Claim through Consultation and Negotiation*): ‘The disputing parties should first attempt to settle a claim through consultation or negotiation’; ECT art 26 (*Settlement of Disputes Between an Investor and a Contracting Party*): ‘1. Disputes ... shall, if possible, be settled amicably. 2. If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either

a pre-condition to submit a claim to arbitration that disputing parties first engage in consultations,²⁰⁷ and that such consultations be held within 60 days of the submission of the request for consultations.²⁰⁸ Both treaties provide that a dispute may be settled at any time, including after the arbitral proceedings have been commenced.²⁰⁹

Arbitral practice has been divided over the consultations requirement. Whilst some tribunals have found that compliance with an amicable settlement requirement is compulsory prior to triggering the arbitral process (such that a failure to engage in such consultations might deprive the tribunal of jurisdiction),²¹⁰ others have held it to be merely 'directory and procedural rather than as mandatory and jurisdictional in nature',²¹¹ and curable with the passage of time.²¹² With this context in mind, the consultation requirement in CETA and the EU–Vietnam FTA aims to ensure that negotiation between the disputing parties is more constructive (and thus more conducive to a settlement) than has previously been the case under existing treaties where the process is more a matter of form rather than substance. In such instances, disputes have often later arisen as to whether one or both disputing parties engaged in the consultations process in good faith.²¹³ That said, the extent of the consultations under CETA and the EU–Vietnam FTA appears to remain limited only to issues in dispute which 'as far as possible' can be settled amicably.²¹⁴ Further, the EU–Vietnam FTA contains an additional provision not present in CETA, namely that the prescribed time periods for submitting a request for consultations 'shall not render claims inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim is due to the claimant's inability to act as a result of actions deliberately taken by the Party concerned, provided that the claimant acts as soon as reasonably possible after it is able to act'.²¹⁵

The EU–Vietnam FTA has separate 'amicable resolution' and 'consultations' provisions.²¹⁶ CETA provides for both these aspects in a single article.²¹⁷ Both treaties provide that if a dispute cannot be resolved, then a claimant 'shall submit a request for consultations to the other Party',²¹⁸ within the applicable prescribed time period (either 2 or 3 years, depending on whether local remedies are pursued).²¹⁹ These limitation periods for the submission of a request for

party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution.' Christian Tams, 'Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach?' (2014) 15 J World Inv & Trade 603.

²⁰⁷ EU–Vietnam FTA s 3, s-s 2, art 4(1); CETA art 8.19(1).

²⁰⁸ EU–Vietnam FTA s 3, s-s 2, art 4(4); CETA art 8.19(1).

²⁰⁹ CETA art 8.18(1).

²¹⁰ *Ethyl Corporation v Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998) para 84: The consultations requirement may be disregarded when it is demonstrated that in fact no remedy was available and any attempt would have been futile.

²¹¹ *ibid*; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003) (*SGS v Pakistan*) para 184.

²¹² CETA art 8.23(1): 'If a dispute has not been resolved through consultations, a claim may be submitted under this Section.' (emphasis added). Reinisch and Stifter (n 97) 16.

²¹³ *SGS v Pakistan* (n 211) paras 183–84.

²¹⁴ CETA art 8.19(1).

²¹⁵ EU–Vietnam FTA s 3, s-s 2, art 4(6).

²¹⁶ EU–Vietnam FTA s 3, s-s 2, arts 3, 4.

²¹⁷ CETA art 8.19.

²¹⁸ CETA art 8.19(1); EU–Vietnam FTA s 3, s-s 2, art 4(1) (emphasis added).

²¹⁹ CETA art 8.19(6); EU–Vietnam FTA s 3, s-s 2, art 4(2).

consultations²²⁰ are traceable to NAFTA,²²¹ and also appear in the ASEAN Comprehensive Investment Agreement²²² and the ASEAN–China FTA.²²³ These treaties do, however, feature a novel overriding 10-year (under CETA) or 7-year (under the EU–Vietnam FTA) limitation period, regardless of whether local remedies are pursued.²²⁴

Under both CETA and the EU–Vietnam FTA, the request for consultations²²⁵ require certain details about the parties and the claim(s).²²⁶ CETA further provides that such particulars must be articulated with ‘sufficient specificity to allow the respondent to effectively engage in consultations and to prepare its defence’²²⁷—this may be an instance where the legal scrubbing of the EU–Vietnam FTA brings it more in line with the CETA text.

Both treaties set out certain time frames which must be observed in the consultations phase. Consultations must take place within 60 days of the submission of a request for consultations, unless the disputing parties agree to an extension of time.²²⁸ A request for consultations must always be sent to the EU, irrespective of whether the underlying claims concern an alleged breach by the EU or of a Member State.²²⁹ The EU–Vietnam FTA further specifies that where the measures of an EU Member State are complained of, the claimant must also send its request for consultations to that Member State.²³⁰

With respect to the locus of any consultations, under CETA, unless otherwise agreed by the parties to the dispute, they shall take place in: Ottawa if the impugned measures were adopted by Canada; Brussels if the measures challenged are EU measures; or the capital of the EU Member State if the measures challenged are exclusively measures undertaken by that Member State.²³¹ In the same vein, under the EU–Vietnam FTA, unless otherwise agreed, the consultations shall be held in: Hanoi, Brussels, or the EU Member State’s capital.

Reflecting a concern for costs, and departing from the traditional practice that first meetings be held in-person, both CETA and the EU–Vietnam FTA provide for the possibility of consultations by video-conference, which may be helpful for

²²⁰ CETA Guide (n 37).

²²¹ NAFTA art 1116(2) (*Claim by an Investor of a Party on Its Own Behalf*): ‘An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.’ Article 1117(2) (*Claim by an Investor of a Party on Behalf of an Enterprise*): ‘An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.’ Article 1121(1)(b) (*Conditions Precedent to Submission of a Claim to Arbitration*): ‘A disputing investor may submit a claim under Article 1116 to arbitration only if: . . . the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.’ (emphasis added).

²²² ASEAN Comprehensive Investment Agreement (signed 26 Feb 2009, entered into force 29 March 2012) art 34.

²²³ ASEAN–People’s Republic of China Comprehensive Economic Cooperation Agreement (signed 4 November 2002, entered into force 1 July 2005) art 14(6).

²²⁴ CETA art 18.19(6)(b); EU–Vietnam FTA s 3, s-s 2, art 4(2)(b).

²²⁵ CETA art 8.19(1)

²²⁶ CETA art 8.19(4); EU–Vietnam FTA s 3, s-s 2, art 4(1).

²²⁷ CETA art 8.18(5).

²²⁸ CETA art 8.19(1); EU–Vietnam FTA s 3, s-s 2, art 4(4).

²²⁹ CETA art 8.18(7); EU–Vietnam FTA s 3, s-s 2, art 4(7).

²³⁰ EU–Vietnam FTA s 3, s-s 2, art 4(7).

²³¹ CETA art 8.18(2).

small- or medium-sized enterprises.²³² This relatively new provision reflects the increased comfort on the part of counsel and States with the idea of obviating the need for costly, in-person discussions through video- or tele-conferencing. That said, this development might not prove so significant, as consultations could be held via video-conference regardless of whether an explicit provision in CETA recognized the possibility. However, it may be that enshrining the possibility of holding consultations via video-conference—explicitly citing the instance where the claimant is a small or medium-sized enterprise—might assist in making this option more routine for disputing parties.²³³ This provision, along with the possibility of a sole Member of the Tribunal hearing the case when both parties agree,²³⁴ and the possibility for the Parties to adopt ceilings for costs of claims,²³⁵ are intended to lessen the financial burden on smaller claimants in bringing claims under the ITS framework. These innovations serve as helpful tools to facilitate consultations at minimum costs, with a view to settling all, or part, of the underlying dispute amicably.

Under CETA, the investor must wait ‘at least 180 days from the submission of the request for consultations and, if applicable, at least 90 days from the submission of the notice requesting a determination of the respondent’.²³⁶ The EU–Vietnam FTA contains a further intermediate step that, ‘[i]f the dispute cannot be settled within 90 days of the submission of the request for consultations, the claimant *may* deliver a notice of intent which shall specify in writing the claimant’s intention’ to submit the claim to arbitration, and must set out certain details about the parties and the claim(s).²³⁷ The EU–Vietnam FTA provides that ‘[i]f the dispute cannot be settled within 6 months from the submission of the request for consultations *and* at least 3 months have elapsed from the submission of the notice of intent’, only then may the claimant submit the claim to arbitration.²³⁸ The aforementioned use of the word ‘and’, in addition to the heading of this subsection (*Submission of a Claim and Conditions Precedent*), make it seem as though the notice of intent might be a mandatory precondition to the submission of a claim, despite the use of the word ‘may’, above.

Both treaties provide that if the investor fails to submit a claim to arbitration²³⁹ within 18 months of submitting the request for consultations, the claimant will be deemed to have withdrawn its invitation to consult.²⁴⁰ CETA further specifies that, in these circumstances, the claimant’s notice requesting a determination of the respondent,²⁴¹ if applicable, will also be deemed withdrawn.²⁴² CETA further provides that the investor ‘shall not submit a claim under this Section with respect

²³² EU–Vietnam FTA s 3, s-s 2, art 4(3).

²³³ CETA art 8.18(3).

²³⁴ CETA art 8.23(5) (*Submission of a Claim to the Tribunal*).

²³⁵ CETA art 8.39(6) (*Final Award*).

²³⁶ CETA art 8.22(1)(b).

²³⁷ EU–Vietnam FTA s 3, s-s 3, art 6(1) (emphasis added). It should be noted that where the notice of intent has been sent to the EU, the EU ‘shall make a determination of the respondent’, pursuant to art 6(2), and inform the claimant within 60 days of receipt as to whether the EU itself or a Member State of the EU shall be respondent.

²³⁸ EU–Vietnam FTA s 3, s-s 3, art 7(1) (emphasis added).

²³⁹ Pursuant to CETA art 8.23 or EU–Vietnam FTA s 3, s-s 3, art 7.

²⁴⁰ CETA art 8.18(8); EU–Vietnam FTA s 3, s-s 2, art 4(5).

²⁴¹ Pursuant to CETA art 8.21.

²⁴² CETA art 8.18(8).

to the same measures',²⁴³ whilst the EU–Vietnam FTA states that the claimant 'may not submit a claim under this Section.'²⁴⁴

Perhaps most significantly, both CETA and the EU–Vietnam FTA provide that the submission of a claim must 'not identify a measure in its claim that was not identified in its request for consultations'.²⁴⁵ This is a grafting of WTO practice onto ISDS, whereby the request for consultations in the WTO defines the totality of the dispute, and it is difficult thereafter to expand it. It is unclear whether a claimant would be allowed to supplement its original claims if new measures were taken by the respondent during the course of proceedings, under the same set of facts. Under established investment treaty arbitral practice, an amendment for new claims would be permitted in such circumstances.²⁴⁶ The requirement that the request for consultations include the whole claim therefore raises questions about whether CETA has implicitly amended the applicable arbitral rules dealing with amendments of claimants' claims. Even if the arbitration rules afford the tribunal the discretion to admit new claims by way of amendment, this provision of CETA might be paramount, and a claimant might arguably be prevented from claiming new measures in its case.

H. *Procedural and Other Requirements for the Submission of a Claim to the Tribunal*

While both CETA and the EU–Vietnam FTA contain a detailed set of procedural and other requirements which must be satisfied before an investor may submit a claim to the Tribunal, CETA is slightly more comprehensive in this regard.²⁴⁷ Legal scrubbing may bring the EU–Vietnam FTA more in line with CETA. If it does not, it will be interesting to see in which respects it departs from CETA.

(i) *Determination of the respondent for disputes with the EU or its Member States*

Another unique aspect of the investment chapter in CETA and the EU–Vietnam FTA is the provision dealing with how a Canadian or Vietnamese claimant is to determine who to name as the respondent in a case involving the EU or an EU Member State. This provision has never before appeared in existing IIAs. However, it is interesting to note that the procedure outlined for the determination of the respondent was previously set out in a written statement submitted by the (then) European Communities to the Secretariat of the Energy Charter Treaty.²⁴⁸ In *Electrabel SA v Hungary*, the EC acted as *amicus curiae*, and argued that the claimant should have resorted to the procedure for the determination of the respondent, and that its failure to do so meant it knowingly took a risk that it brought a case against the wrong respondent or before the wrong forum.²⁴⁹

²⁴³ *ibid.*

²⁴⁴ EU–Vietnam FTA s 3, s-s 2, art 4(5).

²⁴⁵ CETA art 8.22(1)(e); EU–Vietnam FTA s 3, s-s 3, art 7(3).

²⁴⁶ *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) (*Metalclad v Mexico*) paras 66–69.

²⁴⁷ CETA art 8.22(1); EU–Vietnam FTA art 9(1).

²⁴⁸ Energy Charter Treaty (opened for signature 17 December 1994, entered into force 24 April 1998) (ECT); s 8 of Transparency Document on Policies, Practices and Conditions of Contracting Parties listed in Annex ID < <http://www.energycharter.org/what-we-do/dispute-settlement/unconditional-consent-to-arbitration-and-conciliation/> accessed 30 June 2016.

²⁴⁹ *Electrabel SA v Hungary*, ICSID Case No ARB/07/19, Award (25 November 2015) para 3.19.

The determination of the proper respondent is crucial at the outset of the arbitration, for if the claimant errs, the tribunal could find that it lacks jurisdiction over the proper respondent or the award might not be enforceable. It appears that this provision is intended to stop the tribunal from deciding on the issue of competence (and thus international responsibility) as between the EU and the Member State. The procedure set out in each of the relevant treaties for the determination of the respondent is intended to resolve questions of jurisdiction over the ‘proper’ party, but it is not without its potential interpretative challenges.

Under CETA, if after 90 days has elapsed from the submission of the request for consultations and the dispute is not resolved, the investor must deliver to the EU a notice requesting a determination of the respondent,²⁵⁰ which identifies the measures in which the investor intends to submit a claim.²⁵¹ The EU will determine whether the measures challenged by the claimant are EU measures or a Member State’s measures. In contrast, under the EU–Vietnam FTA, it is when the notice of intent (the seemingly mandatory step in between consultations and the submission of the claim) has been sent to the EU, that the EU shall make a determination of the respondent, and inform the claimant within 60 days of receipt. Thereafter, the claimant may submit a claim on the basis of such determination.

Another notable feature of the determination of the respondent provision under both CETA and the EU–Vietnam FTA provides that, the EU and the Member State may not (i) assert the inadmissibility of the claim, (ii) assert the lack of jurisdiction of the Tribunal, or (iii) otherwise assert that the claim or award is unfounded or invalid on the ground that the proper respondent should be the EU rather than the Member State or *vice versa*.²⁵² If a tribunal finds that the EU’s determination of the respondent turns out to be wrong, this provision serves as a sort of ‘saving clause’; namely, the EU will honour its obligations as if it were the proper respondent if an award is made against it, and seek compensation from its Member State. Under both CETA and the EU–Vietnam FTA, the Tribunal and the Appeal Tribunal shall also be bound by this determination.²⁵³

The EU–Vietnam FTA is otherwise silent as to the determination of the Respondent by the EU. The following analysis therefore only concerns CETA. If both EU and Member State measures are being challenged, the default respondent is the EU.²⁵⁴ In making its determination, the EU coordinates with its Member States internally. The EU regulation on the allocation of financial responsibility for investor-state arbitration under EU investment agreements is Regulation 912/2014.²⁵⁵ The relevant article in CETA is best read in light of the Regulation, which allows a Member State to request that the EU stand in its place as the respondent. The Regulation contemplates that, in limited circumstances, the EU may unilaterally direct that it, not the Member State, is the respondent.²⁵⁶ Where

²⁵⁰ CETA art 8.21(1).

²⁵¹ CETA art 8.21(2).

²⁵² CETA art 8.21(6); EU–Vietnam FTA s 3, s-s 3, art 6(4).

²⁵³ EU–Vietnam FTA s 3, s-s 3, art 6(5). The fact that the claimant ‘may’ rely on the EU’s determination might suggest that the claimant can disregard the determination.

²⁵⁴ CETA art 8.21(4).

²⁵⁵ European Parliament and Council Regulation 912/2014, [2014] OJ L257/121, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the EU is party.

²⁵⁶ CETA art 8.21(6); For a brief discussion of the limited circumstances in which the EU may stand in the shoes of the Member State, see Luca G. Radicati di Brozolo and Federica Iorio, ‘Arbitration Under Investment Protection Agreements Between The EU and Non-Member States’ 8 World Arbitration Reports 2015, 20–21: If the EC decides

the EU stands in the shoes of the Member State, the Regulation states that the EU must consult with the Member State and keep its best interests in mind. The Regulation further provides that the EU will bear the financial responsibility for the conduct of the case, but that it can then turn to the Member State to reimburse the EU budget.

CETA provides that a Canadian claimant may submit a claim for arbitration on the basis of the EU's determination (which the EU must provide to the claimant within 50 days from the date of the request for a determination) if the investor allows at least 180 days to elapse from the Request for Consultations and, if applicable, at least 90 days from the notice requesting a determination of the respondent.²⁵⁷ If, however, the EU fails to inform the investor within the 50-day period, it is on the investor to correctly construe the default position advanced by CETA. Where measures are exclusively those of an EU Member State, the Member State is the respondent; if the measures include measures taken by the EU, the EU is the respondent.²⁵⁸ The Treaty is silent about what happens if the EU issues its determination *after* 50 days, but *before* the 90-day required lapse before a claim may be submitted to arbitration.²⁵⁹ For instance, is the claimant obliged to accept the EU's determination over its own determination under Article 8.21(4) if it disagrees? It would be wise for the claimant to heed the EU's determination or to hedge by naming the EU and the Member State as respondents. However, arguably, the latter option might expose it to a costs order for unnecessarily naming a party as a respondent. It is interesting too that CETA does not address the 40-day time gap between the determination deadline and first possible date on which the claimant may submit its claim.

Several potential challenges may materialize from the procedure, or lack thereof, set out in CETA (and absent altogether from the EU–Vietnam FTA). First, where the EU has stepped into the Member State's shoes to defend against a claim, the EU might be unable to obtain information and documents from the EU Member State. Whilst this will be a challenge for the EU to contend with and not the claimant, non-cooperation can be expected to occur from time to time, and the answer to this quandary appears to rest on the legal enforceability of Regulation 912/2014. Member States are obliged to co-operate with the EU, and general principles of EU law provide for the day-to-day co-operation between the EU and the Member States.

Second, whilst it might be advisable for claimants to initiate claims against the EU and a Member State simultaneously, CETA does not explicitly envisage the possibility of multiple respondents.²⁶⁰ It is noteworthy that Article 8.21 does not address the possibility of co-respondent status, but instead refers repeatedly to the

that the EU should defend against the claim, either because the EU would bear at least part of the financial responsibility for the alleged breach or because the dispute also concerns treatment afforded by the EU institutions.

²⁵⁷ CETA art 8.22(1): 'An investor may only submit a claim pursuant to Article 8.23 if the investor: ... (b) allows at least 180 days to elapse from the submission of the request for consultations and, if applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent.'

²⁵⁸ CETA art 8.21(4).

²⁵⁹ CETA art 8.22(1)(b).

²⁶⁰ *ibid*, 22.

respondent as either the EU or a Member State.²⁶¹ In light of the EU's overlapping layers of competence with its Member States, it will be interesting to see 'whether practice will find solutions to address the need to establish a co-respondent mechanism in the absence of clear language to that effect in the agreement'.²⁶² Until there is clarity on the point, Canadian claimants should default to naming the EU as the respondent, where there is any doubt.

Third, for purposes of the enforcement of an award that for any reason was not paid by the EU, the EU might be more exposed to the forced seizure of its assets than an individual Member State, because the EU likely has assets spread over a wider geographical area. That said, the EU has a relatively small budget compared to most Member States. This raises problems under the ICSID Convention, because membership in the Convention, as it is presently drafted, is restricted to States.²⁶³ Thus, the strong enforcement provisions contained in Article 54 of the Convention²⁶⁴ apply to the territory of each ICSID Contracting State and the EU, which, although comprising many ICSID Contracting States, is itself not a Contracting State. The Parties to CETA have sought to overcome this problem by providing that an award shall be treated as if it were an ICSID award,²⁶⁵ but it is unclear how a sub-set of parties to a treaty (Canada and certain EU Member States) can interpret a multilateral treaty (the ICSID Convention) that binds non-parties to their agreement to give effect to a CETA award as if it were an ICSID award. The Parties have sought to address this by stipulating that a final CETA award is an arbitral award under the New York Convention,²⁶⁶ and that it shall qualify as an ICSID Convention award.²⁶⁷ The purported modification of existing arbitral rules does not, however, bind third-party States to the treaties under study.

Under CETA, the EU agrees to forego any option to change its position on such determinations at a later stage.²⁶⁸ However, one might query whether this provision fully protects a Canadian claimant that is suing a Member State, rather than the EU. If the claimant errs in naming the Member State as the respondent, when it should have been the EU, the treaty does not provide for recourse. This situation is only likely to arise if there is no determination made by the EU within the prescribed time period, and would perhaps have been preceded by consultations in which the EU would have dealt with the Member State, and so would be aware that there was in fact an EU measure involved. It is therefore probably more advantageous, when in doubt and where the EU does not provide its determination by the expiry of the 50-day deadline, for a claimant to sue the EU, rather than the Member State.

²⁶¹ Hannes Lenk, 'Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA' in Andrea Bjorklund, John Gaffney, Fabien Gélinas and Herfried Wöss (eds) *TDM CETA Special*, 13 *Transnational Dispute Management* 1 (March 2016), 22.

²⁶² Lenk, 22.

²⁶³ ICSID Convention art 67: 'This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.' Accordingly, the EU cannot be a party to the ICSID Convention, which can only be signed by States that are members of the World Bank or the Statute of the International Court of Justice (ICJ); the EU is neither of these. Statehood is a requirement for adherence to the ICSID Convention.

²⁶⁴ ICSID Convention, art 54.

²⁶⁵ CETA art 8.41(6).

²⁶⁶ CETA art 8.41(5).

²⁶⁷ ICSID Convention art 25(1).

²⁶⁸ CETA art 8.21(6).

(ii) *Prohibition on parallel proceedings*

Both CETA and the EU–Vietnam FTA require that the investor withdraw or discontinue, and waive the right to initiate, any existing proceedings before a tribunal or court under domestic or international law with respect to the measure alleged to constitute a breach referred to in its claim.²⁶⁹ However, the waiver shall cease to apply in certain circumstances, including where the claim is rejected on the basis of a failure to meet the jurisdictional or other procedural²⁷⁰ or nationality requirements²⁷¹ to bring an action under the relevant FTA. In so doing, these treaties seek to prohibit parallel proceedings by limiting investors' right to seek both remedies in domestic or international tribunals and courts and under the ITS at the same time. This provision generally comports with the principle in ICSID arbitrations that claimants should submit the whole of an investment dispute to the arbitral tribunal. The presumptive rule under the Convention is that the '[c]onsent 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'.²⁷² The EU–Vietnam FTA, like NAFTA, varies this ICSID rule by prescribing that investors can also seek injunctive relief before local courts simultaneously with the arbitral proceedings, so long as they do not claim damages.²⁷³ In contrast, CETA's formulation is generally consistent with the approach taken under the ICSID regime,²⁷⁴ whereby investors can go to the local courts, but it results in an 'either/or' situation: arbitration or local courts, not both simultaneously. Interestingly, mass claims or class action claims are expressly made inadmissible in the EU–Vietnam FTA, but CETA is silent on this point.²⁷⁵

Both CETA and the EU–Vietnam FTA contain a provision (drafted in the double-negative) requiring that, in order to submit its claim to the Tribunal, the investor 'shall not identify a measure in its claim that was not identified in its request for consultations'.²⁷⁶ This provision is reflective of the WTO practice stipulating that the claims must have all been outlined in the Request for Consultations. The question of whether an impugned measure has been identified in the request for consultations could lead to a jurisdictional challenge by the respondent, and the tribunal will then need to determine whether, and to what extent, the claim complies with this formal prerequisite. This rule modifies the ICSID Convention rule which allows for ancillary claims to be brought²⁷⁷ (a nearly identical provision is available under the ICSID Additional Facility Rules)²⁷⁸ and the UNCTRAL rule that permits claims to be amended,²⁷⁹ and implies that it is not open to a claimant to amend its claim(s). This is a potential landmine for claimants.

As already discussed above under the consultations requirement, a further potential challenge lurks in the ambiguity of whether a claimant is allowed to

²⁶⁹ CETA arts 8.22(1)(f), (g); EU–Vietnam FTA s 3, s-s 3 (*Submission of a Claim and Condition Precedent*), art 8(4).

²⁷⁰ CETA art 8.22(5)(a).

²⁷¹ EU–Vietnam FTA s 3, s-s 3 (*Submission of a Claim and Condition Precedent*), art 8(6).

²⁷² ICSID Convention art 26.

²⁷³ EU–Vietnam FTA s 3, s-s 3 (*Submission of a Claim and Condition Precedent*), art 8(7).

²⁷⁴ Albeit the ICSID Convention contains a presumptive exclusive jurisdiction, which can be varied pursuant to art 26.

²⁷⁵ EU–Vietnam FTA art 7(6).

²⁷⁶ CETA art 8.22(1)(e); EU–Vietnam FTA art 7(3).

²⁷⁷ ICSID Arbitration Rules r 40 (*Ancillary Claims*).

²⁷⁸ ICSID Additional Facility Rules art 47 (*Ancillary Claims*).

²⁷⁹ 2010 UNCITRAL Rules art 22 (*Amendments to the Claim or Defence*).

supplement its case if new measures are taken by the respondent during the course of proceedings, but within the same factual matrix. If the tribunal follows established investment treaty arbitral practice, this would be permitted (the reasoning being that a claimant can hardly be faulted for not anticipating measures taken after the initiation of the proceeding).²⁸⁰ Even if the applicable arbitral rules provide that the tribunal may admit new claims by way of amendment, the dispute settlement rules must apply subject to the FTA.²⁸¹ Therefore, a claimant might not be allowed to include the new measures in its case. In such a scenario, perhaps a claimant could commence another new set of proceedings, and later seek consolidation of both sets of proceedings, although that would be costly and unfair to the claimant.

Both CETA and the EU–Vietnam FTA provide that a claim may be submitted to the Tribunal ‘only’ if all of the procedural and other requirements for the submission of a claim are satisfied.²⁸² For greater certainty, CETA further requires that the Tribunal decline jurisdiction if the investor, or its locally established enterprise, fails to fulfil the aforementioned requirements, of which there are seven. The EU–Vietnam FTA does not include a similar clarification at present, which might be added upon legal scrubbing, or left implicit.

In the early NAFTA cases, respondents argued that the treaty’s condition precedents to the submission of a claim to the tribunal must be complied with in order to perfect the agreement to arbitrate, but tribunals have sometimes dismissed the alleged failures to comply with conditions precedent as *de minimus* and insufficient to deprive the tribunal of jurisdiction.²⁸³ Subsequent Canadian and US treaty-making practice has emphasized the need to comply with conditions precedent, and has spelled out the consequences of noncompliance for tribunals.²⁸⁴ CETA reflects this trend.

I. *Submission of a Claim to the Tribunal and the Applicable Arbitral Rules*

Both CETA and the EU–Vietnam FTA provide that if a dispute has not been resolved through consultations within 6 months from the submission of the request for consultations (and 3 months have elapsed from the notice of intent to submit a claim, under the EU–Vietnam FTA), an investor of a State Party may submit a claim either on its own behalf or on behalf of a locally established enterprise which it owns or controls directly or indirectly.²⁸⁵ The claimant has the following choice of rules under which to bring its claim(s): (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

²⁸⁰ See discussion in *Metalclad Mexico* (n 246) paras 66–69.

²⁸¹ EU–Vietnam FTA art 7(4).

²⁸² CETA art 8.22(1)(a)–(g); EU–Vietnam FTA art 9(1)(a)–(f).

²⁸³ See eg *Ethyl Corporation v The Government of Canada*, UNCITRAL (1976), Award on Jurisdiction (24 June 1998, para 91).

²⁸⁴ See eg *Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments* (Canada–China FIPA), art 21 (*Conditions Precedent to Submission of a Claim to Arbitration*) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng>> accessed 7 July 2016.

²⁸⁵ CETA art 8.23(1); EU–Vietnam FTA arts 7(1), 9(1)(b).

UNCITRAL Arbitration Rules; or (d) any other rules on agreement of the disputing parties.²⁸⁶

The inclusion of the ICSID Arbitration Rules and ICSID Additional Facility Rules under the EU–Vietnam FTA is interesting, given that, at the time of writing, Vietnam is not a Contracting State to the ICSID Convention,²⁸⁷ and the EU, as a supranational organization, is currently incapable of becoming one.²⁸⁸ Consequently, whilst an ICSID claim brought by a national of an EU Member State is clearly available against Canada, as is any claim by a Canadian national against an EU Member State, if the treaty drafters intended to suggest that a CETA claim may be brought against the EU itself under ICSID, this is not yet legally possible.²⁸⁹

There are several potential implications, and possible reasons for, the inclusion of the ICSID Convention in these treaties. First, the ICSID regime might have been included to anticipate the possibility of a future amendment to the ICSID Convention to allow for EU accession. Second, it might be that the choice of the ICSID regime, albeit modified by CETA and the EU–Vietnam FTA, was included for aspirational effect, to spark debate about how the EU might be treated as a contracting party to ICSID, with a view to the EU’s current discussions regarding the multilateralization of the ITS concept. Third, it could be that these treaties seek to make an *inter se* modification of the ICSID Convention to permit the EU to become a party to the treaty. Since Vietnam is currently revising its internal legislation with a view to accession to ICSID (possibly within 5 years after the entry into force of the EU–Vietnam FTA), an EU investor might be able to commence claims as a national of an EU Member State already party to the ICSID Convention after Vietnam’s accession. However, even if Vietnam ratified the ICSID Convention, it would still not be possible for a Vietnamese national to commence a claim against the EU itself.

As things currently stand, Canadian investors bringing claims against the EU may proceed under the ICSID Additional Facility Rules, and both Canadian and Vietnamese investors may proceed under UNCITRAL, or other such rules as the parties agreed. Due to present constraints, it is possible that the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules will be most often invoked in practice.²⁹⁰

²⁸⁶ CETA art 8.23(2); EU–Vietnam FTA art 7(2).

²⁸⁷ Database of ICSID Member States: <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=PtoT&rdo=BOTH&ViewMembership=All>> accessed 13 June 2016.

²⁸⁸ ICSID Convention art 67: ‘This Convention shall be open for signature on behalf of States of the Bank.’

²⁸⁹ Thus avoiding ICSID Convention art 25(1) jurisdictional issues. A further question that might be raised is whether the ICSID Secretariat, if it is Secretariat to the Tribunal, be able to reject the submission of the claim or whether it would be obliged to administer it as an ICSID arbitration nonetheless.

²⁹⁰ Finally, note that in the event that arbitration proceeds under the ICSID Convention, CETA clarifies that, ‘[f]or greater certainty’, a claim submitted by an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly shall satisfy the requirements of Article 25(1) of the ICSID Convention (CETA art 8.23(4)). This might be a drafting error; a more accurate reference would have been to Article 25(2)(b) of the ICSID Convention, which deals with the situation of a locally incorporated juridical person that is considered to be a national of another Contracting State by reason of foreign control. There is no corresponding provision in the EU–Vietnam FTA, for the obvious reason that neither Vietnam nor the EU are Contracting States of ICSID. Finally, each Party must notify the other Party of the place of delivery of notices and other documents by claimants. Consistent with the strong transparency provisions in CETA, the notices must be made publicly available. There is no corresponding provision in the EU–Vietnam FTA.

J. Security for Costs

Whilst CETA does not mention security for costs, the EU–Vietnam FTA contains a provision which, ‘[f]or greater certainty’, confirms that the tribunal has the power to order security for costs.²⁹¹ For such an order, the tribunal need only be satisfied that an order of costs against the claimant is possible, and that there are ‘reasonable grounds to believe’ that a claimant risks not being able to honour a potential decision on costs ordered against it.²⁹² The test under existing investment arbitration practice is significantly higher. In the context of Article 39 of the ICSID Convention, one tribunal held that its power to order security for costs should only be exercised in ‘extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or there is bad faith on the part from whom the security for costs is requested.’²⁹³ With the exception of *RSM Production Corporation v Saint Lucia*,²⁹⁴ investment arbitration tribunals have generally refused to order security for costs.²⁹⁵ The EU–Vietnam FTA appears to only require that the tribunal be satisfied that there is a ‘risk’, and not that there is a ‘high real economic risk’, that a claimant will not be able to pay a costs order.²⁹⁶ While it is unlikely that a tribunal could read into the word ‘risk’ such adjectival modifiers as ‘high’ and ‘real’, there is still room for argument as to what kind of risks must be demonstrated to obtain an order for security for costs. Notably, the EU–Vietnam FTA appears to impose a requirement that the tribunal be satisfied that an order of costs against the claimant is ‘possible’. Considering that the EU–Vietnam FTA imports the ‘loser pays principle’ (costs follow the event), it would appear that a tribunal must make a preliminary evaluation of the claimant’s chances of success on its claim(s). Again, this is a departure from the current approach, where investment arbitration tribunals are ‘reluctant to grant requests for guarantees to cover the costs of arbitration, based on hypothetical assumptions about the outcome of a given arbitration’.²⁹⁷

K. Third-Party Funding

Both CETA and the EU–Vietnam FTA impose a new obligation on disputing parties to promptly²⁹⁸ disclose if they are being aided by third-party funding or donations to finance their claims, both at the time of a claim, as well as throughout the duration of the dispute.²⁹⁹ They must disclose to their tribunal the existence and nature of the third-funding arrangement, and the name and address of any funder (which, presumably, then permits the tribunal Members to make

²⁹¹ EU–Vietnam FTA art 22(1).

²⁹² *ibid.*

²⁹³ *South American Silver Limited v The Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No 10, para 59 (*South American Silver*).

²⁹⁴ *RSM Production Corporation v Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs (13 August 2014).

²⁹⁵ As noted in *South American Silver* (n 293) para 306.

²⁹⁶ EU–Vietnam FTA art 22(1).

²⁹⁷ Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (CUP 2009) 784.

²⁹⁸ CETA art 8.26(2): ‘The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.’ EU–Vietnam FTA s 3, s-s 3, art 11(2).

²⁹⁹ CETA art 8.26(1); EU–Vietnam FTA s 3, s-s 3, art 11(1). Recent case law ordering identification of third-party funders: *Muhammet Çap & Şehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No ARB/12/6, Procedural Order No 3 (8 July 2015).

their own investigations as to whether such funders present a conflict of interest).³⁰⁰ The provision does not expressly require that the disputing parties disclose the precise terms of the funding agreement. It can be expected that the mandatory disclosure of such information will play a role in subsequent submissions over potential costs awards, and the desire of respondents to be made whole on any award for costs made against an unsuccessful claimant.

Absent from CETA, the EU–Vietnam FTA provides that, in making its determination regarding security for costs ‘the Tribunal shall take into account whether there is third-party funding.’³⁰¹ However, it is unclear how the existence of such funding and the promptness of the disclosure of the funding should factor into the Tribunal’s consideration.³⁰² It will be interesting to see if this provision survives legal scrubbing, or it otherwise revised.

L. Consolidation

The consolidation provisions are yet another example of an area where CETA and the EU–Vietnam FTA modify and supplement existing arbitral rules.³⁰³ CETA provides detailed provisions on consolidation of two or more claims, following on the approach in NAFTA Article 1126. In contrast, the UNCITRAL Arbitration Rules, the ICSID Convention, and the Additional Facility Rules do not have any provision allowing for consolidation of claims. To date, consolidation under the ICSID and Additional Facility Rules has been done consensually.

One of the concerns that animates the EU’s new approach to investor-State arbitration by way of the ITS is the consistency of arbitral awards. The multiplication of IIAs with investor-State arbitration provisions has raised the risk of conflicting awards in parallel proceedings, as the same dispute can lead to awards under different treaty regimes, as well as under different contracts. Investors are sometimes able to claim breaches of different IIAs and to seek relief through different arbitration proceedings under each of the invoked treaties in respect of a single investment and regarding the same facts. Accordingly, both CETA and the EU–Vietnam FTA provide that, where two or more claims submitted separately to the ITS have a question of law or fact in common and arise out of the same events or circumstances, a disputing party (or the disputing parties, jointly) may seek the establishment of a separate Division of the Tribunal, submit a request for consolidation.³⁰⁴

The request for consolidation must be delivered, in writing, to the President of the Tribunal and to all the disputing parties sought to be covered by the order, and must specify the names and addresses of the disputing parties; the claims; and the grounds for the order sought.³⁰⁵ Where more than one respondent is the

³⁰⁰ EU–Vietnam FTA s 3, s-s 3, art 11(2).

³⁰¹ *ibid* art 11(3).

³⁰² See Jean-Christophe Honlet, ‘Note—Recent decisions on third-party funding in investment arbitration’ (2015) 30(3) *ICSID Rev—FILJ* 704–07: on the tribunal decisions differing on whether to grant a request for security for costs where third-party funding is involved; 702: five investment cases addressed the allocation of costs in third-party funded investment arbitrations ‘with a complete level of consistency’—the existence of third-party funding did not affect the allocation of costs.

³⁰³ CETA art 43; s 3, s-s 3, EU–Vietnam FTA art 33.

³⁰⁴ CETA art 8.43(1); EU–Vietnam FTA art 33(1).

³⁰⁵ CETA art 8.43(4); EU–Vietnam FTA art 33(1).

subject of a request for consolidation, all such respondents must agree to the request.³⁰⁶

Both CETA and the EU–Vietnam FTA set out a process for determining the rules applicable to the proceedings if and when they are consolidated. Under CETA, if all of the claims for which a consolidation order is sought have been submitted under the same arbitral rules, these shall govern. Less clearly drafted, the EU–Vietnam FTA merely provides that ‘the dispute settlement rules chosen by agreement of the claimants from those referred to in Article 7(2)’ shall govern.³⁰⁷ Alternatively, if the claimants have not agreed on such rules within 30 days (such that the claims for which a consolidation order is sought were not submitted to the same arbitral rules),³⁰⁸ the default is that the UNCITRAL Arbitration Rules shall apply.³⁰⁹

The request for consolidation must be heard by a new Division (referred to as the ‘Consolidating Division’) of the Tribunal, selected by the President.³¹⁰ If, after hearing the disputing parties, the Consolidating Division is satisfied that the claims have a question of law or fact in common and arise out of the same events or circumstances, and consolidation would best serve the interests of fair and efficient resolution of the claims including the interest of consistency of awards, it may assume jurisdiction over some or all of the claims.³¹¹ In the event consolidation occurs, the original Divisions of the Tribunal shall cede jurisdiction in relation to the claims, or parts thereof, over which the Consolidating Division takes jurisdiction and the proceedings of such Divisions shall be stayed or adjourned, as appropriate.³¹² If the Consolidating Division takes jurisdiction only over parts of the claims, its award (when it becomes final) in relation to those parts shall be binding on the Divisions having jurisdiction over the remainder of the claims.³¹³ The provision does not address whether the Divisions may seek guidance on the interpretation of the Consolidating Division’s award should it be necessary for the Divisions’ own decision-making with respect to the remaining unconsolidated claims.

M. *The Award*

Like NAFTA,³¹⁴ both CETA and the EU–Vietnam FTA give the respondent the choice of whether to make restitution or pay damages.³¹⁵ Neither treaty imposes restitution as a remedy, but rather recognizes that restitution can be an appropriate way of resolving the dispute. Further, the Tribunal may not award monetary damages in an amount greater than the loss suffered by the investor/locally established enterprise, and must reduce this amount by prior damages,

³⁰⁶ CETA art 8.43(6); EU–Vietnam FTA art 33(2).

³⁰⁷ CETA art 8.43(6)(a); EU–Vietnam FTA art 33(4).

³⁰⁸ CETA art 8.43(6)(b).

³⁰⁹ EU–Vietnam FTA art 33(5).

³¹⁰ CETA art 8.43(7); EU–Vietnam FTA art 33(2).

³¹¹ CETA art 8.43(8); EU–Vietnam FTA art 33(6).

³¹² CETA arts 8.43(10), 11; EU–Vietnam FTA art 33(6).

³¹³ CETA art 8.43(10); EU–Vietnam FTA art 33(6).

³¹⁴ NAFTA art 1135(1): ‘Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs in accordance with the applicable arbitration rules.’

³¹⁵ CETA arts 8.39(1), (2); EU–Vietnam FTA art 27(1).

compensation already provided, or any restitution of property or repeal/modification of a measure.³¹⁶ Punitive damages are not permissible under either of the treaties.³¹⁷

Both CETA and the EU–Vietnam FTA contain provisions on how the Tribunal must apportion the costs of the proceedings; both adopt the ‘loser pays principle’, meaning the cost rulings shall follow the event, such that all reasonable costs (including legal fees) will be borne by the losing party. It is only in ‘exceptional circumstances’ that the Tribunal may apportion the costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim.³¹⁸ Of course, if only parts of the claims have been successful, the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.³¹⁹ Further, the Joint/Trade Committee is empowered to consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises, taking into account ‘the financial resources of such claimants and the amount of compensation sought.’³²⁰

As already mentioned, the Tribunal in CETA is instructed to issue its final award within 24 months of the date on which it submitted its claim, and is obliged to exercise ‘best efforts’ to ensure that the dispute is resolved in a timely manner.³²¹ The EU–Vietnam FTA provides that a ‘Provisional Award’³²² shall be rendered within 18 months of the date of submission of the claim.³²³ Should the Tribunal require additional time to issue its award, both treaties require that the tribunal provide the disputing parties with reasons for the delay.³²⁴ CETA is silent as to the consequences of the Tribunal either: (i) not providing reasons for its delay; and/or (ii) not delivering its award within the 24 month period. This lacuna in the otherwise detailed and precise language employed in CETA prompts the question of whether a failure by the Tribunal to render the award within 24 months would make the award susceptible to appeal.

Given the difficulty of determining complex or factually-extensive cases common to investment disputes, it is unlikely that in practice the tribunal under these treaties will be able to meet such a tight schedule. More detailed substantive obligations than have been previously employed in extant BITs, and the possibility of first instance tribunals being overturned, will require a more careful determination by each and every tribunal. Further, whilst the problems of *ad hoc* arbitration—where busy arbitrators often find it difficult to find mutually convenient times for hearings and deliberations, with attendant delay—might be alleviated in part by the availability of a full-time Tribunal, if the Tribunal’s caseload grows and challenges its capacity, delay will be inevitable. Investment treaty cases are typically very factually complex and complicated, particularly where areas of expertise such as valuation of damages, come into play. This makes

³¹⁶ CETA art 8.39(3); EU–Vietnam FTA art 27(2).

³¹⁷ CETA art 8.39(4); EU–Vietnam FTA art 27(3).

³¹⁸ CETA art 8.39(5); EU–Vietnam FTA art 27(4).

³¹⁹ *ibid.*

³²⁰ CETA art 8.39(6); EU–Vietnam FTA art 27(5).

³²¹ CETA art 8.39(7).

³²² As in ICSID and other ISDS regimes, a Provisional Award can be on the merits, on jurisdiction, or can contain the Tribunal’s decision to dismiss a claim on the basis that it is manifestly without legal merits. EU–Vietnam FTA arts 18(3), 19(3). Article 28(1): After a Provisional Award has been issued, either disputing party may appeal before the Appeal Tribunal within 90 days of its issuance, after which point it will become a Final Award.

³²³ EU–Vietnam FTA art 27(6).

³²⁴ CETA art 8.39(7); EU–Vietnam FTA art 27(6).

ISDS significantly different from WTO dispute settlement practice, from which the investment chapter seems to draw inspiration. While the ITS addresses some of the causes of delay, it remains to be seen whether these reforms would be able to reduce the length of these proceedings by half if not more, especially if disputes under CETA and the EU–Vietnam FTA remain as factually complex and/or document-intensive as ISDS disputes have been to date.

N. *Consent to the Settlement of the Dispute by the Tribunal*

CETA and the EU–Vietnam both explicitly confirm the respondent States' consent to arbitration by the Tribunal under the investment chapter, a provision that is typically included in IIAs.³²⁵ It is the same provision as in NAFTA.³²⁶ Both CETA and the EU–Vietnam FTA further clarify that the respondent's consent and the submission of a claim to the Tribunal satisfies the consent requirements of Article 25 of the ICSID Convention, Chapter II of the ICSID Additional Facility Rules, and Article II of the New York Convention.³²⁷

O. *Transparency of the Arbitral Proceedings*

Both CETA and the EU–Vietnam FTA include similar transparency provisions that adopt a binding modified version of the 2013 UNCITRAL Transparency Rules,³²⁸ which cannot be waived by the Tribunal or by the disputing parties.³²⁹ The great majority of older investment treaties, including ones to which the EU Member States were signatories, do not address transparency in investor-State arbitration at all, let alone make it compulsory.³³⁰ The strong transparency provisions in these treaties are one of the hallmarks of the new EU-led approach to investor-State arbitration, and is an example of States including provisions that harmonize the procedural, and in some cases substantive, aspects of claims, irrespective of the claimant's choice of the applicable arbitration rules. This is particularly evident in the provisions on open hearings and public access to documents. This trend originated from the NAFTA experience, and has continued in such treaties as the CAFTA-DR, US–Singapore FTA, TPP, and EU–Singapore FTA.³³¹

Both CETA and the EU–Vietnam FTA require that the following documents be made public: the request for consultations; the notice requesting a determination of the respondent (for claims involving the EU or a Member State); the notice of determination of the respondent; the agreement to mediate; the notice of intent to challenge a Member of the Tribunal; the decision on challenge to a Member of the Tribunal; and the request for consolidation.³³² The EU–Vietnam FTA also requires that the notice of intent (not required under CETA) be made public.³³³

³²⁵ CETA art 8.25; EU–Vietnam FTA art 10.

³²⁶ NAFTA art 1122 (*Consent to Arbitration*).

³²⁷ CETA art 8.25(2).

³²⁸ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (also known as the Mauritius Convention on Transparency), UN General Assembly, Resolution 68/109 (adopted 10 December 2013, entered into force 18 October 2017, effective as of 1 April 2014) (UNCITRAL Transparency Rules), art 3(1).

³²⁹ CETA art 36; EU–Vietnam FTA art 20.

³³⁰ N Jansen Calamita, 'Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy' (2014) 15 *J World Inv & Trade* 645, 672.

³³¹ See eg Celine Levesque, 'Influences on the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond' (2006), 44 *CYIL* 249.

³³² CETA art 8.36(2); EU–Vietnam FTA art 20(2); UNCITRAL Transparency Rules art 3(1).

³³³ EU–Vietnam FTA art 20(2).

Exhibits must also be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules.³³⁴ Consistent with the approach taken in other treaties which have adopted broad transparency requirements, both CETA and the EU–Vietnam FTA ensure that sensitive information (such as business proprietary information and information considered confidential under the national laws of the respondent) will be protected from disclosure.³³⁵ The EU–Vietnam FTA adds a further clarification in a footnote which provides that ‘[f]or greater certainty, confidential or protected information, as defined in Article 7(2) of the UNCITRAL Transparency Rules, includes classified government information’.³³⁶ Both treaties contemplate the documents which are made public being ‘available by communication to the repository’ referred to in the UNCITRAL Transparency Rules.³³⁷

Under CETA, a disputing party may not object to open hearings. Hearings ‘shall be open to the public’.³³⁸ There is no expressly stated equivalent in the EU–Vietnam FTA, but the open hearings principle appears to be subsumed by the adoption of the UNCITRAL Transparency Rules, which, at Article 6, provides that, subject to the need to protect confidential information or the integrity of the arbitral process, hearings shall be public.³³⁹ CETA further provides that ‘[i]f the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection’.³⁴⁰ Again, no such provision is in the EU–Vietnam FTA, but it is adopted by reference to the UNCITRAL Transparency rules, which contains such a proviso at Article 6(2).³⁴¹ Further, CETA stipulates that the respondent may communicate to the public information it is required to publicly disclose by its laws, but that it must do so ‘in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information’.³⁴² A similar provision is not included in the EU–Vietnam FTA.

Whilst CETA includes a separate Article on information sharing, this provision is articulated as part of the transparency of the proceeding provision in the EU–Vietnam FTA.³⁴³ This provision introduces a relatively new (not previously articulated in any treaty text) obligation to protect redacted documents if the parties share them with other people in connection with the proceedings. Both treaties articulate its direction on information sharing in an identical manner: a disputing party must only disclose—to other persons in connection with the proceedings and/or officials of the EU, EU Member States and subnational governments (of either party to the treaty)—‘such unredacted documents as it considers necessary in the course of proceedings’, and it ‘shall ensure that those

³³⁴ CETA art 8.36(3); EU–Vietnam FTA art 20(3); UNCITRAL Transparency Rules art 3(2).

³³⁵ CETA 8.36(4); EU–Vietnam FTA art 20(4).

³³⁶ EU–Vietnam FTA art 20(4), fn 28.

³³⁷ CETA art 8.36(4); EU–Vietnam FTA art 20(5).

³³⁸ CETA art 8.36(5).

³³⁹ UNCITRAL Transparency Rules art 6(1).

³⁴⁰ CETA art 8.36(5).

³⁴¹ UNCITRAL Transparency Rules art 6(2).

³⁴² CETA art 8.36(6).

³⁴³ CETA art 8.37; EU–Vietnam FTA art 20(8).

persons protect the confidential or protected information contained in those documents'.³⁴⁴

P. Enforcement of the Final Award

In line with other IIAs, both CETA and the EU–Vietnam FTA state that awards shall be binding between the disputing parties.³⁴⁵ CETA provides that ‘a disputing party must recognize and comply with an award without delay’ after it becomes a final award.³⁴⁶ The EU–Vietnam FTA uses slightly different wording, albeit with the same effect, which states that a disputing party ‘shall recognize an award ... as binding and enforce the pecuniary obligation within its territory as if it were a final judgment of a court in that Party’.³⁴⁷ Only a ‘Final Award’ may be enforced. In this regard, CETA and the EU–Vietnam FTA have drafted their respective enforcement of awards provisions very differently, both in terms of terminology and time periods for when an award becomes final, and thus capable of enforcement. It is therefore more apposite to examine the relevant enforcement of award provisions in CETA and the EU–Vietnam FTA separately, in turn. It may be that some of the differences between these provisions in the two treaties are harmonized, and thus brought more in line with CETA (to whatever extent possible, given that Vietnam is not a party to the ICSID Convention), after the EU–Vietnam FTA undergoes legal scrubbing.

CETA provides that a disputing party cannot seek enforcement of a final award until the following conditions have been satisfied. For ICISD Convention cases, 120 days must have elapsed from the date of the award (where there are no requests for revision or annulment; *or* enforcement of the award has been stayed, and revisions/annulment completed).³⁴⁸ For arbitrations under the ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, or any other rules, 90 days must have elapsed from the date of the award (where there are no requests for revision, set-aside, or annulment; *or* enforcement of the award has been stayed, and revisions/annulment completed).³⁴⁹ That said, this particular provision—Article 8.41(3) of CETA—is meant to be transitional; meaning that as soon as the organizational matters with respect to the Appeal Tribunal are addressed in Article 8.28(7), the provisions of Article 8.41(3) cease to be operational as per Article 8.28(9). Thereafter, all that is left in Article 8.41 are the provisions about bindingness, compliance, and characterization for purposes of the ICSID Convention and the New York Convention.

In contrast to CETA, the EU–Vietnam FTA explicitly distinguishes between ‘Provisional Awards’³⁵⁰ and ‘Final Awards’³⁵¹. It provides that a Provisional Award shall become final if neither disputing party appeals within 90 days of its issuance,³⁵² regardless of the arbitral rules selected by the claimant. Unlike CETA,

³⁴⁴ *ibid.*

³⁴⁵ CETA art 8.41(1); EU–Vietnam FTA art 31(1)(a).

³⁴⁶ CETA art 8.41(2).

³⁴⁷ EU–Vietnam FTA art 31(2).

³⁴⁸ CETA art 8.41(3)(a).

³⁴⁹ CETA art 8.41(3)(b).

³⁵⁰ EU–Vietnam FTA art 27 (*Provisional Award*).

³⁵¹ EU–Vietnam FTA art 29 (*Final Award*).

³⁵² EU–Vietnam FTA arts 27(7), 29(1).

the EU–Vietnam FTA draws no distinction by way of different time periods depending on whether the award is issued under the ICSID Convention (which, as discussed above, is not possible at present given that neither the EU nor Vietnam are ICSID Contracting States), ICSID Additional Facility Rules, UNCITRAL Rules, or other such rules agreed by the party.³⁵³

The EU–Vietnam FTA makes clear that Final Awards shall not be appealed, reviewed, set aside, annulled, or subject to any other remedy.³⁵⁴ Therefore, even where a party seeks enforcement of an award under the New York Convention (to which the EU is not currently a signatory), it appears that that party would not be able to challenge the award under the grounds set out at Article V of the New York Convention. However, for the first 5 years after the entry into force of the Agreement,³⁵⁵ the recognition and enforcement of a Final Award in respect of a dispute where Vietnam is the respondent shall be conducted pursuant to the New York Convention. Therefore, during this time, where Vietnam is a respondent, a party would be able to challenge the award under the Article V grounds of the New York Convention. Interestingly, this exception also means that Vietnam will not be held to the same standard as the EU or EU Member State when it is a respondent, until its accession to the ICSID Convention.

For the EU–Vietnam FTA, where a Provisional Award is appealed, it becomes final as of the date on which the Appeal Tribunal renders its decision, either dismissing the appeal or modifying the award.³⁵⁶ Where, however, the Appeal Tribunal remands the Provisional Award back to the Tribunal for revisions, which the Tribunal ‘shall seek’ to complete within 90 days of receiving the report of the Appeal Tribunal, the *revised* Provisional Award becomes final 90 days after it is issued.³⁵⁷

Under both CETA and the EU–Vietnam FTA, as is the case with the ICSID Convention,³⁵⁸ the execution of a final award ‘shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought’.³⁵⁹ Further, both treaties provide that Final Awards are deemed to be arbitral awards in relation to claims arising out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention,³⁶⁰ such that it should be treated as a typical arbitral award under the New York Convention (again, to which the EU is not a member). While as a matter of the law of treaties, the EU, Canada, and Vietnam cannot bind non-parties to their interpretation, the provision serves as evidence of their intent to honour these awards.

The most notable aspect of the enforcement provisions in CETA and the EU–Vietnam FTA is their attempt to make an *inter se* modification to the ICSID Convention by providing that, ‘[f]or greater certainty’, final awards rendered under these treaties ‘shall qualify as an award under Section 6 of the ICSID

³⁵³ See CETA art 8.41(3).

³⁵⁴ EU–Vietnam FTA 8.31(1)(b). See also art 10(3)(b). When the disputing parties consent to dispute settlement, this implies that they must refrain from enforcing an award until it has become final under art 29, and must also refrain from challenging the award in any fora.

³⁵⁵ Which may be longer should the conditions warrant.

³⁵⁶ EU–Vietnam FTA art 29(3).

³⁵⁷ EU–Vietnam FTA art 29(4).

³⁵⁸ ICSID Convention art 54(1).

³⁵⁹ CETA art 8.41(4); EU–Vietnam FTA art 31(5).

³⁶⁰ CETA art 8.41(5).

Convention'.³⁶¹ Recall that, for CETA, the EU is not an ICSID Contracting State; for the EU–Vietnam FTA, neither Vietnam nor the EU are ICSID Contracting States. It is unclear whether this provision seeks to address only the situation where an EU Member State is the respondent in the proceedings, or whether the EU intends to become a party to the ICSID Convention, which would require an amendment to the Convention itself.

The attempt in these treaties to override, or modify, the ICSID Convention raises several interesting issues.³⁶² For instance, does an award that is subject to appeal violate Article 54 of the ICSID Convention, which expressly prohibits any appeal or other remedies for ICSID awards? A further question which arises is whether a claimant could seek enforcement of an ICSID Final Award under the New York Convention. More fundamentally, can Canada, Vietnam and the EU purport to vary the operation of a multilateral treaty (here, the ICSID Convention) in their respective investment treaties? Whilst they may be able to vary the ICSID Convention as between themselves, they cannot bind third-party States. It is therefore unlikely that this provision will oblige the courts of third-party Contracting States to the ICSID Convention to enforce the Final Awards rendered under either CETA or the EU–Vietnam FTA ‘as if it were a final judgment of a court’ in those States when neither Vietnam and nor the EU is a party to the ICSID Convention. On account of the general principle of that treaties should neither harm nor benefit non-Parties (*pacta tertiis nec nocent nec prosunt*),³⁶³ a decision by non-Parties to the ICSID Convention that their dispute settlement regime and award review procedures—which differ from those prescribed in the Convention—would nevertheless have the effect of creating an ‘ICSID Convention award’ raises a spectre of doubt as to their application in practice; the answers to which remain to be seen.

VI. CONCLUSION

The new first instance and appeal tribunals under CETA and the EU–Vietnam FTA represent a significant departure from the long-standing ISDS model of party-appointed arbitrators and *ad hoc* tribunals. Recalling that, under existing international and national review regimes, there is generally no review of investment treaty arbitral awards for error of law, CETA is the first signed investment treaty to create such a mechanism, and to specify new rules governing the identity and tenure of the arbitral ‘members’ (no longer referred to as ‘arbitrators’). Under both CETA and the EU–Vietnam FTA, the Members of the Tribunal cannot be appointed by the disputing parties, but rather must be appointed from the roster of Members of the Tribunal established by the Parties to the respective treaties. In doing so, the ITS retains the Parties’ governmental control over the entire dispute settlement process, including the appointment of the Tribunal and Appeal Tribunal, to ensure high ethical standards and qualifications.

The investment chapters in both CETA and the EU–Vietnam FTA also include more detailed drafting on procedure and substance, the possibility for the issuance

³⁶¹ CETA art 8.41(6); EU–Vietnam FTA art 31(8).

³⁶² Calamita (n 9).

³⁶³ VCLT arts 34–36.

of binding interpretations by their respective Joint/Trade Committee, and more definitions, footnotes, exceptions and exclusions than early generation treaties, which tended to be more skeletally drafted and generally worded. In particular, CETA and the EU–Vietnam FTA provide the Tribunal and Appeal Tribunal with much more detailed guidance about how to interpret certain investment protections. Yet, by design, there is no formal system of *stare decisis* in international investment law to guide arbitral discretion, and the ITS must deal with each case on its own merits, for it is only binding between the disputing parties and in respect of that particular case.³⁶⁴ It may be that a *de facto* set of precedent develops, as it has under the ICSID regime, despite awards being binding only on parties,³⁶⁵ but the challenge remains whether a *jurisprudence constante* unique to CETA and the EU–Vietnam FTA would be transportable to cases decided by arbitral tribunals outside these treaties. It may be that the consistency of arbitral awards can only hope to be improved after the establishment of a multilateral appellate mechanism, with a wide membership of States.

The ITS reflects a creative grafting of new elements onto existing ISDS structures and arbitral rules. Whilst the EU model ushers in new and profound institutional changes under some provisions of CETA and the EU–Vietnam FTA, it also retains certain, more desirable, aspects of ISDS. One of the most notable features of the ITS is its purported continuation, modification and supplementation of existing arbitration rules.

The shift in treaty-drafting practice evinced by the EU’s new approach to ISDS is significant, but, unsurprisingly, some critics remain of the view that these changes ‘fall short of creating a balanced and respectful means to resolve, fairly and independently, disputes about what countries can lawfully do on behalf of their people’.³⁶⁶ Despite this initial resistance, the ITS has, in some circles, instilled a sense of optimism, as the substantive innovations and corresponding institutional apparatus in CETA and the EU–Vietnam FTA promise to palliate some of the concerns commonly associated with ISDS. These treaties contain amendments to treaty-drafting practice which generally comport with some of the reforms identified by UNCTAD in its roadmap.³⁶⁷

That said, optimism is not synonymous with blind acceptance; arbitration experts and other stakeholders must continue to strive to improve this system and to enhance its legitimacy, transparency and integrity. CETA and the EU–Vietnam FTA are perhaps best seen as a progressive, albeit imperfect, step in the right direction. The test of time will inform whether the ITS makes a difference in resolving the criticisms against ISDS it seeks to remedy, and/or whether it generates new reproaches. It will also take the experience of the years to come to see how various features of the ITS evolve with time and practice and, ultimately,

³⁶⁴ CETA art 8.41(1); EU–Vietnam FTA art 31(a). *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004) para 97; *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decisions on Jurisdiction (24 February 2014) para 85; *René Rose Levy and Gremcitel SA v Republic of Peru*, ICSID Case No ARB/11/17, Award (9 January 2015) para 76.

³⁶⁵ ICSID Convention art 53(1).

³⁶⁶ Gus van Harten, ‘ISDS in the Revised CETA: Positive Steps, but is it a “Gold Standard”?’ (20 May 2016) *CIGI Investor-State Arbitration Commentary Series no 6* <<https://www.cigionline.org/publications/isds-revised-ceta-positive-steps-it-gold-standard>> accessed 26 October 2017.

³⁶⁷ UNCTAD IIA Issues Note, ‘Reform of the IIA Regime: Four Paths of Action and a Way Forward’ (June 2014) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf> accessed 26 October 2017.

how the vision underpinning CETA and the EU–Vietnam FTA will take form. The EU–Vietnam FTA remains subject to legal scrubbing, and it will be interesting to see how much, and in what manner, the present draft will be amended in light of the signed CETA text, as well as any new concerns which drive the EU and Vietnam to make further changes which might innovate the EU–Vietnam FTA even more than CETA.

This discussion of the relevant legal and policy issues engaged by the EU’s new approach to ISDS is particularly timely, given that discussions are presently underway between the EU and its trading partners regarding the establishment of a ‘multilateral investment court’. At minimum, there appears to be a significant appetite amongst ISDS users for a multilateral appellate mechanism, likely comprised of a standing roster of adjudicators, which could then be grafted on top of the current ISDS regime. At the time of writing, it remains to be seen how many States are willing to adopt such a model—be it the two-tier ITS or a standing multilateral appellate tribunal—in their investment treaties.³⁶⁸

³⁶⁸ Eg Ecuador recently withdrew from its remaining investment treaties and the Mercosur block signed a new Protocol for the Cooperation and the Facilitation of Investment within the Mercosur which *excludes* ISDS. Damien Charlotin and Luke Eric Peterson, ‘Analysis: in new Mercosur Investment Protocol, Brazil, Uruguay, Paraguay and Argentina radically pare back protections, and exclude investor-State arbitration’ (4 May 2017) IAREporter; Daniel Uribe, ‘Ecuador withdraws from its remaining investment treaties’ (24 May 2017) <<http://www.bilaterals.org/?ecuador-withdraws-from-its>> accessed 6 June 2016.