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ARTICLE

Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions

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I. INTRODUCTION

One of the interesting questions regarding an appeal mechanism for investor–State dispute resolution (ISDS) awards is how it would interact with the New York[2] and ICSID[3] Conventions. The relevance of this question is evident given the importance of both treaties for international arbitration. Each convention has more than 150 Contracting States, and both have been thoroughly tested in numerous court decisions interpreting and applying their provisions.[4] Analysing the question is also timely, as the United Nations Commission on International Trade Law (UNCITRAL) Working Group III is currently discussing possible reforms of ISDS, including a potential appeal or court mechanism for ISDS disputes.

To put the question in context, there are more than 3,300 international investment agreements (IIAs), which comprise bilateral investment treaties (BITs)[5] and multilateral investment treaties (MITs). IIAs can also be part of free trade agreements (FTAs) or in the form of an investment protection agreement (IPA). Almost all of them provide for arbitration as a means of settlement of disputes between investors and host States. Very few of them—less

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[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) (New York Convention).

[3] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

[4] See the reporting of the court decisions interpreting and applying both Conventions in Part V of each of the 42 volumes of the ICCA Yearbook Commercial Arbitration as of 1976 <http://www.kluwerarbitration.com> accessed 15 January 2019. The court decisions on the New York Convention are indexed per topic and per country at New York Convention Arbitration, Court Decisions, 'Topic List of Court Decisions on the New York Convention Cases' <www.newyorkconvention.org> accessed 15 January 2019.

[5] The term 'plurilateral investment treaty' is also used sometimes, indicating a limited number of Contracting States. An example is the North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA). In this article, they are considered equivalent to BITs. The EU also prefers to use the term 'plurilateral' as it concludes FTAs with countries outside the EU together with its 28 Member States.

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than 2 percent—contain provisions regarding an appeal mechanism. Attempts to establish an appeal mechanism for ISDS have failed in the past.

As will become clear from this article, the interaction of a potential appeal mechanism with the New York and ICSID Conventions is multifaceted and highly complex. The interaction is analysed under a number of headings: the reasons for the appeal mechanism in ISDS (Section II); the appeal mechanism in practice (Section III); the legal regime governing current ISDS (Section IV); the legal regime governing an appeal mechanism (Section V); the nature and scope of appeal (Section VI); enforcement of the appeal award (Section VII); and setting aside or annulment of the appeal award (Section VIII). Concluding observations are offered in Section IX.

II. REASONS FOR APPEAL MECHANISM

The matter of an appeal mechanism for ISDS awards has been the subject of debate for some 25 years.[6] The present discussion at Working Group III of UNCITRAL shows that a number of delegates have concerns regarding consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals. Regular reference to legitimacy is also made. The UNCITRAL Secretariat analysed these concerns in a Note of 28 August 2018,[7] which gave an 'illustrative list' of examples of divergent interpretations of substantive standards of protection, divergent interpretations with respect to jurisdiction and admissibility, and inconsistencies in procedural matters.[8]

A word of caution should be offered here. The UNCITRAL list may create an impression of total chaos in the ISDS arbitration system. Closer analysis of the list, however, shows that the contradictory decisions of ISDS tribunals are limited to a few instances. If the measure complained of is the same in two cases, but the standard in the relevant treaties is different, the two cases may be comparable if the treaty standard is similar—although, even here, the danger is that it is an exercise in comparing apples with oranges.

To give an example, the fair and equitable treatment (FET) standard under NAFTA is a minimum standard under customary international law. The FET standard as set forth in many other IIAs is interpreted either as an (evolving) minimum standard under customary international law or in an autonomous manner. Here, differing interpretations are not the result of some capricious arbitrators; rather, they are due to differing treaty texts.

The FET standard is also a good example of why differing interpretations are offered. First-and second-generation IIAs contain broadly worded FET provisions, offering little guidance to arbitrators as to how to interpret them. Drafters of more recent third-generation IIAs are aware of this problem and have provided more detailed FET provisions.

[6] See generally, the Special Issue on 'NUS Centre for International Law Collection of Articles on an Appellate Body in ISDS' (2017) 32(3) ICSID Rev—FILJ. For a historical context, see Chester Brown, 'Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court', 32(3) ICSID Rev—FILJ 595–610.

[7] UNGA 'Possible Reform of investor-State dispute settlement (ISDS): Consistency and related matters' (2018) UN Doc A/CN.9/WG.III/WP.150 (Secretariat's Note).

[8] ibid paras 14–18.

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These observations were also made at the 36th Session of UNCITRAL's Working Group III, held in Vienna between 29 October and 2 November 2018. The Working Group recalled that:

> a distinction had been made between divergence in decisions that could be justified and differing interpretations which could not be justified (for example, contradictory interpretations of the same substantive standard in the same treaty, or of the same procedural issue, particularly when the facts were similar).[9] The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns related to 'unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals'.[10]

The Working Group then considered whether 'limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions made it desirable to undertake reforms'. It answered this question in the affirmative.[11] The following is reported regarding the Working Group's discussion of incorrect decisions:

> On the meaning of 'correct' decisions (including whether obtaining a correct outcome should be an objective of reform), it was mentioned that 'incorrect' decisions would be those rendered where treaty provisions have been improperly interpreted by tribunals, not reflecting the intent of the parties to the treaty or contrary to the applicable rules of interpretation. It was also stated that decisions based on manifest errors of law or facts were also 'incorrect', for which there was a lack of mechanism to rectify the situation. It was stated that ensuring correctness might generally assist in obtaining consistency of decisions as well.[12]

The Working Group noted that the existing mechanisms of annulment and setting aside of awards were designed to address significant deficiencies in the arbitral proceeding, also referred to as 'the integrity and fairness of the process', but did not necessarily constitute a mechanism for addressing concerns arising from 'incorrect' decisions.[13]

It is submitted that divergent interpretations of treaty provisions do exist, but not on the scale suggested at the Working Group and elsewhere. Moreover, most of these divergences appear in awards that date from more than a decade ago. Investment law, being a relatively new field of law, requires time to mature, and assessment of inconsistency should be made on the basis of more modern jurisprudence.

In any event, assuming that a serious divergence of interpretations of IIA provisions exists, one would think that the first step towards remedying the divergence would be to unify the *substantive* standards of investment protection. However, that approach is missing from the Working Group's mandate. The approach seems not to unify the differing substantive provisions in the 3,300 IIAs, but rather to offer a *procedural* solution in the form of an appeal mechanism or a multilateral court system.

[9] UNGA 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session' (2018) UN Doc A/CN.9/964 para 28.
[10] ibid para 40.
[11] ibid paras 54–63 [See also the Secretariat's Note (n 7) at paras 19–26].
[12] ibid para 57.
[13] UNGA 'Possible reform of investor-State dispute settlement (ISDS)' (2018) UN Doc A/CN.9/WG.III/WP.149 para 10.

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Actually, consistency no longer appears to be the first priority for the UNCITRAL Working Group. The focus now is 'predictability and correctness' of arbitral awards:

> During the discussion in the Working Group, it was also agreed that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity (A/CN.9/935, para. 26).[footnote omitted] Indeed, the Working Group considered that consistency and coherence were not objectives in themselves and that caution should be taken in trying to achieve uniform interpretation of provisions across the wide range of investment treaties, considering that the underlying investment treaty regime itself was not uniform (A/CN.9/930/Add.1/Rev.1, paras. 11, 17 and 18).[14]

The Secretariat's Note lists 'Possible reforms on a multilateral basis', including:

(i) introducing a system of precedent;
(ii) providing guidance to tribunals;
(iii) prior scrutiny of arbitral awards;
(iv) appellate mechanism;
(v) system of preliminary rulings; and
(vi) setting up an international court system.[15]

As the topic of this article is the interaction of the ICSID and New York Conventions with a potential appellate mechanism, I will address possible reforms (iv) and (vi). The latter possible reform is advocated in particular by the European Union (EU).

III. APPEAL MECHANISMS FOR ISDS IN PRACTICE

The result of the extensive discussions about appeal mechanisms in ISDS during the last two decades is dismal: insofar as it could be researched, it seems that no appeal mechanism is legally or otherwise operative under any IIA.[16]

The discussions seem to have yielded aspirational language in a few IIAs. Out of the more than 3,300 IIAs, some 25 contain provisions that contemplate the possibility of an appeal mechanism in the future. Most of them seem to be inspired by the USA Model BIT (2004),[17] which contains two types of provisions.

The first type contemplates a *multilateral* agreement establishing an appellate body in the future. Article 28(10) of the US Model BIT (2004) provides:

> 10. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have

[14] Secretariat's Note (n 7) para 8.
[15] ibid paras 37–47.
[16] With the possible exception of the Permanent Review Tribunal under article 18 of the Protocolo de Olivos para la Solución de Controversias en el Mercosur [Protocol of Olivos for Dispute Settlement in Mercosur] of 18 February 2002 <http://opil.ouplaw.com/view/10.1093/law-oxio/e148.013.1/law-oxio-e148-regGroup-1-law-oxio-e148-source.pdf> accessed 15 January 2019.
[17] These provisions in the US Model BIT (2004) originate in turn from the 2002 Trade Promotion Authority legislation in the US: 19 USC § 3802(b)(3)(G)(iv), 'providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements'.

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> such appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

The second type contemplates a *bilateral* appellate body in respect of which the parties are to enter into negotiations within three years after the entry into force of the relevant IIA. Annex D to the US Model BIT (2004) provides:

> Possibility of a Bilateral Appellate Mechanism
>
> Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.

Each of the 25 or so IIAs contains both types of provisions or one of them.

IIAs that contain both types of provisions (a multilateral agreement establishing an appellate body in the future and negotiations regarding a bilateral appellate body) include: the Singapore–USA FTA of 2003;[18] the Chile–USA FTA of 2003;[19] the Morocco–USA FTA of 2004;[20] the Uruguay–USA BIT of 2005;[21] the Peru–USA FTA of 2006;[22] the Oman–USA FTA of 2006;[23] the Panama–USA FTA of 2008;[24] the Colombia–USA FTA of 2006;[25] and the Australia–Republic of Korea FTA of 2014.[26] Also, the Central America Free Trade Agreement (CAFTA) of 2004 contains both types of provisions.[27] IIAs that contain only the first type of provision (pertaining to a multilateral agreement establishing an appellate body in the future) include: the Panama–Peru FTA of 2011;[28] the Costa Rica–Peru FTA of 2011;[29] the Nicaragua–Taiwan FTA of 2006;[30] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP) between Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam of 2018.[31] Two IIAs may also

[18] Singapore–United States Free Trade Agreement (signed 6 June 2003, entered into force 1 January 2004) (Singapore–USA FTA) art 15.19(10); Exchange of Letters on the Possibility of Bilateral Appellate Mechanism (6 May 2003).

[19] Chile-United States Free Trade Agreement (signed 6 June 2003, entered into force 1 January 2004) (Chile–USA FTA) art 10.19(10), annex 10-H.

[20] Morocco–United States Free Trade Agreement (signed 15 June 2004, entered into force 1 January 2006) (Morocco– USA FTA) art 10.19(10), annex 10-D.

[21] Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (signed 4 November 2005, entered into force 31 October 2006) (Uruguay–USA BIT) art 28(10), annex E.

[22] Peru–United States Free Trade Agreement (signed 12 April 2006, entered into force 1 February 2009) (Peru–USA FTA) art 10.20(10), annex 10-D.

[23] Oman–United States Free Trade Agreement (signed 19 January 2006, entered into force 1 January 2009) (Oman–USA FTA) art 10.19(9)(b), annex 10-D.

[24] Panama-United States Trade Promotion Agreement (signed 28 June 2007, entered into force 31 October 2012) (Panama–USA FTA) art 10.20(10), annex 10-D.

[25] United States-Colombia Trade Promotion Agreement (signed on 22 November 2006, entered into force on 15 May 2012) art 10.20(10), annex 10-D.

[26] Australia–Republic of Korea Free Trade Agreement (signed 8 April 2014, entered into force 12 December 2014) (Australia –Korea FTA) art 11.20(13), annex 11-E.

[27] Dominican Republic—Central America Free Trade Agreement (opened for signature 5 August 2004, entered into force 1 January 2009) (CAFTA) art 10.20(10), annex 10-F.

[28] Panama–Peru Free Trade Agreement (signed 25 May 2011, entered into force 1 May 2012) (Panama–Peru FTA) art 12.21(9).

[29] Costa Rica–Peru Free Trade Agreement (signed 21 May 2011, entered into force 1 June 2013) (Costa Rica–Peru FTA) art 12.21(9).

[30] Nicaragua–Taiwan Free Trade Agreement (signed 23 June 2006, entered into force on 1 January 2008) (Nicaragua–Taiwan FTA) art 10.20(9).

[31] Comprehensive and Progressive Agreement for Trans-Pacific Partnership [signed 8 March 2018 (by Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) entered into force 30 December 2018 for Canada, Australia, Japan, Mexico New Zealand, and 14 January 2019 for Vietnam] (CPTPP). Many of the provisions of the CPTPP are identical to the Trans-Pacific Partnership (signed 4 February

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be mentioned: the Protocol of Pacific Alliance between Chile, Colombia, Mexico and Peru of 2014;[32] the Colombia–Costa Rica FTA of 2013;[33] together with the Dutch 2018 Model Investment Agreement (MIA).[34] The EU–Canada Comprehensive Economic Trade Agreement (CETA),[35] the EU–Singapore IPA and the Vietnam IPA contain similar provisions, but are aimed not only at an appellate body, but at a first-instance tribunal. They will be discussed below.[36]

The IIAs that contain only the second type of provision (pertaining to negotiations for a bilateral appellate body) include two IIAs: the China–Australia FTA of 2015;[37] and the Canada–Republic of Korea FTA of 2014.[38]

The US Model BIT (2012) has abandoned the aspirational provisions concerning negotiations of a bilateral appellate body within three years (the second type of provision). This model is limited to the first type of provision, which is worded as follows in article 28(10):

> In the event that an appellate mechanism for reviewing awards rendered by investor–State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

To date, the first type of provision pertaining to a multilateral agreement establishing an appellate body in the future has remained a dead letter, as no such multilateral agreement has been concluded. The same can be said about the second type of provision pertaining to negotiation within three years of a bilateral appellate body as, insofar as it could be researched, negotiations, if any, yielded no result, in that no bilateral appellate body has been set up.

Actually, the recently concluded Protocol replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) of 2018, which will replace

2016, not yet entered into force) (TPP) as the final draft of the TPP had already been prepared before the USA abandoned the negotiations. Article 9.23(11) TTP (also incorporated into CPTPP) provides: 'In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings).'

[32] Protocol of Pacific Alliance between Chile, Colombia, Mexico and Peru (signed 10 February 2014, entered into force 1 August 2016) art 10.20(12).

[33] Colombia–Costa Rica Free Trade Agreement (signed 22 May 2013, not yet entered into force) (Colombia–Costa Rica FTA) art 12.22(9).

[34] Dutch Model Investment Agreement (19 October 2018) art 15 <https://www.rijksoverheid.nl/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden> accessed 15 January 2019.

[35] Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016, provisionally entered into force 21 September 2017) (CETA).

[36] See below.

[37] China–Australia Free Trade Agreement (signed 17 June 2015, entered into force 20 December 2015) (ChAFTA). Article 9.23 provides: 'Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law.'

[38] Canada–Republic of Korea Free Trade Agreement (signed 22 September 2014, entered into force 1 January 2015) (CKFTA) annex 8-E.

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NAFTA, provides for ISDS in relations between Mexico and the USA, but does not contemplate an appeal mechanism.[39]

In 2004, the ICSID Secretariat briefly considered the creation of an appeals facility.[40] It envisaged a single appeals facility that might be established and operate under a set of ICSID Appeals Facility Rules. An IIA then could provide that awards, made in cases covered by the treaty, would be subject to review in accordance with those Rules. At the time, the Secretariat believed that the 'Facility would best be designed for use in conjunction with both forms of ICSID arbitration, UNCITRAL Rules arbitration and any other form of arbitration provided for in the investor-to-State dispute-settlement provisions of investment treaties'.[41] A year later, in 2005, the ICSID Secretariat abandoned the idea for lack of positive response.[42]

A decade later, the EU advanced a more far-reaching idea: that of a multilateral investment court (MIC). According to a website that the European Commission (EC) dedicated to its idea:

> The overall objective for creating a Multilateral Investment Court is to set up a permanent body to decide investment disputes. It would build on the EU's ground-breaking approach on its bilateral FTAs and be a major departure from the system of investor-to-State dispute settlement (ISDS) based on ad hoc commercial arbitration.
> A Multilateral Investment Court, like the approach in the FTAs, would bring the key features of domestic and international courts to investment adjudication.
>
> The idea is that the Multilateral Investment Court would:
>
> - have a first instance tribunal
> - have an appeal tribunal
> - have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards and a dedicated secretariat
> - be a permanent body
> - work transparently
> - rule on disputes arising under future and existing investment treaties
> - only apply where an investment treaty already explicitly allows an investor to bring a dispute against a State
> - would not create new possibilities for an investor to bring a dispute against a state
> - prevent disputing parties from choosing which judges ruled on their case
> - provide for effective enforcement of its decisions
> - be open to all interested countries to join.

[39] Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018) (USMCA). The Annex contains the Agreement. Chapter 14 concerns Investment. Annex 14-D pertains to Mexico–United States Investment Disputes. Canada is no longer involved in ISDS (except for legacy disputes under NAFTA for a period of three years). This seems to depart from the trade negotiating objective of 'seeking to improve mechanisms used to resolve disputes between an investor and a government through .... (iv) providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements'. Bipartisan Congressional Trade and Priorities and Accountability Act of 2015, Sec 102(b)(4)(G(iv), Publ L No 114-26 of 29 June 2015 <https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf> accessed 15 January 2019.

[40] ICSID Secretariat, 'Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration', (22 October 2004) paras 20–23 and annex, 'Possible Features of an ICSID Appeals Facility' <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf#search=Possible%20Improvements> accessed 15 January 2019.

[41] ibid annex 'Possible Features of an ICSID Appeals Facility', para 1.

[42] Antonio Parra, *The History of ICSID* (1st edn, OUP 2012) 251–4: 'Many doubted the wisdom; most considered it premature at best' (253).

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> For the EU, the Multilateral Investment Court would replace the bilateral investment court systems included in EU trade and investment agreements.
>
> Both the EU–Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement foresee setting up a permanent multilateral mechanism and contain a reference to it.
>
> The EU now includes similar provisions in all of its negotiations involving investment.[43]

In this article, the EU approach, as stated above and reflected in the FTAs (some of which are also called 'IPAs'), is referred to as the 'EU Model'.

The EU's position is summarized in a factsheet that the EC released on 7 July 2017, on the occasion of the EU–Japan FTA's reaching agreement in principle:

> Following the recent public debate, the Juncker Commission has fundamentally reformed the existing system for settling investment-related disputes.
>
> A new system—called the Investment Court System, with judges appointed by the two parties to the FTA and public oversight—is the EU's agreed approach that it is pursuing from now on in its trade agreements. This is also the case with Japan.
>
> Anything less ambitious, including coming back to the old Investor-to-State Dispute Settlement, is not acceptable. *For the EU ISDS is dead.*[44] (emphasis added)

The statement 'For the EU ISDS is dead' is not only remarkable because one may wonder whether it is shared by countries outside the EU;[45] it is also noteworthy because the bilateral treaties concluded by the EU (with Canada, Singapore and Vietnam), contain provisions similar to those in current ISDS agreements.[46] As we will see in a moment, the main difference at first instance is that the investor no longer has a say in the composition of the tribunal.[47] Moreover, these three FTAs are inoperative at present insofar as the dispute resolution provisions are concerned, pending ratification by the 27/28 EU Member States, now the Court of Justice of the European Union ("CJEU") has decided that they are compatible with EU law.[48]

[43] See European Commission 'The Multilateral Investment Court project' *News Archive* (21 December 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> accesses 15 January 2019.

[44] European Commission 'A new trade Agreement with Japan' (July 2018) <https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf> accessed 15 January 2019.

[45] Japan does not seem to be convinced either. The FTA entered into force on 1 February 2019, but the IPA is still being negotiated <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> p 2.l. accessed 15 January 2019.

[46] An overview of the status of the negotiations of FPAs and IPAs between the EU and various countries is available at <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> accessed 15 January 2019. The new EU–Mexico Agreement was agreed in principle on 21 April 2018. The text is still subject to 'legal scrubbing'. The current text regarding Investment Dispute Resolution is contained in Chapter 19 and available at: <http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf> accessed 15 January 2019.

[47] A number of other changes with respect to the usual ISDS provisions can be characterized as ISDS 2.0. See below.

[48] With respect to the EU-Singapore FTA (EUSFTA), the CJEU opined that ISDS as contemplated by Chapter 9 falls within the competence shared between the EU and the Member States, which means that each Member State has to give its approval to the ISDS provisions [Opinion 2/15 (16 May 2017), available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN> accessed 15 January 2019]. Thereafter, the ISDS part of the EUSTFA was split off into a separate IPA. It is 'not binding under international law and will only become so after completion of the ratification process by each Party according to its internal legal procedures' (see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 15 January 2019). The EU Trade Committee has consented to the IPA but ratification from each EU Member State is still outstanding (see <http://www.europarl.europa.eu/news/en/press-room/20190124IPR24202/eu-singapore-free-trade-deal-gets-green-light-in-trade-committee> accessed 15 January 2019).

With respect to CETA (n 35), Belgium applied to the CJEU for an opinion pursuant to Article 218(11) TFEU (Opinion 1/17) regarding the question: 'Is Chapter Eight ("Investments"), Opinion 1/17 'Opinion of Advocate

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By way of example of the EU Model, the FTA with Canada, commonly referred to as 'CETA', provides for dispute resolution in the first instance under the ICSID Convention and Rules, ICSID Additional Facility Rules or UNCITRAL Rules.[49] The main difference with current ISDS is that the tribunal is composed of three members who are selected from a panel of 15 who are appointed by the CETA Joint Committee.[50]

CETA also contemplates an appellate tribunal.[51] The same selection method applies. However, the appellate procedure is not available, as the CETA Joint Committee is yet to adopt a decision on a number of administrative and organizational matters regarding the functioning of the appellate tribunal.[52] It is only after adoption of such a decision that a disputing party may appeal an award rendered at first instance.[53]

The ICSID Secretariat is designated to act as Secretariat for the tribunal.[54]

Both the first-instance tribunal and the appellate tribunal under CETA function on the basis of arbitration.[55]

The appellate tribunal in CETA is a bilateral appellate mechanism. It is transitional in nature, as the drafters of CETA aspire to a MIC:

Article 8.29 Establishment of a multilateral investment tribunal and appellate mechanism

General Bot delivered on 29 January 2019' ECLI:EU:C:2019:72, Section F ("Resolution of investment disputes between investors and states") of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?' see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=196185&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=909639> accessed 15 January 2019. On 30 April 2019, ECLI:EU:C:2019:341, the ECJ answered the request for an opinion: 'Section F of Chapter Eight of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, is compatible with EU primary law.'

With respect to the EU-Viet Nam IPA, it is also 'not binding under international law and will only become so after completion of the ratification process by each Party according to its internal legal procedures' (see EU-Vietnam Investment Protection Agreement text <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 15 January 2019).

[49] Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) (1976).

[50] CETA (n 35) art 8.27. Such an appointment method may raise questions because all arbitrators are appointed by one party only (here, the States). See, eg, art 1028 of the Netherlands Arbitration Act ('If by agreement or otherwise one party is given a privileged position with regard to the appointment of the arbitrator or arbitrators, either party may, in derogation of the agreed method of appointment, request the provisional relief judge of the district court to appoint the arbitrator or arbitrators … .'). A provision comparable to CETA (n 35) art 8.27 is contained in the EU–Singapore IPA art 3.9(2) and in the EU–Vietnam IPA art 3.38(2)–(9).

[51] CETA (n 35) art 8.28. In the EU–Singapore IPA (n 50) art 3.10(1), it is called the 'permanent Appeal Tribunal', as it is in the EU–Vietnam IPA Vietnam IPA art 3.39(1).

[52] According to art 8.28(7) CETA (n 35), the matters are: '(a) administrative support; (b) 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; (c) procedures for filling a vacancy on the Appellate Tribunal and on a division of the Appellate Tribunal constituted to hear a case; (d) remuneration of the Members of the Appellate Tribunal; (e) provisions related to the costs of appeals; (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'. The EU–Singapore IPA (n 50) does not require further elaboration: see art 3.19.

[53] CETA (n 35) art 8.28(9): 'Upon adoption of the decision referred to in paragraph 7: (a) a disputing party may appeal an award rendered pursuant to this Section to the Appellate Tribunal within 90 days after its issuance.'

[54] CETA (n 35) art 8.27(16); the administrative support for the appellate tribunal is still to be determined by the CETA Joint Committee [art 8.28(7)(a)]. A similar provision concerning the ICSID Secretariat for both the first instance tribunal and the appellate tribunal is contained in the EU–Singapore IPA (n 50) arts 3.9(16) and 3.10(14) and in the EU–Vietnam IPA Vietnam IPA arts 3.38(18) and 3.39(18).

[55] See CETA (n 35) art 8.41, which envisages enforcement under the ICSID Convention and the New York Convention, respectively. A similar provision is contained in the EU–Singapore IPA (n 50) art 3.22 and in the EU–Vietnam IPA Vietnam IPA art 3.57.

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> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[56]

The MIC is what the EU ultimately wants. The Council of the EU adopted the 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' on 20 March 2018.[57] The Council instructed that negotiations pertaining to the MIC be conducted under the auspices of UNCITRAL and that EU Member States that are members of UNCITRAL are required to exercise their voting rights 'in accordance with these directives and previously agreed EU positions'.[58]

On 18 January 2019, the EC submitted two papers to UNCITRAL Working Group III. According to the EC press release,[59] 'the first EU paper sets out the EU's proposal of establishing a permanent multilateral investment court with an appeal mechanism and full-time adjudicators'.[60] The EU believes that this is 'the only reform option that can effectively respond to all the concerns identified in this UN process'. In the second EU paper, it makes proposals for a work plan for Working Group III.[61]

It is an open question whether the EU is able to convince the other members of UNCITRAL that the MIC is the way forward as an appeal mechanism for the more than 3,300 IIAs that contain differing provisions of substantive protection. What the EU has achieved to date seems to have convinced three States (Canada, Singapore and Vietnam) to include a *bilateral* appeal mechanism in their treaties, which, as mentioned, is similar to current ISDS but is presently inoperative in all three cases for reasons due to the EU legal system.[62]

Finally, when discussing an appellate mechanism for ISDS, regular reference is made to the Appellate Body of the WTO.[63] The aspect of a standing body is interesting for the purposes of comparison with an appellate mechanism for ISDS. However, the WTO model is less useful for ISDS, as the WTO concerns a limited number of instruments, involves rather technical trade obligations, and is State-to-State

[56] A similar provision is contained in the EU–Singapore IPA (n 50) art 3.12 and in the EU–Vietnam IPA Vietnam IPA art 3.41.

[57] Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (1 March 2018) 12981/17 <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 15 January 2019.

[58] ibid at para 4: 'In the event of a vote, the Member States which are Members of the United Nations Commission on International Trade Law shall exercise their voting rights in accordance with these directives and previously agreed EU positions.' See para 4 *et seq* above. The EU submitted its views to UNCITRAL on 12 December 2017 [UNGA 'Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union' (2017) UN Doc A/CN.9/WG.III/WP.145].

[59] European Commission, 'The EU moves forward efforts at UN on multilateral reform of ISDS' *News Archive* (Brussels, 18 January 2019)<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972> accessed 15 January 2019.

[60] Submission of the European Union and its Member States to UNCITRAL Working Group III, 'Establishing a standing mechanism for the settlement of international investment disputes' <http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf> accessed 15 January 2019 (EU January 2019 Submission).

[61] Submission of the European Union and its Member States to UNCITRAL Working Group III, 'Possible work plan for Working Group III' (18 January 2019) <http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf> accessed 15 January 2019.

[62] Mexico can be added, as the text is in the state of legal scrubbing: see n 46.

[63] World Trade Organization, 'Dispute Settlement' See <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 15 January 2019.

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only.[64] Moreover, current practice shows that the WTO's appeal mechanism is not the best example for that in ISDS, as its appointment process[65] and the precedential value of its panel and Appellate Body reports are called into question.[66]

IV. LEGAL REGIME GOVERNING CURRENT ISDS

A. *Introduction*

In the preceding two Sections, we reviewed the reasons given for establishing an appeal mechanism for ISDS awards and surveyed the current practice of appeal mechanisms. The practice is scant, but the EU tries to give it a new impetus through its FTAs (the EU Model) and its active participation in UNCITRAL Working Group III.

Against that background, we turn to the question of interaction of a (potential) appeal mechanism with the ICSID and New York Conventions, as it is important to know with which legal regime these Conventions would be interacting. To answer that question, we need first to determine the legal regime governing current ISDS. That is the subject matter of the present Section IV. Thereafter, in the subsequent Section V, we will consider the legal regime governing a (potential) appeal mechanism. These two matters need to be considered sequentially, because an appeal mechanism may legally be dependent (or built) on the existing ISDS system (although it is not necessarily so).

It is also important to note that, in all cases, the method of dispute settlement is by arbitration, be it (first-instance) ISDS and an appeal mechanism. That the method is arbitration is one of the prerequisites of the applicability of the ICSID and New York Conventions.

B. *Current Legal Regime: Treaty-Based Only (ICSID)*

Many IIAs provide for ISDS under the ICSID Convention. A number of them give the investor the option of using either the ICSID Convention or the UNCITRAL Arbitration Rules (and sometimes the International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC) or similar arbitration rules). Legally, the difference is significant in terms of both control and enforcement (see Section D below).

The ICSID Convention provides for a self-contained ISDS treaty-based arbitration system, outside the reach of national arbitration law. Control is concentrated in the *ad hoc* annulment committee under article 52 of the

[64] See Mark Huber and Greg Tereposky, *The WTO Appellate Body: Viability as a Model for an Investor-State Dispute Settlement Mechanism* 584–5.

[65] Tom Miles, 'U.S. blocks WTO judge reappointment as dispute settlement crisis looms' *Reuters* (27 August 2018) <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O> accessed 15 January 2019.

[66] The United States recently criticized the Appellate Body report in *US Stainless Steel (Mexico)*, in which the Appellate Body stated: 'ensuring "security and predictability" in dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case' (para 160). See United States, 'Statement by the Unites States at the Meeting of the WTO Dispute Settlement Body' (Geneva, 18 December 2018) <https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf> para 63 accessed 15 January 2019. According to the United States, the role of WTO adjudicators is to make findings that are 'based on the text of the covered agreements, not the prior appellate reports' (para 112). As regards jurisprudence of ICSID tribunals, see para 94.

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Washington Convention.[67] The grounds for annulment in article 52(1) are in essence not much different from the generally accepted grounds for review in setting aside proceedings under national arbitration laws (although the wording is not the same and somewhat narrower). However, there is a notable difference: the grounds for annulment in the ICSID Convention do not include a violation of public policy (except for corruption).

Enforcement of an ICSID award is automatic, without the possibility of a national court reviewing the award on the basis of grounds for refusal of enforcement (see, in more detail, Section VII.C below). Again, an alleged violation of public policy is not a ground for refusal of enforcement of an ICSID award.

ICSID is unique in that, at present, it is the only self-contained treaty regime for investment arbitration that is used in practice.

C. *Current Legal Regime: National Arbitration Law and New York Convention*

If an investment arbitration takes place under the UNCITRAL Arbitration Rules, in principle it is governed by a national arbitration law.[68] That law is almost always the arbitration law of the place of arbitration. This follows from article 1(2) of the 1976 version of the Rules, as confirmed in article 1(3) of the 2010 version of the Rules:

> These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

It is a generally accepted principle in international arbitration that the courts of the country whose law governs the arbitration have exclusive competence regarding the setting aside (annulment) of the arbitral award.[69]

Table C - Investment Arbitration

Action	Country of Origin	Abroad
Enforcement UNCITRAL	• National arbitration law • If "non-domestic": New York Convention	• New York Convention
Enforcement ICSID	• No "Country of Origin" • Art. 54 ICSID Convention • Automatic enforcement in all Contracting States	
Setting aside UNCITRAL	• National arbitration law • Courts have exclusive jurisdiction	• Not possible
Setting aside ICSID	• No "Country of Origin" • Art. 52 ICSID Convention • *Ad hoc* Committee	

[67] Convention on International Trade in Endangered Species of Wild Fauna and Flora (opened for signature 3 March 1973, entered into force 1 July 1975) (Washington Convention).

[68] These observations also apply to the ICSID Additional Facility Rules.

[69] This principle is enshrined in article V(1)(e) of the New York Convention, which contains the ground for refusal of enforcement that the award 'has been set aside .... by a competent authority of the country in which, or under the law of which, that award was made'. Courts have unanimously affirmed that a setting aside by another court does not constitute a setting aside within the meaning of article V(1)(e) of the Convention. See also n 128.

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Thus, an ISDS award resulting from an investment arbitration conducted under the UNCITRAL Arbitration Rules will be subject to the possibility of a setting aside action at the place of arbitration (the country of origin) and to an enforcement action under the New York Convention in other countries,[70] much in the same manner as an award resulting from an international commercial arbitration.

The question of whether an arbitration under the UNCITRAL Arbitration Rules can be 'de-nationalized' is examined at Section VII.D(iv).

D. *Differences between the Two Legal Regimes*

Graphically, this difference can be depicted as shown in Table 1:

To give an example, in the investment arbitrations between Chevron and Ecuador, Chevron opted for arbitration under the UNCITRAL Arbitration Rules as it was permitted to do under the Ecuador–US BIT (rather than ICSID arbitration, which Chevron was also permitted to choose).[71] Chevron and Ecuador then agreed to use the registry services of the Permanent Court of Arbitration (PCA) and The Hague as the (legal) place of arbitration. The result was that the arbitration was governed by Dutch arbitration law. For that reason, after it had lost the arbitration, Ecuador had to make its application for setting aside the award to the Dutch courts (at that time, three instances).[72]

In the event of non-compliance with the award, Chevron would have had to seek enforcement under the New York Convention in countries outside the Netherlands, with Ecuador having the possibility of resisting enforcement on the grounds for refusal of enforcement listed in article V of the Convention.[73] If Chevron had opted for ICSID arbitration, Ecuador would have had to make an application for annulment to the *ad hoc* Committee under the ICSID Convention. In the event of non-compliance with the ICSID award, Chevron would have had to seek enforcement under the ICSID Convention without Ecuador having the possibility of resisting enforcement on any ground for refusal of enforcement.

V. LEGAL REGIME GOVERNING APPEAL MECHANISM

A. *Introduction*

Having examined the legal regime governing ISDS in the preceding Section, we turn now to the legal regime governing a (potential) appeal mechanism. As the legal regime applicable to ISDS is governed by either the ICSID Convention or a national arbitration law, we will consider both legal bases again, but now in

[70] Enforcement of the award in the country where it is made under the New York Convention is possible if the courts in that country apply the second alternative of art I(1) concerning non-domestic awards. At present, the courts in the United States apply the Convention to non-domestic awards made in the United States. For the meaning of the term 'non-domestic', see Albert Jan van den Berg, *The New York Convention 1958. Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 22–8; see also by the same author, 'Non-domestic Arbitral Awards under the 1958 New York Convention' (1986) 2 Arb Intl 191–219.

[71] Ecuador–United States Bilateral Investment Treaty [signed 27 August 1993, entered into force 11 May 1997 (terminated)] (Ecuador–US BIT) art VI(3)(a): see <https://investmentpolicyhub.unctad.org/Download/TreatyFile/1065> accessed 15 January 2019.

[72] Hoge Raad [Supreme Court], 26 September 2014, *Ecuador v Chevron*, ECLI:NL:HR:2014:2837.

[73] Enforcement in the Netherlands would be governed by the relevant provisions in the Netherlands Arbitration Act (arts 1062–3).

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relation to a (potential) appeal mechanism. We will also consider a third possibility, which is a potential separate treaty for an appeal mechanism.

When considering these possibilities, it is important to keep in mind the distinction between bilateral and multilateral appeal mechanisms.

(i) *Bilateral Mechanism*

As mentioned, the number of existing bilateral appeal mechanisms in IIAs is currently very small. Examples are CETA, the EU–Singapore IPA and the EU–Vietnam IPA. Even these treaties are currently legally inoperative (and the appeal mechanism in CETA is also incomplete).

CETA, the EU–Singapore IPA and the EU–Vietnam IPA do not provide for a specific law being applicable to the appeal mechanism. The legal regime governing the appeal mechanism in these treaties, therefore, must be deemed to be the same as the legal regime governing the first instance.

As observed, CETA, the EU–Singapore IPA and the EU–Vietnam IPA offer the investor the option for the first instance between arbitration under the ICSID Convention and the UNCITRAL Arbitration Rules. Depending on the option exercised by the investor, the appeal mechanism would be governed by the ICSID Convention or by the UNCITRAL Arbitration Rules and a national arbitration law. In the next two Sections B and C we will examine whether and how the appeal mechanism could legally be governed by either legal basis.

(ii) *Multilateral Mechanism*

A multilateral appeal mechanism does not (yet) exist. As noted, the establishment of such an appeal mechanism is contemplated by a number of IIAs (see Section III). CETA, the EU–Singapore IPA and the EU–Vietnam IPA go a step further and contemplate an integrated multilateral mechanism (i.e. a multilateral investment tribunal and appellate mechanism).[74] The multilateral mechanism will require the form of a treaty. It will be examined in Section V.D.

B. *Appeal Mechanism under the ICSID Convention*

As mentioned, if the investment arbitration is under the ICSID Convention, the legal basis for an appeal mechanism can also be treaty based, without the applicability of a national arbitration law. The question here is whether the ICSID Convention would allow for an appeal mechanism.

It is argued that the ICSID Convention would not permit an appeal mechanism because article 53(1) provides that awards rendered pursuant to the Convention 'shall *not be subject to any appeal* or to any other remedy except those provided for in this Convention' (emphasis added). It is also argued that amendment of the Convention requires unanimous vote,[75] and that a unanimous amendment of the Convention is unlikely to be achieved in practice.

It is submitted that unanimity for an amendment depends on the proposed amendment itself. For example, if the amendment is to abandon annulment of the award for appeal, the amendment is not likely to make it. If, on the other hand, the amendment is to give an option between annulment and appeal (e.g. under an

[74] See above.
[75] ICSID Convention (n 3) art 66(1).

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adapted version of the ICSID Facility Rules), potential approval by all Contracting States is likely, as no-one loses anything.

An alternative to an amendment of the Convention by all Contracting States would be that two or more Contracting States amend the ICSID Convention *inter se* in a separate IIA pursuant to article 41 of the Vienna Convention on the Law of Treaties of 1969 (VCLT).[76]

Some contend that such an amendment of the Convention is not allowed. It is argued that article 41(1)(b) VCLT:

> requires that the modification *inter se* is not prohibited by the subject of the treaty. It is not necessary that the subject treaty specifically refer to *inter se* modification as such in its textual prohibition. It is enough that the subject treaty provides a clear prohibition of the modification sought to be undertaken.[77]

It is submitted that this reading of article 41(1)(b) VCLT is unduly restrictive. The chapeau of article 41(1) VCLT is not met in the case of the ICSID Convention, because the Convention does not prohibit the modification of its article 53(1). Moreover, the modification, being the introduction of an appeal mechanism, does not relate to a provision (i.e. article 53(1) of the ICSID Convention) derogation from which is incompatible with the effective execution of the object and purpose of the ICSID Convention as a whole, because an appeal mechanism will ultimately also result in a final award and may actually increase the legitimacy of ISDS.

It follows that an amendment *inter se* is legally possible. Reference may also be made to the reasons given in the excellent report of 2016 by Gabrielle Kaufmann-Kohler and Michele Potestà (Kaufmann-Kohler Potestà Report).[78] The possibility of an *inter se* amendment is equally the view of the ICSID Secretariat in the aforementioned Discussion Paper of 2004.[79]

[76] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 41. Article 41 provides:

'1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1z(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.'

While the VCLT is not directly applicable to the ICSID Convention because the VCLT applies only to treaties concluded after the VCLT's entry into force (VCLT art 4), it is considered reflective of customary international law.

[77] Nicolas Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 JWIT Sec II.2.

[78] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' (CIDS, 3 June 2016) paras 141, 200, 237–45 <http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf> accessed 15 January 2019.

Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards (CIDS Supplemental Report, 15 November 2017) <http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf> accessed 15 January 2019.

See also August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA (n 35) and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 J Intl Economic L 761, 772–3.

[79] (n 40) annex, para 3.

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Furthermore, an amendment of the ICSID Convention *inter se* in a separate treaty is already State practice. For example, NAFTA provides that, rather than the Chairman of the Administrative Council of ICSID, the Secretary General of ICSID shall appoint the missing arbitrators in case of failure to constitute the tribunal.[80] USMCA refers the challenge of arbitrators to a decision on procedure under the UNCITRAL Arbitration Rules (decision by the Appointing Authority) rather than under the ICSID Convention (decision by the two remaining arbitrators).[81] As mentioned, CETA, and the EU–Singapore and EU–Vietnam IPAs, provide for ICSID as one of the options for first-instance arbitration, but replace the ICSID appointment method of the arbitrators by a permanent panel.[82]

The issue of enforcement of the award rendered on appeal in an ICSID setting under a bilateral IIA in third countries is considered in Section VII.C. Suffice it to mention here that it is critical for enforcement of an appeal award in third countries that an *inter se* amendment of the ICSID Convention is drafted in such a way that the appeal award can be considered an award for the purposes of article 54 of the ICSID Convention.[83]

C. *Appeal Mechanism under National Arbitration Law*

Assuming that the UNCITRAL Arbitration Rules or similar arbitration rules may be adapted to include an appeal mechanism,[84] the national arbitration law of the place of arbitration applies in principle to the mechanism, and enforcement of the appeal award is governed by the New York Convention in other Contracting States.[85] That situation raises the question of whether an appeal mechanism is allowed by the arbitration law of the place of arbitration.

The arbitration laws of a few countries contain express provisions on arbitral appeal. In other countries, arbitral appeal is commonly practised.[86] An example is England, where many commodity trade associations provide for arbitral appeal.[87]

Arbitral appeal is also common in the Netherlands in commodity and sports arbitration. In terms of legislation, probably the most detailed provisions on arbitral appeal are set forth in the Netherlands Arbitration Act, as amended in 2015.[88]

[80] ICSID Convention (n 3) art 38 ; NAFTA (n 5) art 1124. Another element that distinguishes NAFTA from the ICSID Convention pertains to the stay of enforcement of an arbitral award. Compare NAFTA (n 5) art 1136 with ICSID Convention (n 3) art 52(5).

[81] USMCA (n 39) art 14.D.6(6) ; ICSID Convention (n 3), art 58. See also USMCA (n 39) art 14.D.3(5).

[82] CETA (n 35) arts 8.23(2(a) and 8.27; EU–Singapore IPA (n 50) art 3.6(1)(a); EU–Vietnam IPA (n 50) art 3.33(2)(a).

[83] A residual application of the New York Convention may come to the rescue in case of inapplicability of the ICSID Convention's enforcement regime: see below.

[84] UNCITRAL Arbitration Rules (n 49) art 34(2) provides: 'All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.' It can be assumed that provisions of arbitration rules, including the UNCITRAL Arbitration Rules, can be modified by agreement of the parties.

[85] The question whether an arbitration under the UNCITRAL Arbitration Rules can be 'de-nationalized' is examined below.

[86] A number of arbitral institutions offer appellate mechanisms in commercial and sports context, such as American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR), International Institute for Conflict Prevention & Resolution (CPR), International Arbitration Chamber of Paris (CAIP), JAMS, Court of Arbitration for Sport (CAS), and Shenzhen Centre for International Arbitration (SCIA).

[87] See eg on England: VV Veeder, 'National Report England' in Lise Bosman (ed), *The International Handbook on Commercial Arbitration* ch VI.1(a).

[88] Netherlands Arbitration Act 1986/2015 arts 1061a–1061l (application of other provisions of the Act *mutatis mutandis*; agreement regarding arbitral appeal; period of time for lodging appeal (three months, unless agreed otherwise by the parties); types of arbitral award against which appeal can be lodged; appeal in case of consolidated arbitrations; appeal in case of a first instance decision of lack of jurisdiction; appeal and *astreinte* [penal sum]; appeal

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The legal framework and experience in practice in the Netherlands would offer a sound and tested legal basis for an appeal mechanism for ISDS arbitrations that take place in the Netherlands under the UNCITRAL Arbitration Rules or similar rules. It is particularly relevant for ISDS arbitrations under the auspices of the PCA in which the parties have agreed on The Hague as the (legal) place of arbitration.

The consequence of an ISDS appeal mechanism being governed by a national arbitration law is that control over the arbitration, including appeal, is exercised by national courts: in setting aside proceedings by the courts at the country in which the award was made and in enforcement proceedings under the New York Convention in other countries.[89]

D. *Appeal Mechanism in a Potential Separate Treaty*

The future establishment of a multilateral appellate mechanism in a separate treaty is contemplated in some 25 IIAs (see Section III). CETA and the EU–Singapore and EU–Vietnam IPAs go a step further and contemplate an integrated mechanism of first instance and appeal (see Section V.B). As mentioned, to date, none has materialized.

An interesting approach for a stand-alone treaty establishing a multilateral mechanism is offered by Kaufmann-Kohler and Potestà.[90] They argue that the Mauritius Convention on Transparency[91] can be a model for broader investment reform. In essence, under the Mauritius Convention, States consent that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration apply to existing investment treaties to which they are parties. The effect is that existing investment treaties are supplemented by the UNCITRAL Rules on Transparency.

On the basis of that concept of an opt-in convention, Kaufmann-Kohler and Potestà provide a design for an international tribunal for investments (ITI) as well as for an appellate mechanism (AM) for ISDS awards. They summarize their proposal in the following wording:

> 285. If the reform initiative centered around the ITI and/or the AM for investor-State arbitral awards were to be pursued, the Opt-in Convention would be the instrument by which the Parties to IIAs express their consent to submit disputes arising under their existing IIAs to the new dispute resolution bodies. While the Opt-in Convention would be primarily aimed at the existing IIA network, it would be without prejudice to the possibility that future investment treaties may refer to the new dispute resolution options, as States may deem appropriate.
>
> 286. The implementation of the Opt-in Convention would raise law of treaties issues which would need to be carefully considered. The paper has considered both the questions concerning the relationship between the Opt-in Convention and existing IIAs and the relationship between the Opt-in Convention and the ICSID Convention (in the situation where the Opt-in Convention were to extend the AM to ICSID awards).

and additional award at first instance; declaration of enforceability of first instance award notwithstanding appeal; binding force of first instance award; enforcement; setting aside and revocation). An English translation is available at <https://www.nai-nl.org/downloads/Book%204%20Dutch%20CCPv2.pdf> accessed 15 January 2019.

[89] See s VII.D below.

[90] Kaufmann-Kohler and Potestà (n 78).

[91] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted on 10 December 2014, entered into force on 18 October 2017) (Mauritius Convention).

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As regards existing IIAs, Kaufmann-Kohler and Potestà observe that 'the final objective of the exercise that is envisaged here is the implementation of a multilateral instrument aimed at producing changes to the network of existing IIAs'. They believe that '[u]ltimately, the multilateral instrument (the Opt-in Convention) and the IIAs will co-exist'.

In the EU January 2019 Submission, the EU confirmed its proposal for an instrument establishing a standing mechanism.[92] The standing mechanism would concern not only the appellate mechanism but two levels of adjudication: first instance and appellate tribunal. Accordingly, the instrument that the EU has in mind seems to be a stand-alone treaty for the entire dispute resolution between investors and States.

The EU considers it 'vital' that the standing mechanism 'be able to rule on disputes under the large stock of existing and future agreements' and therefore suggests a combination of accession to the instrument establishing the standing mechanism and a special notification ('opt-in') that a particular existing or future agreement would be subject to the jurisdiction of the standing mechanism and in that regard adopts elements of the proposal of Kaufmann-Kohler and Potestà.[93]

However, it may be wondered how the approach as advocated by the EU can be reconciled with ISDS provisions in the existing 3,300 IIAs. The EU's two-level proposal could be effective only if the ISDS provisions in the existing IIAs (i.e. the first level) are *replaced* by the provisions regarding the first level in the instrument establishing the standing mechanism. That goes much further in terms of amendment of IIAs.

The EU January 2019 Submission was previewed in an informative and thoughtful article in the *ICSID Review* by Colin Brown,[94] offering 'Preliminary Sketches' (although more detailed than the EU January 2019 Submission).[95] He addresses: status and qualifications of adjudicators; first-instance tribunal; establishing an appellate mechanism; ensuring consistency; appointment of adjudicators; institutional support; costs; adaptation over time; enforcement; State-to-State dispute settlement; and advisory centre for investment disputes. Colin Brown also discusses the opt-in approach advocated by Kaufmann-Kohler and Potestà, and adds that the Organisation for Economic Co-operation and Development (OECD) has recently made use of the same technique of an opt-in treaty with respect to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting of 2017 to amend around 2,000 existing tax treaties (BEPS Convention).[96] The reference to the BEPS Convention is repeated in the EU January 2019 Submission.[97]

Enforcement of awards made under a specific treaty establishing an appellate body in an opt-in convention (Kaufmann-Kohler and Potestà proposal) or a standing mechanism (EU proposal) is considered in Section VII.

[92] See above.
[93] EU January 2019 Submission (n 60) para 35.
[94] Directorate General for Trade of the European Commission, but representing his own views.
[95] Colin M Brown, 'A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches' (2017) 32(3) ICSID Rev 673–90.
[96] ibid 684–6.
[97] EU January 2019 Submission (n 60) para 36.

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E. *Differing Legal Regimes Governing First Instance and Appeal*

An intricate legal situation arises where first-level ISDS is governed by a national arbitration law, but the appeal mechanism would be governed by a treaty. Such a *dépeçage* may occur if the first instance offers an option between the ICSID Convention and UNCITRAL Arbitration Rules and the investor opts for the UNCITRAL Arbitration Rules. The consequence is that the first-instance arbitration is governed by the arbitration law of the place of arbitration. If in this scenario an appeal is available under a mechanism governed by a treaty only (e.g. an opt-in convention), the process is subject to two different legal regimes: one of national arbitration law and the other of the treaty.

Specific treaty provisions may be tailored to amend or replace those provisions of national arbitration law, but drafting the treaty provisions in question is a challenge.

VI. NATURE AND SCOPE OF APPEAL

To analyse properly the issues regarding the appeal mechanism in ISDS in relation to the ICSID and New York Conventions, it is also necessary to define what is understood by the concept of appeal.

Appeal needs to be distinguished from annulment or setting aside. It is a basic proposition that appeal aims to correct errors of law and/or fact. Such a review means a review of the merits. The purposes of annulment and setting aside have is to ensure a fair procedure and supervise proper jurisdiction.

The distinction does not exclude the possibility that appeal grounds include annulment grounds. The reverse is conceptually not permitted: it is a generally accepted principle of arbitration that the merits are not reviewed in setting aside actions by the national courts and in annulment actions by the *ad hoc* Committee of ICSID.

As regards the grounds for appeal, in a much-generalized manner, two systems can be noted. In Civil Law countries, appeal is frequently *de novo* with respect to facts and law. In Common Law countries, appeal is usually limited to a *de novo* review of legal issues, giving high deference to factual determinations made at first instance by using tests such as ‘plainly wrong’ or ‘clearly erroneous’.

In both legal systems, recourse to a supreme court is nearly always limited to questions of law and manifest error in giving reasons. The recourse may be limited further by requiring leave to apply to the supreme court.

Also in both systems, appeal is a balancing act between finality (*lites finiri oportet*) and correctness. The principle of finality is one of the main drivers of any one-shot proceeding in most commercial arbitrations and, until recently, ISDS arbitrations. The occasional ‘incorrect’ award was considered the price to be paid for maintaining the principle. That is no longer current thinking regarding ISDS, as concerns have arisen about correctness (and to some extent consistency) with a number of stakeholders in ISDS. An appeal mechanism may alleviate those concerns. The question then is what the scope and standard of review on appeal are. To put it in a very generalized way: a Civil Law system or a Common Law system?

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To that question may be added another: that of what an appellate body may do? For example:

- affirm the award;
- reverse the award;
- remit the award to the first–instance tribunal;
- modify the award; and/or
- substitute the first-instance award by its own award.

The treaties that the EU concluded with Canada, Singapore and Vietnam are closer to the Common Law scope and standard of review on appeal. For example, CETA provides in article 8.28.2:

> The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on:
>
> (a) errors in the application or interpretation of applicable law;
> (b) manifest errors in the 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).

Article 52(1) of the ICSID Convention contains the following grounds for annulment:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

The EU Model, therefore, has an appeal system that combines a traditional appeal in the Common Law sense with an annulment (setting-aside) action.

The questions whether and, if so, to what extent an appeal award can be subject to review are analysed in Section VIII.

VII. ENFORCEMENT OF AN APPEAL AWARD

A. *In General*

The question of interaction between a (potential) appeal mechanism and the ICSID and New York Conventions is particularly important for enforcement of an appeal award.

If the appeal award is made within the framework of the ICSID Convention, its enforcement is governed by article 54 (see Section IV.B). It provides for enforcement of 'the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'. No grounds for refusal can be invoked.

If the appeal award is made within the framework of the UNCITRAL Arbitration Rules or similar arbitration rules, its enforcement at the place where the award was made is governed by the arbitration law of that place, and in other countries by the New York Convention, in which case the grounds for refusal of enforcement contained in article V can be invoked.

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This is the scheme contained in the EU Model (treaties with Canada, Singapore and Vietnam). By way of example, as article 8.41 CETA ('Enforcement of awards')[98] applies to 'An award issued pursuant to this Section [F]', that article comprises both first-instance and appeal awards. Article 8.41 refers, in paragraphs 3(a) and 6, explicitly to enforcement under the ICSID Convention, and in paragraph 5 to the New York Convention.[99] The result is that there is no control by a national court in the case of ICSID appeal awards under CETA, while there is control by a national court on the basis of the grounds for refusal of enforcement listed in article V of the New York Convention in the case of other appeal awards under CETA.[100]

B. *Enforcement* Inter Se *and Third Countries*

An option is to include a self-contained regime for enforcement of the appeal award in the relevant IIA itself or in the treaty establishing the appeal mechanism (see Section V.D). However, such a solution will be effective only in the States party to the IIA or treaty concerned. Third countries who are not party to an IIA or a treaty are not bound by its enforcement provisions. That is markedly different for the New York Convention and the ICSID Convention, both of which have global coverage of more than 150 Contracting States. As a result, adoption of the self-contained enforcement regime by a large number of States would be required to make this regime effective.

As such adoption will probably take many years, it is more likely that the solution for enforcement of an award resulting from an appeal mechanism for ISDS is to be found by legally linking it in the IIA or separate treaty to either the ICSID Convention or the New York Convention. The incorporation by reference of the enforcement regimes of either the ICSID Convention or the New York Convention into an IIA or separate treaty requires careful attention to a number of specific characteristics of these two conventions. They will be analysed in turn below.

C. *Enforcement Issues under the ICSID Convention*

(i) *Enforcement of ICSID Awards in General*

Enforcement of an ICSID Convention award is provided for in article 54, which does not provide for grounds for refusal of enforcement:

> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

[98] For the full text of CETA (n 35), see <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 15 January 2019.

[99] A similar provision is contained in the EU–Singapore IPA (n 50) art 3.22 and in the EU–Vietnam IPA (n 50) art 3.57.

[100] CETA (n 35) does not contain a waiver of the grounds for refusal of enforcement in article V of the New York Convention (assuming that such a waiver would be possible, which is questionable).

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> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Notwithstanding the absence of grounds for refusal of enforcement in article 54, enforcement of ICSID awards has given rise to the question whether the equation to 'a final judgment of a court in that State' would subject the supposedly automatic enforcement to alleged requirements concerning the execution of local judgments.[101]

(ii) *ICSID's One Award Scheme*

As regards the enforcement in third countries of the award rendered on appeal in an ICSID setting under a bilateral or multilateral IIA, it is to be noted that under the ICSID treaty scheme only one award can be rendered, and that all other rulings, interim or partial, are considered to be 'decisions'.[102]

Taking into account ICSID's one award scheme, the solution may be to characterize all decisions of the first instance and appellate body as a (provisional) 'decision' and only the last decision on appeal as an 'award'.[103] A variation is that the appeal decision finally goes back to the first-instance tribunal that endorses it in the form of an award, which becomes enforceable as an ICSID Convention award. A similar solution is suggested by the ICSID Secretariat in the 2004 Discussion Paper regarding the possibility of an Appeals Facility:

> 8. An ICSID arbitral tribunal renders just one award, the final award disposing of the case. Earlier decisions of the tribunal will be deemed part of the award and subject at that stage to annulment and other post-award remedies. In some other systems of arbitration, including arbitration under the UNCITRAL Rules, interim decisions of the tribunal may be made in the form of awards and possibly challenged immediately. To avoid discrepancies of coverage between ICSID and non-ICSID cases, the Appeals Facility Rules might either provide that challenges could in no case be made before the rendition of the final award or allow challenges in all cases in respect of interim awards and decisions. It might be best to allow such challenges subject to certain safeguards. These could include a procedure for a party to proceed with the challenge only with permission of a member of the Appeals Panel, chosen in advance by the Panel members to perform this function, and a provision making it clear that the arbitration would continue during the challenge proceeding.
>
> 9. Under the possible Appeals Facility Rules, an appeal tribunal might uphold, modify or reverse the award concerned. It could also annul it in whole or in part on any of the grounds borrowed from Article 52 of the ICSID Convention. With the exceptions mentioned in the next sentence, the award as upheld, modified or reversed by the appeal tribunal would be the final award binding on the parties. If an appeal tribunal annulled

[101] James W Barratt and Margarita N Michael 'The 'Automatic' Enforcement of ICSID Awards: The Elephant in the Room?' *GAR* (29 October 2013) <https://globalarbitrationreview.com/chapter/1036801/the-'automatic'-enforcement-of-icsid-awards-the-elephant-in-the-room> accessed 15 January 2019.

[102] See Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, 2009) 812–81 at paras 24–303.

[103] To which may be added that if no appeal is taken within the prescribed period of time, the last 'decision' will automatically be converted to an 'award'.

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> an award or decided on a modification or reversal resulting in an award that did not dispose of the dispute, either party could submit the case to a new arbitral tribunal to be constituted and operate under the same rules as the first arbitral tribunal. The Appeals Facility Rules might, however, allow appeal tribunals in some such cases to order that the case instead be returned to the original arbitral tribunal.[104]

In the alternative (or additionally), the award of the ICSID appellate body may be enforceable under the New York Convention (see Section D(iv)). The drawback of this alternative is that the attraction of automatic enforcement of ICSID awards under article 54 of the Convention without grounds for refusal of enforcement is lost.

(iii) *The EU Model and Enforcement under the ICSID Convention*

The EU Model raises the question of whether the appeal award is enforceable under the ICSID Convention in third countries. An example is the EU–Vietnam IPA. Article 3.57(8) ('Enforcement of Final Awards') provides:

> For greater certainty and subject to subparagraph 1(b), where a claim has been submitted to dispute settlement pursuant to subparagraph 2(a) of Article 3.33 (Submission of a Claim [submission to the ICSID Convention]), a final award issued pursuant to this Section shall qualify as an award under Section 6 of Chapter IV of the ICSID Convention.

Subparagraph 1(b) of article 3.57 provides that 'Final awards issued pursuant to this Section … (b) shall not be subject to appeal, review, set aside or any other remedy'. The Section includes an award by an appeal tribunal. Actually, an award by the first-instance tribunal is called a 'provisional award' (article 3.53), which becomes final in the circumstance described in article 3.55 (no appeal; dismissal of appeal; modified or reversed on appeal; and remission to first-instance tribunal).[105] These provisions operate in the EU and Vietnam *inter se*, but it is an open question whether enforcement of the final award on appeal is enforceable as an ICSID Convention award in third countries. The use of the term 'provisional award' until a final award has been rendered, i.e. until after the possibilities on appeal have been exhausted, would indicate that the final award is intended to be one that is enforceable under the ICSID Convention in third countries.

D. Enforcement Issues under the New York Convention

The enforcement of an award resulting from a (potential) appellate mechanism that falls under the New York Convention may involve various issues.

(i) *Definition of 'Arbitral Award'*

A first issue is whether the award is an 'arbitral award' within the meaning of the New York Convention. The Convention itself does not provide a definition of what constitutes an 'arbitral award'. The answer depends on the law applicable to the (potential) appeal mechanism.

If the appellate mechanism is governed by a national arbitration law (e.g. in the case of use of the UNCITRAL Arbitration Rules), the answer is to be found in that law. It is generally accepted that the question whether a document constitutes

[104] ICSID Secretariat, *Discussion Paper* (n 40) paras 8–9.
[105] Similar provisions are contained in the draft of the EU–Mexico Agreement (n 46) art 31.

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an award is to be determined under the arbitration law applicable to the award, which is almost always the arbitration law of the place of arbitration.[106]

If the appeal mechanism is governed by treaty provisions (e.g. opt-in convention), an autonomous interpretation of the term 'arbitral award' in both the New York Convention and the treaty may provide the answer. It would seem appropriate to distinguish the notion of what constitutes an arbitral award from what is generally understood by arbitration in the national legal systems.[107]

(ii) *Permanent Arbitral Body (article I(2))*

In respect of a standing mechanism for investment disputes resolution established by a treaty, encompassing both levels or the appellate level only, it is argued that such a standing mechanism is a permanent arbitral body within the meaning of article I(2) of the New York Convention.[108] Article I(2) provides:

> The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

Textually, the argument appears to be correct, provided that the parties (investors and host States) have agreed to arbitration by the standing mechanism. According to the *travaux préparatoires*, the drafters had something else in mind.[109] Originally, the USSR had proposed inserting a provision to this effect in the United Nations Economic and Social Council (ECOSOC) Draft Convention of 1955, but the Committee deemed such a provision unnecessary.[110] At the beginning of the New York Conference of May–June 1958, the Czechoslovak delegate took up the USSR proposal, arguing that he did not agree that it was unnecessary and that it would tend to strengthen the Convention and help in avoiding certain difficulties that had been encountered in the past and might arise again in the future.[111] An entire session was devoted to this proposal.[112] The crucial question was whether the proposal would include permanent tribunals to which parties were obliged to submit their disputes (so-called compulsory arbitration). The Czechoslovak delegate emphasized that his proposal envisaged voluntary arbitration only. The Conference decided then to add 'to which the parties have voluntarily submitted'. Upon instigation of the Drafting Committee, the word 'voluntarily' was subsequently deleted, as it was considered redundant.[113]

It is submitted that a decision by a standing mechanism would have been an 'arbitral award' falling under the Convention even without the support of article

[106] Van den Berg, *The New York Convention 1958* (n 70) 19–22.

[107] ibid 44. See also Bernd Ehle, 'Criteria Qualifying a Decision as an Arbitral Award' in Reinmar Wolff (ed), *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Commentary* (2012) 34–5, paras 30–3.

[108] Kaufmann-Kohler Potestà Report (n 78) paras 148–55.

[109] See Van den Berg (n 70) 379–80.

[110] ECOSOC 'Report of the Committee on the Enforcement of International Arbitral Awards' (1955) UN Doc E/2704 and Corr 1 para 25.

[111] ECOSOC 'Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards-Belgium, Czechoslovakia, United Kingdom: additional provision to be included in the draft Convention' (1958) UN Doc E/CONF.26/L.10 and Rev 1.

[112] ECOSOC 'Summary Record of the Eight Meeting-Consideration of the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1958) UN Doc E/CONF.26/SR.8.

[113] ECOSOC 'Summary Record of the Twenty-Third Meeting-Consideration of other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes' (1958) UN Doc E/CONF.26/SR.23. Article I(2) is considered superfluous by, *inter alia*, P Sanders, in 'Commentary' (1976) I ICCA YB 207.

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I(2). What is essential is an arbitration agreement regarding the standing mechanism.

(iii) *Application to A-national Award*

If an award resulting from a (potential) appeal mechanism is not governed by a national arbitration law, the question is whether such an award can be enforced under the New York Convention.

The question whether an award can be enforced under the New York Convention without reference to an applicable arbitration law is answered in the affirmative by the Dutch Supreme Court and a US Court of Appeals.[114] Both decisions concerned a so-called 'a-national' award (sometimes called a 'trans-national', 'stateless' or 'floating' award). This is an award resulting from an arbitration that is detached from the ambit of a national arbitration law by means of either a special agreement of the parties (in the Dutch case) or a special treaty (in the US case).[115] Such arbitration, also called 'de-nationalized' arbitration, rarely occurs in practice.[116]

Without an applicable (national) arbitration law, there is no longer an authority supervising the award in setting aside proceedings (including the validity of the arbitration agreement, due process, excess of authority). The control is then left to the enforcement courts under the New York Convention, possibly in multiple countries, provided that the enforcement courts accept the applicability of the Convention to a-national awards.[117]

Practice, however, wishes to retain the possibility of setting aside the award in the country where it was made.[118] Exclusion of the possibility of having an award set aside would also lead to the incongruous situation in which an ICSID award can be annulled by the *ad hoc* Committee and enforced without scrutiny by the courts, while an UNCITRAL ISDS award cannot be annulled (set aside), and enforcement is subject to the grounds for refusal of enforcement under the New York Convention in multiple fora.

It is sometimes argued that it is possible to construe the phrase 'the law applicable to the arbitration' in article 1(2)/(3) of the UNCITRAL Arbitration Rules as permitting to agree on an arbitration without an applicable (national) arbitration law (see Section IV.C). In support of that argument, reference is made to the Iran–US Claims Tribunal in The Hague, which operates under the Algiers Claims Settlement Declaration of 1981 and which adopted an amended version of

[114] Hoge Raad [Supreme Court] (26 October 1973) *SEEE v Yugoslavia*, (1976) I ICCA YB Commercial Arbitration 196 (Netherlands 2B); US Court of Appeals for the 9th Circuit, 23 October 1989, *Gould v Iran*, (1990) XV ICCA YB Commercial Arbitration 605–10 (US 100).

[115] The Dutch case concerned an arbitration clause providing for two arbitrators, while the applicable arbitration law of the place of arbitration (Canton Vaud in Switzerland) required mandatorily an uneven number of arbitrators. The agreement for two arbitrators was considered to elevate the arbitration to a 'de-nationalized' arbitration. The US case involved arbitration as provided by the Algiers Accords of 1981, which, following the hostage crisis in Iran, established the Iran–US Claims Tribunal.

[116] See Van den Berg, *The New York Convention 1958* (n 70) 28–43. The author has aligned his view to that of the Dutch and US courts referred to in nn 114 and 115. See also Kaufmann-Kohler Potestà Report (n 78) paras 156–7.

[117] The question whether the control in a setting aside action before a national court can be replaced by an appellate body in a treaty is considered in s VIII.

[118] Switzerland, for example, is one of the few countries in which parties may agree to exclude the action for setting aside the award. It appears that in practice parties rarely agree to an exclusion agreement. See Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award Be Abolished?' (2014) 29(2) ICSID Rev—FILJ 1–26. Other countries in which setting aside can reportedly be excluded by agreement of the parties are: Belgium, France, Panama, Peru, Sweden and Tunisia: see *UNCITRAL Secretariat Guide on the New York Convention* (2016) 21.

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the UNCITRAL Arbitration Rules.[119] It is controversial whether Dutch arbitration law applies, even though the Iran–US Claims Tribunal deposits its awards with the registry of the District Court at The Hague.[120]

(iv) *Residual Application of the New York Convention to ICSID and Other Awards*

A notorious question is whether an ICSID award can be enforced under the New York Convention (a question herein referred to as the residual application of the New York Convention). That question is relevant for enforcement of an ICSID award in a country that is not party to the ICSID Convention but is party to the New York Convention, or where the enforcement concerns non-pecuniary obligations.[121]

The (potential) appeal mechanism for ISDS awards adds a similar question with respect to the case in which two States have amended the ICSID Convention *inter se* for the purposes of the appeal mechanism and enforcement of the award resulting from the appeal mechanism is sought in a third country (see Section V.B). The third country is not bound by the amendment of the ICSID Convention and hence the award may not be enforceable under the ICSID Convention in that third country. The question then is whether the appeal award can be enforced under the New York Convention.

This question is not hypothetical. It was noted previously that it is doubtful that a final award on appeal under the EU–Vietnam IPA can be enforced as an award under the ICSID Convention in third countries [see Section VII.C(iii)]. If such an enforcement is legally not possible under the ICSID Convention, the remaining option may be to enforce the award under the New York Convention.

It is submitted that enforcement of an ICSID award in these cases is possible under the New York Convention.[122] The New York Convention applies to the enforcement of an award made in another State. Arbitration proceedings under the ICSID Convention are conducted in Washington or another place as agreed by the parties.[123] The place of the proceedings is also the place where the award is made, unless the tribunal has indicated otherwise. That place meets the description of the field of application in the first sentence of paragraph 1 of article I of the New York Convention of enforcement of an award made in the territory of another (Contracting) State.[124] The text of that provision does not contain any other requirement for the applicability of the Convention than that it is made in the territory of another (Contracting) State.

The arbitration and award under ICSID are governed by a treaty only (the ICSID Convention or its *inter se* amended version). As noted in Section VII.D(iii),

[119] Iran-United States Claims Tribunal 'General Documents', <https://www.iusct.net/Pages/Public/A-Documents.aspx> accessed 15 January 2019.

[120] Albert Jan van den Berg, 'Proposed Dutch Law on the Iran–US Claims Settlement Declaration', Intl Business Lawyer (1984) 341–4.

[121] ICSID Convention (n 3) art 54(1) is limited to enforcement of pecuniary obligations. See text quoted above.

[122] See Schreuer (n 102) 1118 at para 5, arguing that the question should be dealt with by analogy to Additional Facility awards; Van den Berg (n 70) 99–100; David Quinke, in Wolff (ed) (n 107) 482–3; *contra*, Bernd Ehle, ibid 75 and references given (the reference to 'van den Berg, (1986) 2 Arb. Int'l 213, 214' is in error as the passage concerns merely a description of the self-contained system of the ICSID Convention).

[123] ICSID Convention (n 3) arts 62–3.

[124] New York Convention, art 1(1) provides in the relevant part: 'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.'. The limitation to an award made in another Contracting State applies if the enforcement State has availed itself of the reciprocity reservation of art I(3) of the New York Convention ('When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.').

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courts have interpreted the New York Convention as not requiring a link between the arbitration and award and the national arbitration law of the place where the award was made. Courts have also interpreted the New York Convention as being applicable to awards rendered under a treaty only (e.g. the Algiers Accords of 1981).[125] Within that perspective, an award made under the ICSID Convention or an *inter se* amended version would fall under the New York Convention if the award is made in a country other than that in which enforcement is sought.

In the alternative, the award can be considered 'non-domestic' under the second sentence of paragraph 1 of article I of the New York Convention.[126] However, the alternative is less certain, because the second option is discretionary in that an enforcement court may, but is not obliged to, consider an award 'non-domestic'.[127]

The residual application of the New York Convention may require further interpretation of the Convention's provisions:

- Article V(1)(a) refers, for the validity of the arbitration agreement, to 'the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'. The term 'the law' in this definition may be interpreted as referring to the ICSID Convention or its *inter se* amendment.
- Article V(1)(d) refers to 'the law of the country where the arbitration took place' for matters pertaining to the composition of the tribunal and the arbitral procedure to the extent that the parties have not agreed on these matters. The agreement on these matters can be regarded as being encompassed by the ICSID Convention or its *inter se* amendment.
- Article V(1)(e) refers to a setting aside of the award by 'a competent authority of the country in which, or under the law of which, that award was made.' In the case of the ICSID Convention, the *ad hoc* Committee deciding on annulment can be regarded as the 'competent authority'. In the case of an *inter se* amendment of the ICSID Convention, the appellate body can be considered to be the equivalent of the 'competent authority', provided that the text of the inter se amendment is appropriately worded. The term 'or under the law of which' may be interpreted as referring to the ICSID Convention or its *inter se* amendment.[128]

While the residual application of the New York Convention is permitted with respect to an award rendered under the ICSID Convention or an *inter se* amendment, enforcement under the New York Convention means that there is a control by national courts over the award within the framework of the grounds for refusal of enforcement set forth in article V of the Convention. Whether those grounds for refusal of enforcement can be waived is examined at Section (viii) below.

[125] See nn 114–115.

[126] New York Convention, art 1(1) provides, in the relevant part: 'It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

[127] For the meaning of the term 'non-domestic', see Van den Berg (n 70) 22–8.

[128] The origin of the term 'or under the law of which' is a theoretical possibility offered by the Convention's drafters to agree on an arbitration law that is different from the arbitration law of the place of arbitration: see Van den Berg (n 70) 23–4, 350.

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(v) *Commercial Reservation [article I(3)]*

Another issue is whether an award, whether rendered at first instance or on appeal, can be considered 'commercial' within the meaning of article I(3) of the New York Convention:

> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof any State may .... declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

The commercial reservation is made by approximately one third of the Contracting States to the New York Convention.

It is questioned whether an award resulting from an investment dispute can be considered 'commercial'.[129] According to the text of article I(3), this would depend in the first place on the law of the country where enforcement is sought. Under many national laws, matters concerning expropriation are considered as pertaining to administrative law rather than commercial law.

A number of IIAs attempt to solve this question by including an express provision to the effect that the ISDS award is considered as 'commercial' for the purposes of enforcement under the New York Convention.[130]

(vi) *Arbitration Agreement [article II(1)–(2)]*

The New York Convention requires an arbitration agreement in writing (article II(1)–(2)). If an arbitration agreement referred to in article II is lacking, enforcement of the award may be refused under ground (a) of article V(1) of the New York Convention.

Article II(2) of the New York Convention contains strict requirements regarding the written form of the arbitration agreement: 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' For avoidance of doubt, certain IIAs stipulate explicitly that consent and the submission of the claim shall be deemed to satisfy the requirements of article II of the New York Convention for an 'agreement in writing'.[131]

(vii) *Binding Award [article V(i)(e)]*

The question here is whether a first-instance award can be enforced under the New York Convention pending arbitral appeal or during the period of time for lodging the appeal. The relevant provision of the Convention is article V(1)(e):

[129] See Schreuer (n 102) 1122 at para 19: 'The underlying transaction may be classified as commercial but the host State's act leading to the dispute, an expropriation or other act of public authority, may be classified differently. This may lead an enforcing authority to believe that the legal relationship is not commercial in the sense of a declaration made under art I(3) of the New York Convention.'

[130] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) (ECT) art 26(5)(b); USMCA (n 39) art 14.D.13(13); NAFTA (n 5) art 1136(7).

[131] See, for example, the EU–Singapore IPA (n 50) art 3.6(2):

> 2. .... The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of:
>
> (a) ...
>
> (b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (hereinafter referred to as the "New York Convention") for an "agreement in writing".

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> 1.Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that
>
> ...
>
> *(e)* The award has not yet become binding on the parties ...

The Convention's predecessor, the Geneva Convention of 1927, required that the award had become 'final' in the country of origin. The word 'final' was interpreted by many courts at the time as requiring a leave for enforcement (*exequatur* and the like) from the court in the country of origin. Since the country in which enforcement was sought also required leave to enforce, the interpretation amounted in practice to the system of the so-called 'double *exequatur*'. The drafters of the New York Convention, considering this system too cumbersome, abolished it by providing the word 'binding' instead of the word 'final'. Accordingly, no leave to enforce in the country of origin is required under the New York Convention. This principle is almost unanimously affirmed by the courts.

Courts differ, however, with respect to the question whether the binding force is to be determined under the law applicable to the award or in an autonomous manner independent of the applicable law. Indeed, a number of courts investigate the applicable law in order to find out whether the award has become binding under that law.

Other courts interpret the word 'binding' without reference to an applicable law. An argument in support of the autonomous interpretation is that if the applicable law provides that an award becomes binding only after leave to enforce is granted by the court, the 'double *exequatur*' is in fact re-introduced into the Convention, thus defeating the attempt of the drafters of the Convention to abolish this requirement.[132] Further, the autonomous interpretation has the advantage that it dispenses with compliance with local requirements imposed on awards, such as deposit with a court or even leave to enforce from the court in the country of origin, which requirements are unnecessary and cumbersome for enforcement abroad.

In the first place, the autonomous interpretation contemplates the agreement of the parties as to when an award acquires binding force.[133] Such an agreement is usually contained in arbitration rules.[134]

In the second place, the autonomous interpretation envisages that, failing agreement of the parties on the binding force, the award becomes binding on the parties within the meaning of article V(1)(e) of the New York Convention as of the moment when it is no longer open to a genuine appeal on the merits to a second arbitral instance or to a court.

The autonomous interpretation is in particular helpful for an appeal mechanism. The IIA can set forth whether a first-instance award can be enforced pending

[132] See eg High Court of Justice, Queen's Bench Division, Commercial Court, 27 July 2011, D*owans Holding v Tanzania Electric Supply* [2011] EWHC 1957 (Comm) reported in (2011) XXXVI ICCA YB Commercial Arbitration 363–6 (UK 93 sub 11–26).

[133] Van den Berg (n 70) 341–6.

[134] See eg UNCITRAL Arbitration Rules (n 49) art 34(2): 'All awards .... shall be final and binding on the parties'.

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arbitral appeal or the period of time for lodging the appeal. If no such provisions are contained in the IIA (or rules of procedure issued thereunder), the fall-back interpretation can be relied upon, i.e. the award becomes binding at the moment when it is no longer open to an appeal.

(viii) *Waiver of Grounds for Refusal of Enforcement (article V)*

Can the grounds for refusal of enforcement in article V of the New York Convention be waived in respect of enforcement of an award resulting from an appeal mechanism? This is an issue that arises under the EU Model, which appears to attempt to exclude the grounds for refusal of enforcement.[135]

If the exclusion in the EU Model is an amendment of the New York Convention *inter se* (i.e. between the EU and the other Contracting State) it may be effective in the EU and the other State Party to the treaty but not in third countries party to the New York Convention.

If the exclusion in the EU Model is a waiver of the grounds for refusal of enforcement implied in the consent by the investor and the host State to arbitration, it is doubtful whether such a waiver of all grounds for refusal of enforcement is legally possible and acceptable to third countries.

Two types of waiver are generally recognized by the enforcement courts in the Contracting States to the New York Convention. The first type is the untimely objection to jurisdiction for lack of a valid arbitration agreement. Many laws and arbitration rules provide that the objection must be raised prior to submitting a defence on the merits in the arbitration.[136] The enforcement courts recognize that the untimely raising of the objection precludes a respondent in an enforcement action from relying on article V(1)(a) of the New York Convention, which contains the ground for refusal of enforcement that there is no valid arbitration agreement.[137]

The second type is the waiver of objecting to an irregularity in the arbitration. Many arbitration laws and arbitration rules provide for a waiver of the right to object if a party fails to object promptly to any non-compliance with the procedural rules or a requirement of the arbitration agreement.[138] Again, the enforcement courts recognize that the untimely raising of the objection precludes a respondent in an enforcement action from relying on article V(1)(b) of the New York Convention, which contains the ground for refusal of enforcement that a party's right to due process has been violated.[139] The same applies to objecting to irregularity in the composition of the tribunal or arbitral procedure, which is a ground for refusal of enforcement under article V(1)(d) of the Convention.

It is theoretically conceivable to waive or contract out of other grounds for refusal of enforcement listed in paragraph 1 of article V because they are to be

[135] The EU–Singapore IPA (n 50), for example, provides in art 3.22(2) that 'Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligations within its territory as if it were a final judgment of a court in that Party'. That is language copied from art 54 of the ICSID Convention. The words 'as if it were a final judgment of the court in that Party' mean that no grounds for refusal of enforcement may be invoked against enforcement of the award. That is the situation under art 54 of the ICSID Convention. However, art 3.22 ('Enforcement of Awards') applies not only to enforcement of award rendered within the framework of the ICSID Convention (see art 3.22(6) of the EU–Singapore IPA) but also to enforcement of awards rendered within the framework of the New York Convention (see art 3.22(5)). See also the draft of the EU–Mexico Agreement (n 46) art 31.

[136] eg UNCITRAL Model Law art 16(2); UNCITRAL Arbitration Rules (n 49) art 23(2).

[137] See Court Decisions on the New York Convention (n 4) ¶ 303.

[138] eg UNCITRAL Model Law art 4; UNCITRAL Arbitration Rules (n 49) art 32.

[139] See (n 137).

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asserted and proven by the party against whom enforcement is sought. Thus, parties can waive or contract out of the right to seek refusal of enforcement with respect to an award in which the tribunal has awarded more or different from what was claimed [article V(1)(c)], or an award that has not become binding or, though questionable,[140] an award that has been set aside by the court in the country where it was made [article V(1)(e)].

The possibility of a waiver of the setting aside action in the country in which the award is made is of little help, as only a few countries allow parties to agree to such a waiver.[141]

In any event, the grounds for refusal of enforcement in paragraph 2 of article V of the New York Convention are legally not capable of being waived or contracted out of. These grounds concern public policy, which the enforcement court can apply on its own motion.

To the extent that the exclusion in the EU Model is to be considered a waiver of the grounds for refusal of enforcement implied in the consent by the investor and the host State to the arbitration, the issue is whether the text of the waiver in the EU Model is sufficiently clear to constitute a waiver. Under many laws, waiver requires specific language. The EU Model seems to lack such language with respect to the grounds for refusal of enforcement under the New York Convention.

It appears, therefore, that third countries are not bound by the (implied) waiver provisions in the EU Model in enforcement actions under the New York Convention in respect of awards resulting from the appeal mechanism.

VIII. ANNULMENT (SETTING ASIDE) OF AN APPEAL AWARD

When considering a (potential) appeal mechanism and its interaction with the ICSID and New York Conventions, a further issue is whether the decision rendered by the appellate body itself is subject to annulment or setting aside.

If the appeal mechanism has functioned within the framework of the ICSID Convention, the annulment would be governed by the above-quoted article 52 of the ICSID Convention, unless an *inter se* amendment provides otherwise.[142] If the appeal mechanism has operated within the framework of the UNCITRAL Arbitration Rules or similar rules, the appeal award is subject to a setting-aside action before the national courts of the country in which the award was made—again,[143] unless an *inter se* amendment provides otherwise.[144]

As noted, drafters of appeal mechanisms attempt to exclude the annulment or setting-aside action regarding the appeal award, reasoning that two rounds of review are sufficient. They believe that setting aside (annulment) can be integrated into the appeal. An example is the EU–Singapore IPA and the EU–Vietnam IPA.[145] CETA has a similar provision in article 8.28(2) ('Appellate Tribunal') of

[140] See Albert Jan van den Berg, *Enforcement of Annulled Awards?*, (1998) 9(2) ICC Intl Ct Arb Bull15–21.
[141] See (n 118).
[142] See above.
[143] Typical grounds for setting aside (annulment) set forth in a national arbitration law are the grounds listed in the UNCITRAL Model Law 1985/2006 art 34.
[144] See above.
[145] EU–Singapore IPA (n 50) art 3.22(1); EU–Vietnam IPA (n 50) art 3.57(1)(a).

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CETA, quoted at Section VI, which contains appeal grounds for both a review of the merits and for annulment of the first-instance award.

Yet, CETA appears to be internally inconsistent with respect to recourse to annulment at ICSID and setting aside before national courts regarding the appeal award (which in CETA is called 'final award by the Appellate Tribunal').[146] In the part concerning the Appellate Tribunal, article 8.28(9)(b) provides: 'a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section'.[147] However, in the part concerning enforcement of the final award, annulment by an *ad hoc* Committee under article 52 of the ICSID Convention and setting aside by a national court appear to be contemplated by article 8.41(3) ('Enforcement of awards'):

> A disputing party shall not seek enforcement of a final award until:
>
> (a) in the case of a final award issued under the *ICSID Convention*:
>
> (ii) *120 days* have elapsed from the date the award was rendered and no disputing party has requested *revision or annulment* of the award; or
> (iii) enforcement of the award has been stayed and *revision or annulment* proceedings have been completed;
>
> (a) in the case of a final award under the ICSID Additional Facility Rules, the *UNCITRAL Arbitration Rules*, or any other rules applicable pursuant to Article 8.23.2(d):
>
> (ii) *90 days* have elapsed from the date the award was rendered and no disputing party has commenced a proceeding *to revise, set aside or annul* the award; or
> (iii) enforcement of the award has been stayed and a *court* has dismissed or allowed an application *to revise, set aside or annul* the award and there is no further appeal. (emphasis added)

It is a difficult question whether it is desirable that the award of an appellate body be subject to an annulment or setting-aside action. On the one hand, two rounds of dispute settlement would seem to suffice. On the other hand, in pursuit of the tenet of correctness, an appeal tribunal reviews the merits *de novo* or to a limited extent (in addition to a review of procedural integrity as is characteristic for annulment).[148] Should the merits review on appeal be subject to a review of procedural integrity in the same manner as the first-instance award? The maxim *Quis custodiet ipsos custodes?* [Who will guard the guards themselves?] may apply here.

The answer to the question of who guards the guards is compounded by the fact that if enforcement of the appeal award is governed by the ICSID Convention, the national court does not engage in any review of the award, but if enforcement of the appeal award is under the New York Convention, the national court supervises

[146] CETA (n 35) art 8.28(9)(d).
[147] The term 'this Section' refers to Section F that covers 'Resolution of investment disputes between investors and states.' Section F covers both first instance awards rendered by the Tribunal and appeal awards rendered by the Appellate Tribunal. Somewhat confusingly, art 8.41 ('Enforcement of awards') provides in para 3(b)(ii) that 'enforcement of the award has been stayed and a *court* has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.' (emphasis added)
[148] See s VI.

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the award within the framework of the grounds for refusal of enforcement set forth in article V.

IX. CONCLUDING OBSERVATIONS

The ICSID and New York Conventions are crucial for the effective functioning of a (potential) appeal mechanism for ISDS, in particular with respect to enforcement on a worldwide basis. Interaction of such mechanism with either Convention should be considered carefully.

As we have seen, a (potential) appeal mechanism basically has three forms:

(i) appellate body in a bilateral IIA;
(ii) appellate body in a stand-alone opt-in convention; and
(iii) appellate body as an integral part of a MIC.

Form (i) can be envisaged for new IIAs. Less realistic is achieving an amendment of existing IIAs for the addition of an appellate body. Form (ii) is suitable for existing IIAs, as it does not require an amendment of the IIAs as such and is based on a voluntary opt-in method if it is limited to an appeal mechanism. Form (iii) can be envisaged for new IIAs, but would require an amendment of existing IIAs because the MIC includes a first-instance tribunal that would replace the existing ISDS in the IIAs.

All three forms raise complex questions regarding their interaction with the ICSID and New York Conventions. Under the ICSID Convention the one award scheme raises issues for an appeal mechanism.[149] The New York Convention raises a whole host of issues: definition of an arbitral award; what a permanent arbitral body is; whether an a-national award fall under the Convention; whether there is a residual application to ICSID awards; whether investment arbitration falls under the commercial reservation; whether the definition of an arbitration agreement in writing is fulfilled; when an award made at first instance is 'binding' under the Convention; and whether the grounds for refusal of enforcement can be waived.[150] Appropriate and careful treaty design appears to be a challenge for the drafters. To draft legally suitable and workable solutions is a daunting task.

If an appeal mechanism is to be established, it seems that the ICSID Convention is the preferred legal platform for building the mechanism, mainly because it is a treaty dedicated to investment arbitration and does not involve supervision and interference by national courts in enforcement and setting aside proceedings.[151] In that regard, it is critical for enforcement of an appeal award in third countries that an *inter se* amendment of the ICSID Convention is drafted in such a way that the appeal award can be considered an award for the purposes of article 54 of the ICSID Convention.[152]

Appeal may improve correctness of the decision, but not necessarily the accuracy.[153] It may also enhance predictability of the interpretation of the same or

[149] See above.
[150] See s VII.D.
[151] See above. Provided that the issue of who guards the guards can be resolved.
[152] See above. A residual application of the New York Convention may come to the rescue in the event of the inapplicability of the ICSID Convention's enforcement regime.
[153] See Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power (2017) 32 ICSID Rev 528–44.

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similar standard of substantive protection. However, the tenet of predictability is only relative, as most cases are fact driven, and also due to the differing treaty standards among the more than 3,300 IIAs.[154]

It is, therefore, regrettable that, as noted, UNCITRAL Working Group III has excluded consideration of unification of the substantive standards.[155] No doubt that, as Stephan Schill argues in his brilliant PhD thesis of 2009, a 'multilateralization' of IIAs through convergence by interpretation occurs.[156] Indeed, not all differences in formulation result in a difference of meaning. But that is as far as it goes. A tribunal is bound by the intent of the State Parties to an individual IIA who negotiated the specific treaty language. There are differences in treaty language. The example given above is the differing provisions regarding the FET standard.[157] A MIC cannot bridge those differences by a holistic interpretation, treating the differing texts as though they are virtually the same.[158] If that were the mandate of a MIC, States might be reluctant to agree to an institution with such a mandate as it would be prone to undermining the specific meaning of the treaty provisions that they have negotiated with each other. The concept of a MIC is worth exploring, but it requires a prior unification of the substantive protection standards.

Finally, 'legitimacy' is frequently used as a reason for introducing an appeal mechanism. The perception that a second–instance tribunal has reviewed the decision of a first–instance tribunal contributes undoubtedly to its acceptability. A closer look at the legitimacy argument in the ISDS context, however, reveals that it rather concerns the arbitrators, their ethics and the method of their appointment. It is submitted that the criticism is justified in large part. There are issues in the current ISDS with neutrality of party-appointed arbitrators, with repeat appointments, with 'double hatting', and with the fee structure. Recent IIAs and model BITs take this criticism into account. An example is the 2018 Dutch Model Investment Agreement: no longer party-appointed arbitrators but appointment of all arbitrators by an appointing authority from a panel; serious provisions regarding ethics; prohibition of 'double hatting'; and one fee for all: the ICSID fee schedule.[159] These and similar measures can correct many of the shortcomings of the current ISDS. They can be considered as creating an ISDS 2.0. When these and similar measures are implemented, is it necessary to adopt a time-consuming and expensive appeal mechanism for reasons of legitimacy?

[154] See s II.
[155] See above.
[156] Stephan Schill, *The Multilaterization of International Investment Law* (2009).
[157] See above.
[158] This seems to be the view of Colin Brown in support of the MIC (n 95) at 680–1.
[159] Dutch Model Investment Agreement (2018) (n 34) art 20, available at <https://www.rijksoverheid.nl/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden> accessed 15 January 2019.

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