1. Introduction

In recent years, third party funding in international arbitration has increased significantly. While there are various definitions of the term “third party funding”, the notable arbitrator Mr. Yves Derains once defined third-party funding as “a scheme where a party unconnected to a claim finances all or part of one of the parties’ arbitration costs, in most cases the claimant. The funder is then remunerated by an agreed percentage of the proceeds of the award, a success fee, or a combination of the two or through more sophisticated devices. In the case of an unfavourable award, the funder’s investment is lost.”

The wider topic of third party funding encompasses numerous issues such as disclosure; conflicts of interest; privilege; and security for costs, all of which are ripe for discussion. That being said, for the purposes of this newsletter, I would like to first set out some of the basic features of third party funding, before concentrating on third party funding (“TPF”) from the perspective of Japanese law, and the possibility of such a system operating in Japan.

2. Third Party Funding in International Arbitration

There is already considerable use of TPF arrangements in international arbitration today. The 2015 Queen Mary International Arbitration Survey indicates that 39% of the respondents have already encountered third party funding in practice: 12% have used it themselves and 27% have seen it being used. The use of TPF has also further been facilitated by changes in the law in certain countries. On 10 January 2017, the Singapore Parliament passed the Civil Law (Amendment) Act (Bill No. 38/2016), which has since entered into force in March 2017. The amended Civil Law Act now permits third party funding for international arbitration and related court proceedings, subject to certain conditions. In the same vein, Hong Kong has also adopted the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 on 14 June 2017, allowing for third-party funding of arbitrations which are seated in Hong Kong.

The main reason for TPF’s rising popularity is self-evident. International arbitration is becoming increasingly expensive. In the 2015 Queen Mary International Arbitration Survey, 90% of the respondents answered that international arbitration is their preferred dispute resolution method, but 68% of the respondents indicated high costs as the worst characteristics of international arbitration.

While the cost of a specific arbitration will of course depend on the facts and complexity of that case, it is difficult to ignore that the costs are generally high. In 2011 CIArb conducted a survey of 254 international commercial arbitrations conducted between 1991 and 2010. According to that survey, claimants on average spend GBP 1,580,000 (approximately 232 million yen), while respondents spend GBP 1,413,000 (approximately 208 million yen).
Under such circumstances, a reason often raised in support of TPF is that it “promotes access to justice” and “levels the playing field.” In other words, TPF allows victims of obvious wrongdoings to bring their cases to justice notwithstanding the cost.

On the other hand, an objection raised against TPF is that it may contribute to an increase in the total number of legal disputes, as well as an increase in the number of frivolous or unmeritorious claims. However, it has been often said that such an objection does not take into account the rigorous case assessment processes of third party funders. In fact, most third party funders have been noted as requiring a high probability of success before funding the claim.

### 3. Process of Third Party Funding

Each funder will employ its own knowhow for the case assessment process, and hence the exact process may differ significantly between funders. For the purposes of this article, I would like to briefly go over a relatively straightforward example of the funding process.

1. **Funder’s Initial Case Assessment**;
   The funder will check whether the case meets the funder’s investment criteria through its own initial case assessment. For instance, the quantum of the claim, investments costs and time until expected recovery, merits of the claim, respondent’s solvency, enforceability of the award, and legal team expertise are some of the factors that will be considered.

2. **Execution of Confidentiality Agreement(s)**;
   Also, funders will typically enter into confidentiality agreements with parties who are applying for funds, prior to materials being shared for the case assessment process. The purpose of such agreements is to allow both parties to indicate their expectation that the documents shared during the case assessment are privileged.

3. **Setting Period of Exclusivity to Conclude Investment Agreement**;
   Some funders may require parties seeking funding to sign an exclusivity agreement at the beginning of case assessment, which in gist require that the party seeking funding cannot present the same case to other funders for a specified time.

4. **Funder’s Detailed Due Diligence**;
   Funders will then carry out detailed due diligence to assess the case and reach a decision on whether funds should be given. Many funders adopt a multi-step process, and may have a preliminary screening process followed by substantive due diligence.

5. **Execution of an Investment Agreement**;
   If the funder is satisfied that funds should be disbursed, then the funder and the funded party will enter into an investment agreement (the “IA”). Broadly speaking, under the investment agreement, the funder will agree to pay for all, or a specified portion of, the funded party’s costs arising from the claim, in exchange for a share of any recovery following the settlement of the claim, or the issuance of a final award.

6. **Case Monitoring**;
   The IA typically entitles the funder to be informed of all relevant developments in the case, and to receive the corresponding documents. The funder may also be entitled to regular contact with the funded party’s counsel, depending on the stage of the proceedings.

7. **Case Conclusion**
   If the funded party succeeds in its claim, or the claim is settled, the funder is entitled to a portion of the recovered amount as agreed under the IA (e.g., 30% of the total recovered amount). If the case is unsuccessful, the funder will bear all agreed costs up to the date when the case is lost or discontinued.

### 4. Japan - Potential Market for Third Party Funding?

While TPF is hotly debated among arbitration practitioners, it would be fair to say TPF is not yet common in Japan. In Japan, “professional” funders are not active in the market for international arbitration. It is my understanding that currently there are no local funders in Japan. Therefore, even if there is a TPF market in Japan, so far the only participation has been from international funders.

Nevertheless, I believe that Japanese parties could be

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7 Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, at p. 91-95
8 Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, at p. 12-23
9 Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, at p. 17
potential users of TPF, for the following reasons.

First, as litigation in Japan does not require the extensive document production process sometimes seen in common law jurisdictions, it can be said that litigation costs are relatively cheaper in Japan compared to common law jurisdictions. However, when Japanese parties participate in international arbitration proceedings, document production is usually required (however the scope of production will of course vary from case to case) and this will drive up cost. Furthermore, international arbitration will also typically be conducted in English, and Japanese parties will incur considerable translation fees. All these factors result in arbitration costs being quite expensive from the perspective of Japanese parties, and correspondingly give rise to a possible demand for TPF arrangements.

Second, in Japanese litigation the winning party can in principle only recover “court fees” from the losing party (Article 61 of the Japanese Code of Civil Procedure, Act No. 109 of 1996). Recoverable court fees under the Code of Civil Procedure are limited to matters such as filing fees, daily allowance, travel expenses paid to witnesses, experts and interpreters, and remuneration paid to experts and interpreters (the Act on Costs of Civil Procedure, Act No. 40 of 1971). Other legal costs such as attorney’s fees will generally not be recoverable, and will have to be separately borne by each party. In international arbitration, as a matter of practice, most arbitral tribunals routinely award the costs of legal representation to the winner. This creates a larger recovery sum, which in turn means that funders may be able to expect a higher return on investment as compared to funding Japanese litigation.

5. Third party funding and Japanese law

There is currently some uncertainty as to the legality of TPF under Japanese law. In Japan, there are no statutes or cases which expressly prohibit TPF. Moreover, as a civil law country, the common law concepts of maintenance (the support of litigation by a stranger without just cause), champerty (the support of litigation by a stranger in return for a share of the proceeds) and barratry (continuing maintenance or champerty) are generally not applicable in Japan.

Furthermore, while pure contingency fee arrangements were previously regarded as inappropriate in Japan, the same arrangements are currently not considered to be specifically prohibited.

While there is no direct prohibition, there are some laws which may indirectly affect TPF arrangements. In the remainder of this article, I shall discuss two such potential impediments to TPF arrangements in Japan, namely Article 10 of Trust Act of Japan (Act No. 108 of 2006) (Prohibition on Trusts for Suits) and the Japanese Attorney Act (Act No. 205 of 1949).


The Trust Act at Article 10 (Prohibition on Trusts for Suits) stipulates that “No trust may be created for the primary purpose of having another person conduct any procedural act.” In general, it is considered that the wording “trust” may include an assignment of a claim. Such assignment typically includes a claim assignment for debt collection. As for the wording “any procedural act”, court precedents adopt a broad interpretation, ruling that it also includes filing for bankruptcy or compulsory execution. It may thus be possible to interpret “any procedural act” as including arbitration.

It is generally accepted that Article 10 of the Trust Act only applies in cases of a trust arrangement or a claim assignment. However, in a typical TPF arrangement, the original party still retains interest in the claim and pursues the case in its own name (i.e., there is no assignment of a claim as such). In regard to this, it has been said that the funder’s return structure is based on a “waterfall agreement” or priority agreement. This will either be set out in the IA or in a separate document and will usually require execution by all stakeholders such as the claim holder, the funder, the law firm (and any insurer providing coverage for fees, or costs). The relevant document will thus set out how the claim proceeds are to be divided between the stakeholders.

10 As an exception, in claims for damages arising from tort, the successful party may be able to request the payment of attorneys’ fees to a reasonable level.
11 For example, Article 42(1) of the UNCITRAL Arbitration Rules provides that “The costs of the arbitration shall in principle be borne by the unsuccessful party or parties,” except that, in fixing the costs of legal representation, “the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”
12 However, attorneys’ fees must always be appropriate and contingency fee arrangements may be considered inappropriate if they result in an amount of attorneys’ fees becoming extremely high in comparison to the benefit obtained by the clients.
13 Hiroto Dogauchi ed., Joukai Shintaku-ho (Commentary on the Trust Act), at p.63
14 Hiroto Dogauchi ed., Joukai Shintaku-ho (Commentary on the Trust Act), at p.62
15 Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, at p.34
Since there is usually no trust arrangement or claim assignment, in my view, a typical TPF would not violate Article 10 of the Trust Act. However, if the TPF structure requires the funded party to assign the underlying claim to the funder (e.g., the purchase and aggregation of cartel damages claims), then there could be an Article 10 issue.

**7. Legal Impediments? - Attorney Act of Japan**

(1) **Article 73**

Firstly, Article 73 of the Japanese Attorney Act stipulates that “No person shall engage in the business of obtaining the rights of others by assignment and enforcing such rights through lawsuits, mediation, conciliation or any other method.”

The wording “lawsuits, mediation, conciliation or any other method” can generally be interpreted as including arbitration, as the phrase “lawsuits, mediation, conciliation” is illustrative and not exhaustive in nature, and in any event, the inclusive “any other method” will generally include any legal proceedings for the execution of rights.

The critical phrase to consider in Article 73 will thus be “obtaining the rights of others by assignment”, and whether this will include TPF arrangements. For the same reasons as set out in detail in the above section, there is no claim assignment in a typical TPF arrangement, and hence in my view, a typical TPF arrangement is unlikely to violate Article 73 of the Japanese Attorney Act.

(2) **Article 72**

Secondly, Article 72 of the Attorney Act stipulates that “No person other than an attorney or a Legal Professional Corporation may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, handling arbitration matters, aiding in conciliation, or providing other legal services in connection with any lawsuits, non-contentious cases, or objections, requesting for re-examination, appeals and other petitions against administrative agencies, etc., or other general legal services, or acting as an intermediary in such matters.”

The key requirements of Article 72 are thus as follows: (i) No person other than an attorney; (ii) may engage in the business of providing “legal services” or “acting as an intermediary in such matters”; (iii) for the purpose of obtaining compensation.

In my view, the critical requirement is (ii) above. If a funder’s involvement in a TPF arrangement amounts to the provision of “legal services” or “acting as an intermediary in such matters”, then it is also likely that the funder will be considered as providing such services “for the purposes of obtaining compensation”. TPF providers will thus have to be mindful not to provide “legal services”. This is an issue that of course will have to be assessed based on the facts of a specific case. That being said, it can be generally observed that funders might encounter problems if under the relevant IA, the funder is able to influence the actual conduct of the arbitration, or worse still, where the funder is virtually controlling how the entire claim is conducted.

However, as for the funders’ involvement in the initial case assessment and subsequent detailed due diligence - in my view, a violation of Article 72 is unlikely to arise since such activities are for the funders own assessment purposes and are not the provision of “legal services” to the party applying for funding. Also, while the degree and nature of a funder’s activity during case monitoring varies, the main purpose of case monitoring by funders is to protect and promote their investments, and not to control the course of the case. In this regard, it is said that most of third-party funding arrangements are structured to ensure that the funder does not have control over the case or the claimant (in fact, some major funders deliberately emphasize on their webpages that they do not control the case process). Although a typical IA will generally contain the case budgeting provisions and a breach of the funding agreement may entitle the funder to terminate the agreement, in my view, such indirect control alone is unlikely to amount to providing “legal services”.

**8. Conclusion**

To my knowledge, in Japan, we have no case precedents or detailed scholarly articles regarding how TPF is to be dealt with under Japanese law. While third party funding may be subject to some restrictions under the Trust Act and Attorneys Act, this does not mean that all TPF arrangements are generally prohib-

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17 Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, at p. 48
18 Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, at p. 35
19 Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, at p. 41-44
It is a tumultuous time for international investment law. After leading a rather inconspicuous existence for decades, investor-state dispute settlement in the form of international arbitral proceedings (ISDS) is now – maybe not least due to its increasing success and popularity – at the heart of a global controversy. The “halo of mistrust” recently surrounding ISDS has caused the tectonics to shift in this field of international economic law. Traditional proponents of ISDS now either appear to have no (more) official opinion on the subject (e.g. the United States) or have gone as far as to declare the “old” ISDS mechanism to be “dead” – as is the case for representatives of the European Union (EU). The EU’s objective is to replace the current ISDS mechanism with a – in its words – modern, efficient, transparent and impartial system for international investment dispute resolution by way of an “investment court system” (ICS). And it has already made remarkable progress: So far, it has achieved that the UNCITRAL’s Working Group III takes up the question of whether the present ISDS mechanism needs reform, potentially to be replaced by an ICS. Moreover, the EU convinced its negotiation partners Canada and Vietnam to enshrine a permanent investment court in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam FTA (EUVFTA). While no such court has actually been established so far, two recent reports by eminent academics show that the ICS is not a mere fanciful idea, but that its implementation may be feasible in a multilateral form at least from a technical international law perspective.

Other countries, among them Japan have however been more skeptical. This became particularly apparent during the negotiations for the Japan-EU free trade agreement (JEFTA). While JEFTA has meanwhile been agreed, it does not contain an investment chapter. Apparently the EU and Japan were unable to reach agreement on the question of what dispute resolution mechanism to include. Moreover, it seems that during the first session of the UNCITRAL Working Group III in late 2017, Japan was one of the countries that successfully countered the EU’s proposal to directly discuss the establishment of an ICS as

I. Introduction

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How the current controversy about an Investment Court System highlights Japan’s emerging role as a key player in international investment policy

Lars Markert/Stephan Wilske*

4 For more information see http://www.uncitral.org/uncitral/en/commission/working_groups/3/investor_State.html (last visited 22 February 2018).
5 An ICS has not yet been established due to the fact that – for reasons of internal EU law – an agreement in this respect would be considered as a “mixed agreement”, i.e. one that could not be concluded by the EU in its exclusive competence, but which would require the consent of all the EU Member States. See European Court of Justice, Opinion 2/15, 16 May 2017, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170026en.pdf (last visited 22 February 2018).
the primary goal of the Working Group. Instead, the Working Group III will now, very broadly, first, identify and consider concerns regarding ISDS; second, consider whether reform is desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the UNCITRAL. Whether the implementation of an ICS constitutes a solution was left open.

The establishment of an ICS would constitute a major change in the field of international investment law and could determine the global contours of investor state dispute settlement for decades to come. With such fundamental changes on the horizon, this article aims to conduct a critical analysis of whether the promises of ICS can prove true – or may be better characterized as something of a “hype”.

II. What is an ICS?

The main feature of an ICS, as proposed by the EU, is the establishment of a quasi-judicial standing two-tier court system with a Tribunal of First Instance and an Appellate Body. Members of both bodies are to be appointed by the signatory states of the agreement establishing the ICS. The “judges” are required to have qualifications similar to the judges of the International Court of Justice. Thus, the present system of ad hoc tribunals with party-appointed arbitrators would be replaced by a court that consists of permanent, state-chosen members. Cases will be allocated to decision makers on a random basis. Tribunal members are bound by a strict code of conduct that requires them to disclose any personal or professional relation that could impede or be perceived as impeding their independence and they cannot act as counsel in other investment cases.

III. Potential advantages of an ICS

Proponents of the idea argue that an ICS would bring positive changes to ISDS in three key areas: increase legitimacy of the tribunal (1), make its decisions more predictable and consistent (2) and reduce costs and length of proceedings (3).

1. Enhanced legitimacy

In the words of the EU Commission, ICS will provide for more legitimacy “through a new fully transparent system for resolving investment disputes, with publicly appointed judges, the highest ethical standards and the possibility to have errors corrected through an appeal instance.”

It is argued that ad hoc tribunals lack democratic legitimacy as the arbitrator’s legitimacy is limited to the state’s one-time consent to jurisdiction in the governing international investment agreement (IIA). Furthermore, proponents of an ICS point out that a permanent court is more likely to respect states’ right to regulate. ICS would not follow private law rationales as currently purportedly prevalent in ISDS procedures, which some perceive to be inadequate for the settlement of private-public disputes.

The fact that decision makers will be prohibited from acting as counsel in other investors-state proceedings aims at reducing the perception of a potential pro-investor bias. Additionally, it is argued that the legitimacy will be increased as an ICS would implement standards that are also found in most domestic judicial systems: The ICS is to provide for an appellate review mechanism. Also, proceedings will be subject to the UNCITRAL Rules on Transparency. Hence, all documents, hearings and findings will be made publicly available and interested parties such as NGOs and trade unions will be able to make submissions. It should be noted that such degree of transparency is not available in many domestic judicial systems.
2. Increased predictability and consistency of decisions

An ICS is also considered to guarantee more predictable decisions, whereas the present ISDS system is criticized for arbitral tribunals having interpreted similar, similarly worded, or sometimes even identical provisions in inconsistent and contradictory ways. In the eyes of the European Commission the ad hoc character of tribunals is to blame for this: There is no coordination between tribunals and therefore no formal possibility to align the interpretation of substantive rules of different IIA.19 Allegedly, the lack of consistency of interpretation and decisions leads to a lack of predictability, which in turn affects legal certainty and expectations for all actors involved.20 It is believed that this would change with an ICS.

3. Decrease in cost and length of proceedings

Predictability of judicial decisions is not only a key element for the legitimacy of a legal system, but may also help the parties to reduce the costs and length of proceedings. The expected increase in legal certainty allows a reduction of the costs of legal advice.21 Furthermore, the cost for legal fees should also decrease as parties no longer have to choose arbitrators.

In addition, an ICS would be equipped with clear procedural deadlines: overall proceedings under the ICS, including appeal, are supposed to be limited to two years.22 This will not only ensure a fast and efficient dispute settlement, but also help keep costs low. Further, the costs of the court itself will be exclusively paid for by the signatory states.23

IV. ICS – fit for purpose?24

While the current ISDS system is undoubtedly not free from flaws, it is quite striking that a system that has worked well for the past 35 years and has not created major scandals is supposed to be abolished – for what at a closer look seems to be mainly political reasons.25

1. Increased legitimacy – two steps back and one step forward?

The right to regulate affairs of public policy, especially public health, environmental and safety issues is an integral part of a state’s sovereignty and must be preserved in any international agreement and dispute resolution mechanism. What is troubling though is the lack of examples where arbitral tribunals have disregarded states’ right to regulate. Two of the cases frequently cited by critics in this context have both been decided in favor of the state.26 A well-known third case was decided in favor of the investor – but ironically not before an ad hoc arbitral tribunal but before the German Federal Constitutional Court.27 Thus, there is no evidence that arbitral tribunals do not respect states’ right to regulate, while only permanent courts are prone to do so.28

Another serious concern a court with state-chosen members raises is the question of political influence. The appointment of arbitrators will no longer be up to the parties, but likely become a political matter. Considering that most states are more often on the respondent side of a claim, it does not seem far-fetched that “judges” with a pro-state bias are chosen. Additionally, it remains unclear how it is to be ensured that states choose independent and impartial candidates with the highest ethical standards – particularly in states that may not be considered to adhere to democratic standards. It is questionable whether members of the ICS Tribunal appointed through a non-transparent and non-consultative process will in fact be free from real and perceived bias.29 Even perceived bias has the potential to erode the faith of investors in the ICS

20 Ibid.
21 Ibid.
22 European Commission, Fact Sheet, supra note 12.
23 Ibid.
26 Piero Foresti, Laura de Cark and others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1 (measures adopted in the context of Black Economic Empowerment policies to eliminate the consequences of the Apartheid regime) and Philip Morris Asia Limited v. Commonwealth Australia, ICSID Case No. ARB/10/7 (tobacco control measures).
27 German Federal Constitutional Court, Judgment of the First Senate of 6 December 2016 - 1 BvR 2821/11 (Vattenfall v. Germany: Germany’s exit from nuclear energy in reaction to the Fukushima incident).
28 For numerous examples, see Bernardini, supra note 25, 816-822.
29 For concerns on bias within the TTIP, see Alison Ross, Schwebel criticises EU act of “appeasement”; Global Arbitration Review News (24 May 2016) (on file with authors); see also ABA, Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal (34 October 2016), https://www.americanbar.org/aba.html, at p. 24, Bernardini, supra note 25, 813 (pointing out that the “judges” are to be paid and re-appointed by the states).
Moreover, general consensus on the question of transparency has already been reached. This can be seen in the entering into force of the Mauritius Convention in October 2014, the UNCITRAL Transparency Rules of 2014, the reform of the ICSID Arbitration Rules in 2006, as well as in specific transparency provisions of most of the more current IIAs. Thus, the idea that an ICS is needed to finally introduce transparency into ISDS seems exaggerated. Also, it seems that certain actors consider a certain degree of transparency to be desirable (especially when public policy issues are at stake), but not always full transparency. Ironically, in ICSID practice, certain states – despite now complaining about a lack of transparency – time and again do not want awards to be published, particularly when they were not issued in their favor.31

2. More predictability or fragmentation by mistake?

It is a well-known fact that inconsistency in investment arbitration decisions derives from most IIAs being bilateral treaties. Such IIA provisions will naturally differ, and must be read in light of each agreement’s context and signatory states’ intention (which – at least in modern times – can be presumed to have carefully drafted certain standards stronger or weaker as in other treaties).32 Hence, some inconsistency of the resulting case-law is an inherent feature of the system.33 Particularly, this may be the case where nepotism and an ‘old boys network’ has a role in the selection of judges. There is of course always a risk that public positions will be awarded based on political considerations.34 On the other hand, the often alleged pro-investor bias of arbitrators is not supported by facts: As of 31 July 2017, 37% of concluded cases have been decided in favor of the state and only 27% in favor of the investor.35

Since an ICS per se would therefore, not solve the issue of inconsistent decisions, innovative reforms within the current ISDS system appear to be a better and more effective way forward.36 It is worth considering that the (perceived) inconsistency in interpretation may best be dealt with by tighter drafting of provisions which enumerate the scope of protections, such as ‘fair & equitable treatment, expropriation’ or ‘most favored-nation treatment’.37 This has already been done in the new generation FTAs such as CETA and EUVFTA.38 As such, the insistence for the need of an appellate system may be perceived as an overreaction.39

33 Germany, e.g., has been running the two Vattenfall (ICS) arbitrations against it in a less than transparent manner for an extended period of time. It was only in October 2016 that more transparency was introduced when the parties to the Vattenfall II dispute agreed to public evidentiary hearings.
34 Compare Article 31 of the Vienna Convention on the Law of Treaties; see also Bernardini, supra note 25, 822.
In any event, in order to ensure that the ICS appellate body is able to address any incorrect factual and legal assertions that may be present at first instance, the appellate body should arguably be more qualified and have more expertise and experience. However, in the EU's ICS proposal there is no real distinction between the qualifications required at the two levels of the ICS. Therefore, investors will incur substantial costs in having their claims adjudicated by essentially two similarly characterized tribunals with no real appellate consideration. This would also cause additional delay and defer the finality of any award.

3. Costs and length

While reducing the costs of proceedings is certainly a desirable aim, it is not clear whether a permanent court will actually achieve it. Prof. Risse draws a dooming comparison:

“The International Tribunal for the Law of the Sea, established some 20 years ago, provides a warning example. The yearly budget of this [permanent] international tribunal is around EUR 18.8 million (figure for 2015/2016) [...]. However, during the past 18 years, this international tribunal has handled only 24 cases, hence less than 1.5 cases per year. That translates to more than EUR 20 million for each case.”

Additionally, it has to be kept in mind that the costs of legal representation constitute 80% of the overall arbitration costs. It remains an open question how these costs would be significantly reduced by settling the dispute before a permanent court rather than an ad hoc tribunal. At the end, while an ICS reduces the Parties’ time for selecting suitable arbitrators, it adds a second instance and the danger that cases move between the tribunal of first instance and the appellate body. Further, simply stipulating short deadlines for ICS proceedings does not guarantee that a well-reasoned decision may be expected in a complex case within such deadline. Real life often does not follow ambitious political plans and statutory time requirements.

V. Setbacks of ICS

The foregoing – admittedly incomplete and rather rough – analysis leads to the conclusion that while the current ISDS system is not perfect (as cannot be expected), ICS may not be the answer. Not only are there a number of important questions which remain unanswered – the questionable enforcement of “awards” emanating from the ICS being only the most pressing of them. The establishment of an ICS might also impact significant achievements of international investment arbitration, such as its potential for avoiding conflicts between states, replacing the old days of “gun boat” diplomacy. Therefore, potentially “repolitizing” disputes between investors and states through the use of national judges can hardly be seen as a step forward. Further, it is almost needless to mention that goals of diversity in investment arbitration practice will have to be forgotten if all investment cases are to be decided by the same state appointed judges of an ICS.

As a result, Japan’s current skepticism in its negotiations with the EU Commission on a dispute resolution mechanism in JEFTA seems entirely justified. From its perspective, and probably the perspective of other states, too, the ICS must seem like a unilateral Western initiative to quench domestic criticism (fueled by vocal NGOs) and the ensuing negative “perception” of ISDS. Yet, this initiative does not concern itself with assessing what the real issues about ISDS are and how to fix them. Rather, it seems to have surrendered to the negative perception and chosen the ICS as an escape route, rather than trying to convince the general public that – a modernized – ISDS may constitute an acceptable a solution. It is almost tragicomic that sacrificing ISDS in reaction to the current negative perception in certain political circles is not even

41 Wood, Choosing between Arbitration and a Permanent Court: lessons from Inter-State Cases, 32(1) ICSID REVIEW 1, 13 (2017).
44 See Wilcke/Raval, The European Union-Vietnam Free Trade Agreement – Commentary on Dispute Resolution, Chapter 8, Article 28 (forthcoming 2018) with World Arbitration Reporter, published by JURIS.
45 In fact, it can be assumed that the main reason why the EU Commission does not simply speak about an “Investment Court”, but of an “Investment Court System”, is the fact that would like to avail itself of the international enforcement mechanism for international arbitral awards under the New York Convention of 1958. However, it is more than doubtful whether national local courts tasked with an ICS decision will appreciate the linguistic nuances. See also Bernardini, supra note 23, 833-14.
helpful because the ICS proposal has not appeased the critics of ISDS. On top of that, in May 2017 the European Court of Justice held that EU IIAs containing ISDS or an ICS are not in the exclusive competence of the EU, and would therefore require ratification of each EU member state. Thus, Japan or any other contracting partner of the EU would run the unacceptable risk of lengthy IIA/ICS negotiations, only to find that a national parliament in one EU member states refuses ratification of an IIA containing the ICS.

By contrast, Japan’s choice of a reform approach for ISDS appears to be more effective than some in Europe may realize. Instead of replacing the current ISDS system with an ICS, Japan argues in favor of a “reform from within” approach by modernizing ISDS clauses, taking into account some of the justifi
cations. This can be seen in the modern ISDS regime in the Trans-Pacific Partnership (TPP) Agreement. Even after the United States have pulled out, TPP is still relevant as the remaining countries under the leadership of Japan are currently negotiating the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which builds on TPP and does presently not entail major changes to its investment chapter. TPP’s investment chapter proves that most of the criticisms can be addressed through gradual changes to the current ISDS system. Its dispute resolution regime contains provisions that emphasize the right to regulate, a code of conduct for arbitrators and rules on transparency. Furthermore, TPP includes the establishment of a commission that can issue binding interpretations of the treaty and hereby increase consistency in the emanating case-law. Lastly, TPP entails the option to establish a review mechanism. If successful, TPP or for that matter CPTPP could serve as a blueprint for a new ISDS mechanism that strikes a balance between the interests of all the stakeholders involved.

VI. Conclusion and Way Forward

There is, hence, no need “to throw out the baby with the bath water” by replacing ISDS with an ICS. It may rather be worthwhile not to believe the hype and to instead steer the global debate away from public “perception” and towards an open-minded, fact-based analysis on how to reform investor-state dispute settlement.

It may well be that Asia generally, and in particular Japan, turn out to be the frontrunners of this debate. Japan, which is traditionally not known for taking overbearing positions in the arena of international investment rule-making, can now be considered as a vocal proponent of a modern ISDS mechanism. Not only did Japan oppose the EU’s push to define the UNCITRAL Working Group III’s mandate as immediately pointing towards the establishment of an ICS, Japan’s leadership in the negotiations of the


48 See supra, note 5; see also Ross, supra note 29.

49 This risk is very real, considering that Belgium (in recognition of the concerns raised by the regional assembly of Wallonia) in September 2017 has asked the European Court of Justice for an opinion regarding the ICS’s compatibility with EU law, see Belgian Foreign Ministry, press release, 6 September 2017, available at: https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta (last visited 22 February 2018).


54 Article 9.16 TPP.

55 Article 9.23.11 TPP.

56 Article 9.24 TPP.

57 Article 27.2.20) and Article 9.25.3 TPP.

58 Article 9.23.11 TPP.

59 As summarized by EU Commissioner for Trade Malmström, “there is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model. This has significantly affected the public’s acceptance of ISDS […]” Malmström, Proposing an Investment Court System, Blog Post, 16 September 2015, available at: https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en (last visited 22 February 2018).


61 Compare Walters/Landi/Ross, Brower warns against monstrous court proposal, supra note 8.

62 Walters/Landi/Ross, Brower warns against monstrous court proposal, supra note 8. Additionally, Japan's stance has been the subject of discussion at various recent conferences on international investment law, e.g. in Germany. The fact that distinguished senior speakers of varying nationalities were quite well informed about Japan’s motives and policies shows that Japan seems to have established impressive international connections in a relatively short amount of time.
CPTPP gives the impression that Japan’s role might shift from that of a rule taker to a rule maker in the field of international investment law. If CPTPP enters into force, it may become a strong alternative concept to Europe’s proposed ICS. It may thus well be that not least due to Japan’s efforts we are entering into an Asian century, or at least an Asian decade, in international investment law.

64 See Schill, Special Issue: Dawn of an Asian Century in International Investment Law, JWIT 16/2015, p.765.