

Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal

Initial Task Force Discussion Paper:
Executive Summary & Conclusions and Recommendations

**Investment Treaty Working Group
Of the International Arbitration Committee,
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Discussion Paper

The Investment Treaty Working Group Task Force on the Investment Court System Proposal

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The Investment Treaty Working Group Task Force Report on the Investment Court Proposal is a Task Force Report by the Investment Treaty Working Group of the International Law Section's International Arbitration Committee of the American Bar Association. The Task Force was initiated in the Spring of 2016 and comprises a diverse global group of legal practitioners, arbitrators and members of the judiciary and scholars.

The Report was prepared by the Task Force Co-Chairs Barry Appleton and Sean Stephenson with the assistance of the Reports and Contributing Members. The views expressed in the Task Force Report are personal views of the authors and should not necessarily be taken to reflect the views of their respective clients, institutions or firms.

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Executive Summary

Ad-hoc investor-state dispute arbitration tribunals to resolve investment disputes between investors and states are made available in nearly 3000 bilateral investment treaties. The ubiquity of these treaty provisions has made investor-state arbitration the most prevalent process of dispute resolution under free trade agreements. Concerns have arisen about whether investor-state arbitration is the most suitable approach for the resolution of investment treaty disputes. Civil society groups have questioned the appropriateness of relying on a dispute settlement mechanism created to resolve private commercial disputes to apply to public law disputes. Critics have raised concerns over the potential for arbitrator bias and the unbridled potential for conflict of interest.¹ These criticisms were instrumental in developing the EU's Investment Court proposal.²

The EU has indicated that the Investment Court is a permanent feature of all future EU investment treaties and is an integral element of all new EU investment treaties. The European Union's proposal for an Investment Court offers a transformative change in the process to resolve international investment treaty disputes as the Investment Court would have an immediate effect of reducing the predominant role of investor-state arbitration.

The Investment Court proposal would replace investor-state ad-hoc panels in the proposed Trade and Investment Partnership³ ("TTIP") under negotiation between the European

¹ Prof. Muthucumaraswamy Sornarajah describes criticism of the investor-state dispute system:

The illegitimacy of ISDS flows, according to its critics, from the allegation that a select few arbitrators routinely decide disputes in favor of multinational enterprises in an ideologically prejudiced manner, articulating doctrines more extensively than agreed upon by governments negotiating the treaties, thereby also curtailing those governments' regulatory functions.

M. Sornarajah "An International Investment Court: panacea or purgatory?" *Columbia FDI Perspectives: Perspectives on topical foreign direct investment issues*, No. 180. August 15, 2016 at page 1.

² This Working Group Report does not address the sufficiency or validity of these criticisms of the investor-state arbitration system.

³ European Union proposed text for the *Transatlantic Trade and Investment Partnership* ("TTIP"), November 12, 2015 (All references to the TTIP in this Working Group Report are to the November 12, 2015 version unless otherwise noted).

Union and the United States of America. It is also a part of the EU-Canada Comprehensive Economic and Trade Agreement⁴ (“CETA”) and in the EU-Vietnam Free Trade Agreement⁵.

Under the Investment Court proposal, the Investment Court has a Court of First Instance (the “Tribunal”) comprised of fifteen judges and an Appeal Tribunal with six members. The Court of First Instance would sit in benches of three members each and would decide the original complaint. The members of each bench would be chosen by random lot. The Court would be administered by a multilateral institution. In the CETA, it is administered by the World Bank’s ICSID Centre.⁶ In the TTIP and the EU-Vietnam FTA, the Investment Court is administered by either the ICSID or by the Permanent Court of Arbitration at the Hague.⁷

The TTIP text contains an Ethical Code which prohibits judges from the Investment Court from acting as legal counsel in investment dispute cases. The CETA also requires that the judges follow the International Bar Association Guidelines on conflict of interest for arbitrators.

Colin Brown, the EU’s deputy chief negotiator on the Investment Court, discussed the objectives of Investment Court as being neutral, effective, legally predictable and coherent. He stated:

Let me start from the proposition that the EU's policy approach first and foremost takes its cue from what investors and states need at the end of the process, namely access to a neutral, effective, legally predictable and coherent investment dispute settlement system. The EU is both the largest exporter of FDI and the largest recipient. It has a very clear interest in an effective system of investment protection and its enforcement.⁸

⁴ *Canada – European Union Comprehensive Economic Trade Agreement (“CETA”)* See: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/10.aspx?lang=eng>.

⁵ *European Union– Vietnam Free Trade Agreement, (“EU – Vietnam FTA”)*. The EU has announced that the EU-Vietnam Treaty will come into force sometime in October 2016.

⁶ CETA at Article 8.27(16). The CETA does not identify whom will administer the Appellate Tribunal. Pursuant to Article 8.28(7) this is a decision that will have to be made by the Committee.

⁷ TTIP at Article 9(16) and 10(15). The administering institution remains in bracketed text in the November draft; See also EU-Vietnam FTA at Articles 12(18) and 13(18).

⁸ Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.

Since its announcement by the EU, the Investment Court has been the target of significant criticism. In a May 2016 panel organized by the American Bar Association and the American Society of International Law, former International Court of Justice President, Judge Stephen Schwebel, raised serious concerns about the Investment Court Proposal. Judge Schwebel did not accept that the current system of investor-state dispute settlement undertaken by ad-hoc tribunals was “broken”. *Global Arbitration Review* reported on the criticisms of the EU proposal raised by Judge Schwebel at this public discussion:

Schwebel expressed what he called the "fundamental objection" to the proposal ... It would replace "a system that on any objective analysis works reasonably well" with "a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing,"⁹

This Working Group Report does not address the issue whether of whether the criticisms of the investor-state dispute settlement system are valid. Indeed, there are very many investor-state arbitration awards which have been objective, fair and of high quality. There also have been rare examples of poorly-reasoned awards and other examples raising questions about conflict of interest. This topic about the merits of the investor-state dispute settlement system is a broad matter that falls outside of the scope of this Working Group Report.

In considering the Investment Court proposal, the ABA Investment Treaty Working Group has reflected on whether the Investment Court proposal addresses the essential concerns raised by the EU in its consultations. This Working Group Report assesses whether the Investment Court is “neutral, effective, legally predictable “and a “coherent investment dispute settlement system”. The Working Group Report considers whether the Investment Court Proposal is practical, efficient and workable.¹⁰

⁹ Alison Ross, Schwebel criticises EU act of "appeasement" *Global Arbitration Review*, May 24, 2016.

¹⁰ The Working Group Report does not dwell on the substantive investment obligations within the new generation of EU investment treaties as such issues are canvassed in other documents For example, see Catherine Titi, *The European Commission's Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court System - An overview of the European Commission's draft TTIP text of 16 September 2015* or the Report from the European Federation for Investment Law and Arbitration, *Task Force Paper regarding the proposed International Court System*, February 2, 2016.

This Report attempts to provide information and to recommend practical enhancements for the Investment Court. The drafters hope this Working Group Report will assist all stakeholders not only in evaluating the Investment Court but in the furtherance of the discussion of broader issues which affect dispute resolution under international investment treaties.

Conclusion and Recommendations

It is beyond the work of the Task Force to conclusively resolve the future of investment treaty arbitration in this Report. Instead, the Task Force makes specific observations and recommendations about the Investment Court system. The Task Force expresses its desire these observations and recommendation can further the discussion and understanding about investment treaty dispute settlement and the Investment Court.

A. Is the Investor-State Dispute Settlement System Broken?

Michael Goldhaber considered the public debate over the legitimacy for investor-state arbitration to resolve international investment treaty arbitration problems. Mr. Goldhaber noted that:

As early as 2002, the prolific arbitrator Charles Brower of 20 Essex Street proclaimed "A Crisis of Legitimacy" in *The National Law Journal*, because investor-state arbitration lacks the elements of a classic judicial system needed to maintain public confidence. "A crisis has undoubtedly fallen upon us," he wrote. Whether "it will destroy the system, however, remains a subject for debate."¹¹

Apparently, Judge Brower's clarion call about the crisis was heard almost fifteen years later. Judge Schwebel, in his remarks to the ABA – ASIL panel on the Investment Court, raised a "fundamental objection" that the Investment Court would replace "a system that on any objective analysis works reasonably well" with "a system that would face substantial problems of coherence, rationalisation, negotiation, ratification, establishment, functioning and financing,"¹² In his view, the existing investor-state dispute settlement system worked reasonably well and the case for replacing it was weak.

While the investor-state dispute system is still in effect for thousands of existing treaties, the approach to dispute resolution is in trouble in the court of public opinion. The critics of investor-state arbitration did a good job at raising public concern while the supporters of investment arbitration performed a much less adequately in responding to concerns about

¹¹ Michael D. Goldhaber, "Europe says No to Treaty Arbitration". *American Lawyer Magazine*, Focus Europe, July 1, 2016

¹² Alison Ross, Schwebel criticises EU act of "appeasement" *Global Arbitration Review*, May 24, 2016.

the international investor-state dispute resolution process. Public enmity to the investor-state process is widespread and rather than abating, it continues to grow, demonstrating impact on electoral politics in the Parties to investment protection treaties such as the members of the EU and the United States.¹³

Professor Sornarajah contends that the Investment Court would weaken the democratic rights of states, by extending the power to investment treaties and providing the process with greater legitimacy. He states:

The establishment of an Investment Court would dissociate that Court from democratic control. As in the case of other permanent international tribunals, the Court would arrogate additional powers and create regimes through precedents in the area in which it operates. Academic opinion supports such creative expansion into the constitutionalization of fragmented law. The danger is that neoliberal principles will become set in stone beyond the power of democratic processes. To date, there is no doctrine of precedent in investment arbitration. This will not be so when there is a permanent judicial body.¹⁴

Colin Brown, the EU's deputy chief negotiator on the Investment Court, discussed the objectives of Investment Court as being neutral, effective, legally predictable and coherent, stating:

Let me start from the proposition that the EU's policy approach first and foremost takes its cue from what investors and states need at the end of the process, namely access to a neutral, effective, legally predictable and coherent investment dispute settlement system protection and its enforcement.¹⁵

The Investment Court proposal is a clear reaction to public concerns with investor-state dispute settlement. Does the Investment Court meet the stated objectives of the EU, and practically will it fairly address the protections conferred by international investment treaties using the Investment Court?

When examined on this basis, the Investment Court meets some of its goals, but in other

¹³ The authors of this Working Group Report have not addressed whether these concerns raised by critics are well-taken. This Working Group Report only addresses the operation of the Investment Court itself.

¹⁴ M. Sornarajah "An International Investment Court: panacea or purgatory?" *Columbia FDI Perspectives: Perspectives on topical foreign direct investment issues*, No. 180. August 15, 2016 at page 2.

¹⁵ Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.

areas, the objectives of the Investment Court are simply not reached. The Task Force has attempted to provide specific and helpful recommendations with these objectives in mind.

B. The Investment Court

1. Composition of the Court

The Investment Court has the potential to create an independent and legitimate system for investment treaty dispute settlement, but this can only occur where the process for establishing the court is done in a fair and neutral manner. The members of the court have sufficient knowledge and resources to carry out their duties, and due process, fairness and the rule of law must be paramount.

The qualifications of members to sit on the Investment Court is another area where further consideration is merited. To meet the criteria for appointment to the Tribunal of First Instance and Appeal Tribunal, candidates must be qualified to hold judicial office or be a jurist of recognized competence and have demonstrated expertise in public international law.¹⁶ Notably, the qualification shifts slightly for members of the Appeal Tribunal, where members must be qualified for the “highest office,” although, as noted, this distinction may be meaningless given that this is not a strict requirement, and appeal members may still be appointed as jurists of recognized competence. Persons qualified to hold judicial office in their home jurisdiction are often specialists in domestic law and are often with no demonstrated expertise in public international law. A requirement that a member of the court meets the qualifications for judicial office does not, of itself, result in any guarantee that the candidates will be qualified to decide investment disputes. The Investment Court requires that all members, for each level of court, demonstrate expertise in public international law. However, this knowledge of public international law may not be enough for the Investment Court to carry out its functions. Many recent cases being determined

¹⁶ Note that there may be significant differences regarding the qualifications for judicial offices between the different EU Member States. In some Member States, freshly graduated lawyers can qualify for judicial office, whereas in others additional training and qualifications are required. See Koorosh Ameli et al., *EFILA Task Force Paper Regarding the Proposed International Court System (ICS)*, at 15, (February 1, 2016), available at: http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf (hereinafter *EFILA Report*)

involved the consideration of applying fairness in governmental regulatory systems. While the requirement that the candidates know international law is helpful, there may well be benefits from requiring a knowledge of comparative administrative and constitutional law besides the knowledge of international public law and international investment treaty law.

Concerns remain about ensuring diversity in the composition of the court and the process for addressing challenges to judges. The Investment Court might be improved by specifying that best effort should be taken to achieve diversity in the membership of the Tribunals, to which could avoid the Investment Court from becoming as unrepresentative, as ad-hoc investor-state tribunals. The excellent progress on diversity made by the International Criminal Court should be singled out which requires its judges:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

2. Enforcement of Awards made by the Investment Court

EU Investment Court negotiator Colin Brown suggested that the awards made by the Investment Court would be enforceable. At a public forum sponsored by the American Bar Association, Mr Brown explained:

The practical objectives of the new EU Investment Court policy were outlined by the EU Investment Court negotiator as “the incorporation of well-functioning International and domestic systems for dispute resolution as the WTO.” The goal was to produce awards which can be enforced under the New York Convention or the ICSID Convention.¹⁷

¹⁷ Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016. Mr. Brown said: The basic idea is the incorporation of core characteristics of well-functioning international and domestic systems for dispute settlement such as the WTO as a means to increase the legitimacy of the investment dispute settlement system without losing its effectiveness in protecting investments.

The essence of that policy is the creation of a tribunal of first instance, composed by persons nominated by the Parties to the agreement, and chosen at random by the President of the Tribunal for hearing a particular case. This is complemented by an appeal tribunal, capable of hearing appeals on errors of law and manifest

On the basis of these objectives, the EU has had mixed success. It is likely that an award issued by the Investment Court pursuant to the ICSID Convention could be enforced as an ICSID award. It is also likely that an award from the Appellate Tribunal will be enforceable if the final award is to be enforced within the member states who signed the treaty under which the dispute was considered. Enforcement in the territory of parties to the treaty will be a matter of primary obligations under the treaty itself of the member states of the Investment Court. Such enforcement would resemble the enforcement of ICSID awards and would not depend on access to enforcement frameworks established in other multilateral treaties.

As a practical matter, enforcement in third-party states may not be essential to investors bringing claims against the United States, Canada, the European Union and EU member states. It would be far more important in claims brought against states with less robust legal systems and economies. Yet, the potential for complications to arise may exist in the event of enforcement of awards in non-Investment Court member states under the New York Convention.

It is likely that persons resisting enforcement in non-TTIP party states will argue that TTIP awards do not qualify for enforcement under either the *New York* or the ICSID Convention. This argument is strengthened by the EU Parliament's and the Commission's frequent early references to the TTIP's investment dispute architecture as establishing a "court" may have contributed to this uncertainty. This has prompted one commentator's claim that the Commission's Proposal "walks away from the international arbitration format and consequently the application of the *New York Convention*."¹⁸

This uncertainty greatly weakens the expectation of commercial predictability that should arise from an investment protection treaty. Given the central importance of enforcement to the overall success of the Investment Court, the state parties to the Investment Court should try to clarify the status of the Investment Court, to specifically and unequivocally determine the Investment Court's status, be it a "court" or an arbitral body. This is an

errors of facts. The system is designed to produce awards which can be enforced either under the New York Convention or the ICSID Convention, as the case may be.

¹⁸ See Nappert, at 3.

essential clarification that must be clearly addressed by the Treaty Parties in an unequivocal and binding manner if the Investment Court is to be effective.

While it is not obvious that a court in a country that is a party to the ICSID Convention, but not to the TTIP, would care to obstruct enforcement where the respondent and the claimant's states had agreed by treaty to be bound by an award *as if it were an* ICSID award, the status under the ICSID Convention of TTIP awards based on Article 6(2)(a) of the Proposal remains relatively unclear. The Treaty Parties may accordingly wish to consider clarifying the basis on which TTIP awards may be enforced as ICSID awards despite having been rendered by a process different to that contemplated by the ICSID Convention.

3. Procedural Concerns

It is difficult to provide definitive recommendations regarding the procedures for the Investment Court. At a minimum, the Investment Court must meet the objectives set out by the EU negotiators it be neutral, effective, legally predictable and coherent in its dispute settlement system protection and its enforcement.

At the outset, it is noticeable that the Investment Court has instituted no Users Council or another consultative process to engage with investment treaty practitioners. Many courts and some arbitration associations have such a structure and this interaction has proven practical and valuable. However, several current procedural aspects expressed in the Investment Court treaties give rise to concerns about the Court's eventual effectiveness, neutrality, and coherence.

According to the Investment Court negotiators, the Investment Court is fair and neutral. The Investment Court treaties do not explicitly require the Investment Court to act with due process, with fairness to the disputing parties and under natural justice and the rule of law. Such general references assist the court in carrying out its functions in a neutral and fair manner and have been included in investment protection agreements such as the NAFTA or in procedural rules such as the UNCITRAL Arbitration Rules.

Many of provisions in the Investment Court treaties manifest a lack of balance between the disputing parties. The Task Force Report has considered several provisions which give

significant procedural advantage only to government respondents and not to both parties to a dispute. Unbalanced procedural provisions erode confidence in the neutrality of the Investment Court and offend natural justice, due process, and fairness. Conceptually, such unbalanced procedures should not be a part of the Investment Court.

One particular example of these unbalanced procedures in the current TTIP Article 6 that permit the member governments, through the Committee, to modify the binding procedural rules of the Investment Court without notice. Such modifications could apply even to disputes where that member state (or the EU) was a respondent and where the new rule would apply immediately (or even retroactively).

Procedures before the Investment Court are also made murky as the Investment Court treaties permit the EU or a member state to be the Respondent in any claim. This substitution may have a substantial procedural effect, as not all EU member states are members of the ICSID, and the EU itself is not a member of the ICSID. A lack of membership in ICSID would mean that the ICSID Treaty may not apply in such a claim despite the Claimant bringing the case under the ICSID Convention rule to the Investment Court.

Many concerns that resulted in creating the Investment Court were in relation to the need for transparency and public engagement. Clear and direct provisions must be placed into the treaty and the procedural rules to ensure that meaningful interventions are permitted, subject only to the responsibility of the Investment Court to ensure that the rights of the disputing parties to have an orderly and fair hearing is not compromised.

As Investment Court procedural rules have not been released, the following procedural questions remain unanswered:

- 1) Questions about who can represent disputing parties to a claim, the effects of non-appearance of a party or a witness and the powers of the Investment Court to compel attendance:
- 2) Whether the Court of First Instance or the Appellate Tribunal may consider Ex Parte motions?
- 3) What powers does the Investment Court must address evidentiary matters such as?

- a) the standard and burden of proof;
 - b) The power of the tribunal to order evidence;
 - c) admissibility of evidence;
 - d) the requirement to obtain evidence from third parties;
 - e) the approach to evidence (written, interrogatory and *viva voce* evidence) and;
 - f) formalities regarding evidence.
- 4) The conduct of witnesses, parties, counsel and third parties before the Tribunal;
 - 5) Will the Court have the power to address parallel proceedings taking place in other venues on the same issues and between the same parties;
 - 6) Matters regarding confidentiality or the production of evidence where there are claims of privilege;
 - 7) Motions and Interim relief including summary motions, determinations of an issue and other interim applications;
 - 8) Formalities regarding the issuance of awards;
 - 9) How to address truncated tribunals if the non-availability of a member of the Tribunal occurs (such as through illness, or death);
 - 10) Powers regarding:
 - i) issue recommendations and other orders;
 - ii) order documents and information;
 - iii) to address a wide variety of Information Request processes;
 - iv) To reprimand, censure or order fines;
 - v) The powers to rectify, revise, correct or interpret awards.

These procedural rules should be standardized across the Investment Court.

4. Ethical Considerations

The desire to enhance the ethical conduct of those persons deciding investment disputes was central to the development of the Investment Court. The EU's deputy chief Investment Court

negotiator referred to the concerns over pre-disposition bias in the appointment of court members in the following manner:

Some have raised a concern on the alleged risk of pro-state bias in the selection by the Contracting Parties of tribunal members for the court system.

From a government perspective, it would be counterintuitive to push for state biased tribunal members. What we want and need is that the standards negotiated in agreements are upheld, even in the face of powerful sovereigns. The EU, or the US or China are not immune from acting inconsistently with international agreements. There are plenty of examples of that, for example in the WTO context. Purely pro-state tribunal members will not be appointed because governments will be anticipating such scenarios.

The selection process of tribunal members will be highly scrutinized, thus making the risk that overtly pro-state individuals - or overtly pro investor for that matter - are appointed rather unlikely. Moreover, the EU and its negotiating partner need to agree on all tribunal members, so the possibility that one side might "pack" their tribunal members with pro-state individuals is slight.¹⁹

Imposing clear and binding rules that prohibit the judges from engaging in legal counsel work on similar cases conclusively addressed one of the key concerns. The Investment Court rules remove a majority of interests that the arbitrators under the current Investor-State Dispute System may have to secure re-appointment and to make decisions that would be favorable to the clients they continue to represent as counsel in other disputes.

However, different issues relating to the members remain a concern. That treaty parties exclusively appoint judges, renew their terms and pay their salaries, creates a real and appreciable risk of the individuals selected to be judges will be perceived to be "pro-State" in their sympathies. Trust in the independence and impartiality of the Investment Court may largely depend on the transparency of the process by which those individuals are selected. The selection of judges should be done through a transparent process that involves consideration of the interests of relevant stakeholders (including investors).

A further technical concern arises over the statement in footnote 6 to TTIP Article 11(1) that "government officials" and "individuals who receive an income from the government" are

¹⁹ Comments from Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission to the American Bar Association – American Society of International Law panel on the EU Investment Court, Washington, D.C., June 14, 2016.

not ineligible for appointment as judges. This acknowledgement of connection between judges and national governments that could be involved in a dispute raises serious concerns. This textual note should be revised to ensure that the overriding requirement that Investment Court judges be independent of the governments of any EU members state, the EU, and any other treaty Party.

In addition, the Investment Court may also wish to follow the practice of the WTO in consulting with the disputing parties before final empanelment of a tribunal to ensure that egregious concerns are addressed at an early point in time. In the event of a conflict, a more independent and transparent process should be adopted to address challenges to members of a Tribunal. To enhance transparency and independence, a third party, and not the President of the Tribunal, should adjudicate such challenges. For there to be public confidence in the Investment Court, it is essential for there be enhanced transparency and public disclosure about challenges made to members of the Investment Court. Public access must be unequivocally established to preserve confidence and independence.

Last, as a practical matter, the Investment Court ethical rules do not address the real risk of bias presented by the potential for re-appointment of members of the Investment Court. To reduce any notion of the possibility of bias, one practical and simple enhancement to the Investment Court would be to ensure that Investment Court judges only are eligible for appointment to one term. This step would remove the risk of any reasonable perception of bias that could arise in connection with reappointment to the Investment Court by sitting members.

5. Costs

In its Concept Report, the EU placed great emphasis on the consideration of costs and imposing costs upon an unsuccessful party.

One question that may be posed is whether it appropriate for a claimant to handle the costs of a public judicial system? In this context, the claimant cannot name an arbitrator and the procedural rules, which greatly affect costs, are tilted to increase the procedural costs at the behests of the respondent. Arbitrators and domestic judges are permitted to consider

such considerations in the apportionment of costs. An additional question is what is to be considered reasonable “reasonable costs” according to Article 28(4)?

The costs issue identifies yet again the central role of the Committee, as the Committee is to determine the “maximum amount of costs of legal representation.” The Committee has the power to modify the procedural rules of the arbitration, even when members of the Committee are disputing parties to ongoing disputes affected by the rule changes. The Committee also has an important role regarding costs. There is a lack of transparency about who sits on the Article 9 “Committee” and regarding the level of transparency that will take place for Committee meetings. There is no discussion about how persons are appointed to sit on the Committee or whether this Committee has already been established before the ratification of the treaty.²⁰

The costs issues raise concerns about access to justice maintained for small and medium-sized disputes and for disputes that might be brought by non-profit actors. The impact of costs impositions might be unconscionable in *bona fide* but impecunious claimants. The administration of justice could be brought into disrepute by rules which fail to consider the overall context of the circumstances of any dispute.

Further, the TTIP does not address the question of who pays the regular salary of judges in the event that the Committee permanently transform the Judges’ fees (retainer fees, other fees, and expenses) into a regular salary? While presumably, the state parties will cover these costs this is not specified in the proposal.

The TTIP includes strict security for costs provisions. The Tribunal may order the suspension or termination of the proceeding if security of costs is not fully posted within 30 days of the Tribunal’s order. The EU-Vietnam FTA has a nearly identical provision,²¹ although interestingly the CETA contains no specific security for costs provision.

²⁰ Note that in Article 3(3), further reference is made to an “article on Services and Investment Committee” and an “article on Trade Committee.”

²¹ EU-Vietnam FTA at Article 22.

The security for costs provision raises access to justice concerns which disproportionately harm small and medium-sized claimants. A claimant may have made a significant investment in the host state but because of the dispute, the underlying investment may be frozen or destroyed because of the discriminatory or expropriation action. Under the security of costs rule in TTIP Article 21(1), an investor whose assets had been taken on a discriminatory basis by a state, must still establish that it had additional (and unspecified) capital to satisfy any future possible award made against the claimant. TTIP Article 21 makes no explicit mention of a need for “urgency” and “irreparable harm,” which have been required in ICSID case law for an order of security of costs. It also fails to consider the circumstances, such as any general equitable jurisdiction of the court to consider the fairness and appropriateness of the awarding of security for costs. The consideration about the administration of justice is missing. The only test is if “reasonable grounds exist that Claimant is at risk of not being able to honor a possible decision of costs against it.

This rule raises significant access to justice questions because often a case being adjudicated will relate to a very serious or total loss suffered by a claimant. In such circumstances, it's difficult to demonstrate the sufficiency of assets.

The Investment Court must have the power to ensure that it is independent, effective, legally predictable and neutral. Modifications are necessary to ensure that the Court can act in such a manner based on its assessment of the merits of the situations before it.

Finally, the security for costs rules is unequal. They only apply to Claimants and not to Respondents. A neutral and efficient Investment Court should have rules that treat all disputing parties before it fairly. It seems both unusual and unfair to only impose a cost rule upon a Claimant when such a similar rule is imposed upon the Respondent.

C. Conclusion

The Investment Court, if adopted, will have a significant impact on the operations of resolving investment treaty disputes. Despite the critical importance of having dispute resolution processes in international investment treaties, the dispute resolution procedures

of the Investment Court are inchoate and often, incoherent. Procedurally, the Investment Court is not a complete and finished process. As this Working Group Report has addressed, often, many details of the Investment Court appear to not have been fully considered.

This Report has set out concerns regarding the membership of the Investment Court. This includes significant concerns over the need for the Investment Court to follow best practices regarding diversity in the appointment of the membership of the Investment Court and for the avoidance of reasonable perception of bias and issue predetermination.

In many respects, the process would be improved by consultation and by the adoption of general principles which protect the concepts of fairness, transparency and the rule of law.

Many procedures of the Investment Court have been relegated to an EU “Committee” of undisclosed members. Some rules have been set out sporadically in the Investment Court treaties but the bulk of the rules are undisclosed. If there are clear and codified rules and procedures, they have not been transparently shared with the public.

Overall, the Investment Court must be carefully considered before its implementation if it is to be as effective as the Investor-State dispute settlement system. Replacing a workable arbitration system with an unworkable Investment Court must be avoided, and can still be.

The Working Group has done its best to analyze the Investment Court based on the information made available to the public. It is the sincere wish of the Working Group that the information in this Working Group Report can meaningfully contribute to the ongoing discussion of these important international investment treaty issues among all interested stakeholders.

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On behalf of the Investment Treaty Working Group

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