

Towards a new way to settle disputes between states and investors

May 2015

The European Commission published on January 13th 2015 the results of its public consultation pertaining to investor to state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP). Building on the Commission report that outlined four areas of improvement, on an in-depth analysis carried on national level and on productive intergovernmental discussions since January, the French authorities hereby submit to the European Commission several proposals which aim at providing possible drafting to contribute to the on-going reflection for the improvement of investment protection and dispute settlement provisions in future EU agreements. These proposals rely on four main axes:

- I. **securing States' sovereign right to regulate:** the core concepts of investment protection agreements shall not be subject to interpretations that may jeopardize democratically legitimate public choices;
- II. **establishing a new institutional framework:** a new permanent court for EU treaties, designed to review arbitral awards and to administer a dedicated roster of arbitrators, is needed and would be the backbone **a future multilateral permanent court**;
- III. **enhancing ethical requirements for arbitrators and improving the functioning and transparency of arbitral tribunals;**
- IV. **clarifying the relationship between arbitration and local remedies.**

The creation of a new institutional framework is crucial: the present proposal pursues the aim of creating an **ambitious** and **yet doable** permanent court. Given the swift changes in global trade and the growing need for stable institutions which are able to settle dispute between States and investors, it is of utmost importance to conceive a new system that can be implemented on the short or medium term and takes into account the already existing multilateral mechanisms, like ICSID. The institutional proposal builds on the existing legal framework so as to constitute the future backbone of a future multilateral court that would be in charge of first resort awards and appeal.

The objective of these proposals is **to create a new way to settle disputes between States and investors**. Among these proposals, some are based on provisions already contained existing treaties and others are new. This document will be amended and completed by the French authorities over the course of the discussions pertaining to the establishment of these new standards.

This paper is without prejudice to France's positions on domestic or international commercial arbitration. France considers that the specificities of investment disputes involving States need to be taken into account: the means of settling disputes in this area needs to respect the principle of national sovereignty, which justifies a shift towards its "institutionalization".

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I. Protection of the right to regulate

The interpretation of core substantial provisions set forth under investment agreements shall not reduce the ability of governments to regulate for legitimate and rationale public purposes. To this end, the States' right to regulate should be further secured by:

- **clarifying core substantial provisions in light of the right to regulate**, such as "fair and equitable treatment" and "legitimate expectations", non-discrimination clauses and expropriation;
- **strengthening States' right to interpret the protection standards** of an agreement even after its entry into force;
- **extending general exceptions to investment protection disciplines**;
- **ensuring compliance to domestic laws and regulations by foreign investors**;
- **securing the States' financial sovereignty**, i.e. the right to restructure and reschedule sovereign debts and to engage in bank resolution mechanisms, when needed.

(1) Clarifying core substantial standards in light of the right to regulate

The protection of investors' "**legitimate expectations**" is regularly mentioned, either in arbitral case law or recent treaty practice, as one of the component of the fair and equitable treatment (FET) standard. While the draft EU agreements currently negotiated already encompass useful guidance as to their meaning and scope, it shall be further clarified that those "legitimate expectations" should not be interpreted as a so-called "stabilization clause" which would undermine the States' right to regulate and to implement legitimate public policies. To this end, the FET provision should explicitly state that **investors cannot expect that laws will remain unchanged and that they cannot rely on the concept of "legitimate expectations" to challenge a mere change of law, even if such a change caused a significant loss of profit**.

In order to clarify the scope of the protection of foreign investors' legitimate expectations, the following wording may be considered:

When applying the fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor could reasonably rely in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. For greater certainty, a covered investor may not claim that its expectations were either frustrated or breached due to a mere change of legislation, including when such change led to a significant loss or decrease of profit margins.

By virtue of the **non-discrimination standards** routinely inserted into investment protection agreements, host States shall afford foreign investors treatment no less favourable than the treatment accorded, in like circumstances or situation, to their domestic investors (national treatment) or to investors originating from a third country (most-favoured nation treatment). While most investment treaties do not explicitly say so, it is now widely accepted by arbitral tribunals that

investors can be treated differently provided such differentiation is the result of rationale regulatory distinctions, by opposition to a genuine nationality-based discrimination. Accordingly, in order to further secure the States' right to regulate, the **national and most-favoured nation treatment provisions should explicitly specify that differences in treatment between investors are allowed where necessary to achieve legitimate public policy objectives**. To this end, the following wording may be considered:

For greater certainty, the “treatment” referred to in this provision shall not prevent differences in treatment between investors resulting from rationale regulatory distinctions necessary to achieve legitimate public policy objectives.

The meaning and scope of the notion of **indirect expropriation** may have important consequences on governments' ability to regulate. Current EU draft agreements already encompass, in a specific annex, useful guidance as to the boundaries of indirect expropriation measures. However, **further clarifications should be considered in order to secure the States' right to regulate in relation to potential indirect expropriation claims by foreign investors**. To this end, additional guidance should be provided as to (i) the threshold above which a measure should be deemed as having the same consequences as a direct expropriation and (ii) the specific “carve-out” regarding measures of general application in the field of health, environment or other public policy purposes. Based upon the “Expropriation Annex” of the CETA, the following wording may be considered:

1. Expropriation may be either direct or indirect:

- (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
- (b) indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure, to the extent that the benefits which the investor could have expected disappear and the investment is deprived of all utility.

[...] 3. For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive and where a covered investor faces a prejudice which is not suffered by other investors in like circumstances¹, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

¹ This wording is derived from the regime of State's liability for legislative action under French law according to which an individual claimant may be eligible to compensation if the damage suffered due to the enactment and implementation of a law is “special” and “abnormal”.

Finally, the following horizontal clause, inserted into the agreement's Preamble, would make clear that **foreign investors should not receive better substantive rights than domestic investors where an equal level of protection under domestic law is already provided**:

Considering that foreign investors should not receive greater rights than those guaranteed by the domestic law of the Party where they invest provided that it reflects the principles and standards of investments protection set forth by this Agreement.

(2) Strengthening States' right to interpret the protection standards of an agreement even after its entry into force

States shall be able to interpret the protection standards after it has entered into force: as contracting Parties, they shall retain the right to review the interpretation. The following wording may be considered in order **to secure the Contracting Parties' power to agree for binding interpretations of the agreement**:

Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation shall have binding effect from the date of entry into force of this Agreement or from a specific date to be determined by the Trade Committee, taking into account the possible consequences of this interpretation on pending proceedings under this Chapter. A decision of the Trade Committee concerning the interpretation of this Agreement shall not affect final awards rendered before such decision has been made and in respect of which no appeal or annulment procedure is admissible.

(3) Extending general exceptions to investment protection provisions

The right balance between the States' right to regulate and foreign investors' interests should be appropriately fostered through general exception provisions. Current EU draft investment agreements already incorporate the general exceptions set forth under GATT Article XX. However, those general exceptions, as they are currently drafted, are only relevant for sections 2 (Establishment) and 3 (Non-discrimination) of the Investment Chapter and do not cover investment protection provisions. The current scope of application of those general exceptions is therefore too narrow. Accordingly, the general exceptions should also apply to the investment protection provisions (or at least to some of them²) in order to appropriately secure the States' right to regulate. Furthermore, it is questionable whether the chapeau and the various sub-paragraphs of GATT Article

² It is suggested that the general exceptions should apply to investment protection provisions, with exception of core provisions of the fair and equitable standard (*i.e.* denial of justice, breach of due process, arbitrary conduct, etc.) which should not be derogated from even in case of a measure adopted for environment, health or other public purpose reasons. To the contrary, it is not excluded that a potential breach of an investor's legitimate exceptions may be justified or excused under particular circumstances.

XX may be applied *mutatis mutandis* to investment matters. The drafting of the general exception provision should therefore be modified, as envisaged below:

Subject to the requirement that such measures are not applied in a manner inconsistent with the stipulations pertaining to fair and equitable treatment or as means of arbitrary discrimination or disguised restriction to foreign investors, nothing in this agreement shall be construed to prevent the adoption or enforcement by a Contracting Party of measures necessary:

- (a) to protect public morals, or to maintain public order and security in case a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;
- (b) to protect human, animal or plant life or health;
- (c) to protect and implement social and labour law standards;
- (d) for the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (e) to secure compliance with laws or regulations which are not inconsistent with this agreement, including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety.

(4) Preserving the financial sovereignty of States

The right of States to regulate is also linked to the ability of public authorities to take steps in the event of a systemic financial crisis, including by implementing bank resolution mechanisms and, if necessary, negotiated restructuring of public debts.³ A specific provision covering such examples could, as such, be inserted into the general exceptions to the agreement, as indicated below:

Subject to the requirement that such measures are not applied in a manner inconsistent with the stipulations pertaining to fair and equitable treatment or as means of arbitrary discrimination or disguised restriction to foreign investors, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Contracting Party of measures necessary:
* for the resolution of a financial institution that is no longer viable or likely to be no longer viable, for the recovery of a financial institution or the management of a financial institution under stress, or for the negotiated restructuring of public debts.

(5) Ensuring compliance to domestic laws and regulations by foreign investors

As part of their right to regulate, States should be able to secure compliance to their domestic laws and regulations by foreign investors. To this end, the following wording, reminding the basic principle according to which **foreign investors should constantly comply with national laws and regulations**, should be considered:

Covered investors shall conduct their investments in conformity with the laws and regulations of the Party where they invest and shall comply, with all due diligence, to such laws and regulations with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

Investment agreements should also ensure that **States can implement measures aimed at ensuring compliance with their laws and regulations**, including when foreign investors fail to comply with them. In other words, a State should not be held liable where investors challenge legitimate and reasonable measures in response to their illicit behaviour from the point of view of national law. Accordingly, the following wording, within the general exception provision mentioned above (see, item 3), could be envisaged:

Subject to the requirement that such measures are not applied in a manner inconsistent with the stipulations pertaining to fair and equitable treatment or as means of arbitrary discrimination or disguised restriction to foreign investors, nothing in this agreement shall be construed to prevent the adoption or enforcement by a Contracting Party of measures necessary: [...]

³ The definition of debt restructuring will have to be discussed.

* to secure compliance with laws or regulations which are not inconsistent with this agreement and to sanction their violation by a covered investor, provided such measures are reasonable and proportionate to the infringement attributed to the investor.

The possibility for arbitral tribunals to adjudicate counterclaims submitted by Respondent States, provided that these claims are sufficiently linked to the facts concerned by the main dispute, may also be envisaged. The possibility for arbitral tribunals to adjudicate counterclaims would help rebalance the rights of States and of investors in disputes brought before an arbitral tribunal. That could strengthen the position of the defence. A balance will however have to be found with the possibilities of litigation before national courts: national laws within the EU allow, based on various arrangements, public authorities to bring violations of laws and regulations by businesses before a court. This option should not be delegitimized

II. Creation of a permanent court

The establishment of an adjudicatory body involved in investment disputes initiated on the ground of EU agreements would allow the current system, based on *ad-hoc* tribunals, to move towards a more permanent and “jurisdiction-based” framework. The present document sets up a new scheme that would significantly differ from the current system of disputes settlement through the establishment of a permanent court with two specific tasks:

- A judicial role: the Court would review awards issued by arbitral tribunals. This would pave the way for a more stable, foreseeable and clear case law and enable the Parties to have the awards reviewed, like in an appellate body, before it becomes final.
- An administrative role: the Court would be in charge of the administration of the roster of arbitrators with the view to ensure the prevention of conflicts of interests and a more transparent functioning of dispute settlement mechanisms.

(1) Review of arbitral awards by the permanent court

The permanent court would be in charge of adjudicatory powers for the review of awards. The Washington Convention establishing the International Centre for Settlement of Investment Disputes (ICSID), to which most EU member States are Parties, provides for mandatory rules and limited grounds for the review of awards by *ad hoc* committees. This constraint must be taken into account in the creation of such a control mechanism for review of final arbitral awards. International law, which has a major multilateral component (ICSID has 159 members) cannot be ignored, as that would make the mechanism inoperable. Given this legal constraint, a solution would be to allow this permanent court to perform a preliminary review of awards before they become final.

In other words, ICSID and non-ICSID tribunals established under a specific EU agreement would issue an “*interim award*” which may be subject, at the request of the parties to the dispute, to a screening by the court on factual and/or legal grounds similar to those of a genuine appeal facility. The review would be structured as follows:

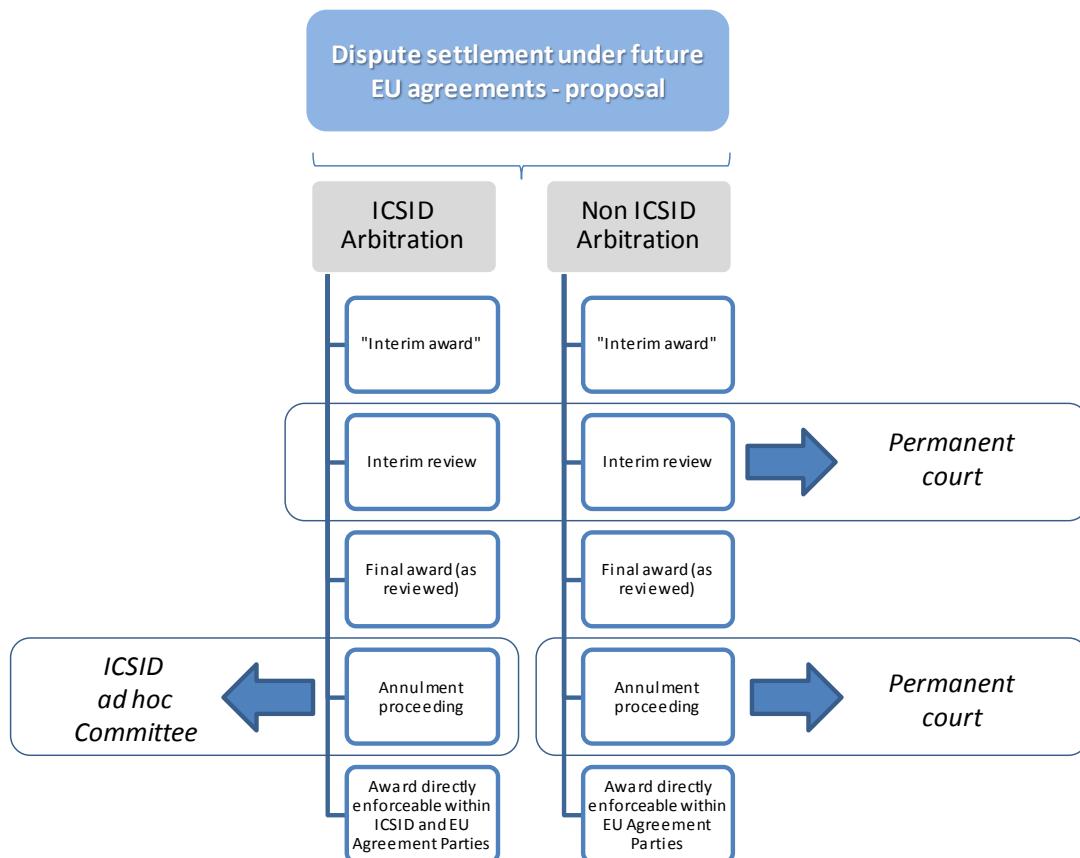
- The arbitral tribunal would issue an interim award on its competence and, if need be, on the merits;
- The parties would have the possibility, within a prescribed deadline (for instance one month), to request the review of this interim award by the permanent court;
- The permanent court would then have the power to review, within a prescribed deadline (for instance six months), the application of the agreement’s provisions to the facts of the case or other possible manifest factual and/or legal errors by the arbitral tribunal that issued the interim award;
- If the permanent court upholds the interim award, the latter would then become final;
- If the permanent court issues a negative opinion on the award of the arbitral tribunal, the latter would then take this opinion into account in the wording of the final award. The possibility of this opinion being legally binding for the arbitral tribunal is not necessarily guaranteed given the

Washington Convention, and all options should be examined by the Commission to ensure full compatibility with it.

The interim award, as reviewed (and amended, if appropriate), would then be submitted, at the request of the parties to the dispute, to a possible annulment proceeding, which would be performed by *ad-hoc* committees for ICSID arbitrations and by the permanent court (instead of national courts of the seat of dispute settlement) for non-ICSID proceedings, as further illustrated below. The option that consists in derogating from the Washington convention in order to create an appeal mechanism when this convention is applied for the European Union and Parties, with which it has signed investment protection agreements, could be envisaged pursuant to Article 41 of the Vienna Convention on the Law of Treaties.

It is of course evident that detailed procedural rules should be drawn up to organize the different awarding formations, based on the pre-established list of arbitrators working in the first instance, appeal (i.e. the review described above) or annulment proceedings, respectively.

Diag. 1: The role of the permanent court (proposal)



The aim of this proposal is to create an ambitious and yet doable permanent court with the objective of stabilizing case law and making it more predictable through the review of awards, similar to appeal facilities that exist in national law systems.

This proposal would take into account existing legal constraints and **build the backbone of a future multilateral court that would be in charge of first resort awards and appeal.**

(2) Administration of the roster of arbitrators by the permanent court

The parties to a specific dispute should designate their arbitrators amongst the persons on a roster of arbitrators administered by the permanent court. They would also have the possibility of asking the ICSID Secretariat to designate these arbitrators on the roster of arbitrators administered by the permanent court. The members of the permanent court responsible for reviewing the arbitral award or annulment proceedings against the arbitral award would, for their part, not be chosen by the parties, but rather designated by the permanent court, which would allocate its members into distinct tribunals which are independent from each other.

This selection from a list of arbitrators managed by the permanent court would avoid conflicts of interest (see part III for further safeguards pertaining to the prevention of conflicts of interest).

The choice of arbitrators should therefore be limited to a **fixed pool of highly qualified arbitrators** who shall not serve, for the duration of their terms, as legal counsels for a party in any dispute arising under international investment or international trade agreements. **Their term shall not exceed six years in the present proposal.** “Qualified arbitrators” shall obviously have expertise or experience in public international law and international trade law, in particular international investment law, and in the resolution of disputes arising under international investment or international trade agreements. The present proposal sets up **stricter criteria** for arbitrators since they shall be qualified professional judges at the national or international (e.g. ICJ, WTO’s Appellate body) level, either in activity or retired, or academics. As previously mentioned, they shall not serve, for the duration of their term, as a legal counsel for a party.

Ensuring the independence of arbitrators is key for the legitimacy of ISDS tribunals. **The present proposal strongly reinforces safeguards to guarantee a high level of independence:** an arbitrator shall be independent of and not be affiliated with a disputing party or the government of a Party. Likewise, he/she shall not take instructions from any organization, government or disputing party with regard to matters related to the dispute and shall comply with the code of conduct for arbitrators and mediators and the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, which are already referred to by a number of arbitral tribunals.

As a consequence, it might be worth considering the following adjustments which would provide for the constitution of tribunals from a predetermined list of arbitrators (administered by the permanent court) designated for a renewable term of six years by the Contracting Parties and would also strengthen the requirements and disciplines imposed on those arbitrators⁴:

1. Unless the disputing parties have agreed to appoint a sole arbitrator, the Tribunal shall comprise three arbitrators who shall be appointed by the parties or, at their request, by the Secretary-General of ICSID from the list of arbitrators established pursuant to paragraph 2.
2. The Court shall establish, and thereafter maintain, a list of individuals who are willing and able to serve, for a renewable period of six years, as arbitrators and who meet the qualifications set out in paragraph 3. It shall

⁴ In the following drafting proposal, the choice between the permanent court (« Court ») and a committee on services and investment is left open, depending on the implementation of the court proposal.

ensure that the list includes at least 15 individuals but may agree to increase the number of individuals. The list shall be composed of three sub-lists each comprising at least five individuals: one sub-list for each Party, and one sub-list of individuals who are neither nationals of Canada nor the Member States of the European Union to act as presiding arbitrators.

3. Arbitrators designated on the list established pursuant to paragraph 2:

(a) shall have expertise or experience in public international law and international trade law, in particular international investment law, and in the resolution of disputes arising under international investment or international trade agreements;

(b) shall be academics or persons who meet the qualifications to serve as a judge;

(c) shall not serve, for the duration of her/his term, as a legal counsel for a party in any dispute arising under international investment or international trade agreements.

4. The Court shall decide, at the request of a Party, to remove an arbitrator from the list when it appears that she/he accepted to act as a legal counsel, in violation of paragraph 3(c). In case she/he serves as arbitrator in a pending dispute under this Section, she/he shall immediately resign and shall not be entitled to any fees or costs derived from this procedure.

5. Arbitrators appointed for a specific dispute pursuant to this Section:

(a) shall be independent of and not be affiliated with a disputing party or the government of a Party, it being clarified that a designation on the list established pursuant to paragraph 2 shall not, as such, be a proof of affiliation with the government of a Party;

(b) shall not take instructions from any organization, government or disputing party with regard to matters related to the dispute;

(c) shall comply with the code of conduct for arbitrators and mediators and the International Bar Association Guidelines on Conflicts of Interest in International Arbitration;

(d) shall not have acted, within the last five years before the submission of the claim to dispute settlement under this Section, as legal counsel either for one of the disputing parties or for any third party involved in a previous dispute related to similar facts as those considered in the dispute submitted to the Tribunal under this Section.

III. Enhance ethical requirements for arbitrators and improve functioning and transparency of tribunals

As underlined in the Commission public consultation, the functioning and transparency of arbitral tribunal shall be significantly enhanced. A series of provisions shall be introduced to significantly enhance the standards.

- the **introduction of a compulsory code of conduct**, to further enhance ethics in tribunal, in addition to the above mentioned proposed provisions;
- the **creation of deterring safeguards against abusive claims by investors**;
- the **enhancement of provisions regarding third party funders (TPF)** so as to clarify their role and make them transparent;
- the **limitation of “Treaty shopping”** in order to prevent plaintiffs to misuse the different agreements in their own interest.

(1) A compulsory code of conduct should be included in future treaties, including a quarantine period for arbitrators

In order to enhance ethical requirements for arbitrators, the following code of conduct for arbitrators and mediators, based upon the system introduced in the EU/Singapore Free Trade Agreement, may be added:

Definitions

1. In this Code of Conduct:

"arbitrator" means a member of a tribunal established pursuant to Section 6 (Investor-State Dispute Settlement) of Chapter Ten (Investment P);

"candidate" means an individual who is under consideration for selection as an arbitrator;

"assistant" means a person who, under the terms of appointment of an arbitrator, conducts, researches or provides assistance to the arbitrator;

"staff", in respect of an arbitrator, means persons under the direction and control of the arbitrator, other than assistants.

Responsibilities to the process

2. Throughout the proceedings, every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Arbitrators shall not take instructions from any organization or government with regard to matters before a tribunal. Former arbitrators must comply with the obligations established in paragraphs 15, 16, 17, 18, 19 and 20 of this Code of Conduct.

Disclosure obligations

3. Prior to confirmation of his or her selection as an arbitrator under Section 6 (Investor-State Dispute Settlement) of Chapter Ten (Investment), a candidate shall disclose any past or present interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.
4. A candidate or arbitrator shall communicate matters concerning actual or potential violations of this Code of Conduct to the disputing parties and the non-disputing Party only.
5. Once selected, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 3 of this Code of Conduct and shall disclose them. The disclosure obligation is a continuing duty which requires an arbitrator to disclose any such interests, relationships or matters that may arise during any stage of the proceeding at the earliest time the arbitrator becomes aware of it. The arbitrator shall disclose such interests, relationships or matters by informing the disputing parties and the non-disputing Party, in writing, for their consideration.

Duties of arbitrators

6. Upon selection, an arbitrator shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding and with fairness and diligence.
7. An arbitrator shall consider only those issues raised in the proceeding and necessary for a ruling and shall not delegate this duty to any other person.
8. An arbitrator shall take all appropriate steps to ensure that his or her assistants and staff are aware of, and comply with paragraphs 2, 3, 4, 5, 17, 18 and 19 of this Code of Conduct.
9. An arbitrator shall not engage in *ex parte* contacts concerning the proceeding.

Independence and impartiality of arbitrators

10. An arbitrator must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or a non-disputing Party or fear of criticism.
11. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of his or her duties.
12. An arbitrator may not use his or her position on the tribunal to advance any personal or private interests and shall avoid actions that may

create the impression that others are in a special position to influence him or her.

13. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgement.

14. An arbitrator must avoid entering into any relationship or acquiring any financial interest that is likely to affect him or her impartiality or that might reasonably create an appearance of impropriety or bias.

Obligations of former arbitrators

15. All former arbitrators must avoid actions that may create the appearance that they were biased in carrying out their duties or derived any advantage from the decision or ruling of the tribunal.

16. Without prejudice to the provision installing a six-year tenure for arbitrators⁵, arbitrators shall act neither as legal counsel of one of the disputing parties, nor as legal counsel of any disputing party involved in another dispute related to similar facts that were considered in the dispute on which the tribunal has ruled, unless a time period of 5 years has elapsed between the final award has been issued and the appointment of that former arbitrator as legal counsel.

Confidentiality

17. No arbitrator or former arbitrator shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of that proceeding, and shall not, in particular, disclose or use any such information to a personal advantage or an advantage for others or to affect the interest of others.

18. An arbitrator shall not disclose a ruling or parts thereof prior to its publication in accordance with article [reference to the article pertaining to transparency of proceedings]

19. An arbitrator or former arbitrator shall not at any time disclose the deliberations of a tribunal, or any arbitrator's view regarding the deliberations.

Expenses

20. Each arbitrator shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred.

Combined with the proposal pertaining to the permanent court, this code of conduct sets up a **quarantine period** based on the following principle: arbitrators would be appointed for a **six year tenure** (see above), followed and **preceded by two periods of five years**:

- *Prior to the tenure*: the arbitrators shall not have acted, within the last five years before the submission of the claim to dispute settlement, as legal counsel either for one of the disputing

⁵ See II. (2) of the present document.

- parties or for any third party involved in a previous dispute related to similar facts as those considered in the dispute submitted to the Tribunal;
- After the tenure: arbitrators shall act neither as legal counsel of one of the disputing parties, nor as legal counsel of any disputing party involved into another litigation lawsuit related to similar facts that were considered in the dispute on which the tribunal has ruled, unless a time period of five years has elapsed between the final award has been issued and the appointment of that former arbitrator as legal counsel.

This proposal ensures in a clear manner the prevention of perceived or real conflicts of interests which are detrimental to the legitimacy of arbitrators.

(2) Abusive litigation by foreign investors shall be tackled by introducing penalties against frivolous claims

The “*loser pays*” principle is a progress towards a more balanced dispute settlement mechanism. However, this principle only allows the compensation of costs incurred by States and is not sufficiently deterrent against abusive claims made by investors. **In order to clearly deter frivolous claims, the “*loser pays*” principle may be reinforced and the possibility for tribunals to impose penalties may be considered :**

A tribunal shall order that the costs of dispute settlement be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the claim. Where only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims. In the circumstance that a claim is dismissed pursuant to the article pertaining to Claims Manifestly Without Legal Merit, and by exception to Final Award provisions, a tribunal shall order that the costs of arbitration and legal representation of the State are borne by the claimant, to which an additional penalty of up to 50% of the amount of damages claimed is applied.

(3) Provision on the mandatory disclosure and behaviour of third party funders (TPF) shall be included

The following provision may be considered in order to enhance disciplines on TPF:

1. Any funding and any modification in financing terms of a disputing party by a third party funder shall be notified to the other disputing party and the tribunal, at any time of the arbitration proceedings. Such notification shall be made without delay as soon as the financing agreement with the third party funder has been signed or modified.
2. The disputing party that has entered into a financing agreement with a third party funder shall disclose, in accordance with the preceding paragraph, the name and address of the registered office of each third party funder.
3. The third funder behaves ethically and respects the following principles:
 - (a) It shall not intervene in the selection of arbitrators and make sure to avoid placing the arbitrators in a situation of conflict of interest; and
 - (b) It shall not interfere in the arbitral proceedings.
4. The third party funder shall maintain the confidentiality of all documents and hearings to which it has access and it shall not, in any circumstances, comment on any communications or publications that could be made available to the public in the framework of the implementation of UNCITRAL transparency rules.

(4) Limit the possibility of “treaty shopping”

In order to deter treaty shopping by foreign investors, the following wording may be inserted in the provision dealing with frivolous claims:

It is understood that a tribunal must decline jurisdiction on the grounds that a claim is manifestly without legal merit under this article where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and if the tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the purpose of submitting the claim under this section.

IV. Relationship between arbitration and domestic remedies

Pending further reflections based on in-depth analysis of the “*fork-in-the-road*”, “*no U-turn*”⁶ and other solutions that may be envisaged in order to properly articulate ISDS and national remedies, it may already be recalled that **foreign investors should first and foremost try to settle their disputes with the host State before national jurisdictions**. The following wording, derived from the Washington Convention’s preamble, may accordingly be considered:

Recognizing that while disputes between States and foreign investors would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Lastly, it is understood that the articulation between ISDS and national remedies must preserve the legitimacy of the national remedies by recalling that arbitration never was the “supreme court” of national judges.

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⁶ “Fork in the road”: obligation to choose between proceedings before the competent national judge and ISDS. “No U-turn”: possibility to move from proceedings before a national judge to ISDS if the whole procedure before the national judge is cancelled. In this case, it is impossible to return before the national judge.