1. The topic of this panel is the current position of Arbitration in the context of international dispute resolution mechanisms, namely vis-à-vis the appearance of some projects to replace Arbitration by international courts.

2. Is this proposal justifiable and, more specifically, is it likely to succeed in its purpose?

3. Criticism on arbitration, which is rooted in the alleged lack of transparency and lack of independence and impartiality on the part of arbitrators, relates basically to investment arbitration and not commercial arbitration.

4. As a matter of fact, transparency in commercial arbitration is not necessarily a requirement in order to be effective given the confidential, or, at least, private nature of commercial disputes. On the other hand, investment disputes concern public and private entities, and, in such cases, the public needs to know the contents of the proceedings or, at least, the most important pieces of the proceedings.

5. But other points of criticism have been made to the dispute resolution system of investment arbitration (ISDS). This was demonstrated, for instance, in the public consultation the European Commission launched which resulted in questions being raised: that ISDS (1) causes erosion of national sovereignty by restricting the states' right to regulate, (2) compromises the principle of fair and equitable treatment and (3) reduces the right to appeal.

6. These issues, including the alleged lack of transparency, appeared not as a reason or justification for ISDS to be replaced, but as a need to improve the ISDS system. For example, lack of transparency of investment arbitration led to the publication of the UNCITRAL Transparency Rules effective on 1 April 2014 and the UN Mauritius Convention on Transparency for investment treaties concluded before 1 April 2014. These rules were ready to be applied to treaty arbitration, but the EU

proposal for TTIP (known in the US as TAFTA) required them to be also applied to judges in the ICS created by that proposal.

However, it should be pointed out that the EU proposal for TTIP's new system of dispute resolution is not isolated. It is part of other measures in the area of the so-called investment protection which include a radical change of the state's right to regulate.

As a matter of fact, the right to regulate for public policies, in accordance of the EU proposal, shall not be understood as a commitment from governments not to change their legal framework. In other words, it should be understood in the sense that the states have the right to change the legal basis under which the investment contract was entered into, including in a manner that may negatively affect the investor's expectations of profits.

In addition, the right to regulate has also made its appearance in the EU proposal associated with the cases where the concept of indirect expropriation has grounded a number of charges of many states for violating treaties. This has led some countries, such is the case of Canada and USA, to review their BIT models with the purpose to define, as much as possible, to what extent states are free to regulate reasonably, that is a non-discriminatory way, some activities without infringing the treaties. Such is the case inter alia on matters of health, environment, consumer protection, safety, promotion and protection of cultural diversity.

In this case as well, the same regime was appropriated by the TTIP's EU proposal. And the same happened in relation to the concept of fair and equitable treatment.

7. Consequently, a good question to ask would be: is there in fact, any justification for the system of international dispute resolution to be drastically changed for any other reason than some people are prejudiced against private mechanism of settling investment disputes?

   In such a way that, under the EU proposal, the grounds for disputing in accordance with the TTIP's proposal a state's decision about any foreign investment may only be based on the following guarantees: (1) expropriation without compensation (2) possibility to transfer or repatriate funds relating to an investment (3) a guarantee of fair and equitable treatment of the investment and physical security (4) a commitment that governments will respect their own written (and legally binding)

contractual obligations towards an investor and (5) a commitment to compensate for losses in certain circumstances linked to war or armed conflict.
All other defense grounds provided for in the ICSID Convention and thousand of BITs disappeared.

8. In brief, the TTIP's EU proposal presented to the US created a different system that set aside the traditional arbitration system and replaced it with an international court (the investment court) composed of 15 judges (five to be proposed by the EU, five by US and another five by both parties but that have to be non-nationals of any EU member state or the US). An Appellate Court has also been proposed which is to consist of 6 judges (two judges from EU member states, two from the US and two non-nationals of either EU or the US).

9. Next October, a new round of negotiations will be held during which the US delegation is expected to reply to this EU proposal, as well as other matters still under discussion.

10. It should be emphasized that the original TTIP proposal made by the EU contemplated not a TCS but the ISDS. That the Commission had a change of mind is because of pressure from the European Parliament, more specifically from several anti-globalization, anti-liberal and anti-capitalist political forces supported in Europe by the left-wing press and media that take the position of NGOs. These forces support a system where states would take the lead in the dispute resolution system by means of judges and not arbitrators, in other words, people selected and appointed by the public sectors.

Let's now look at the criticisms that can be leveled at this position:

11. Is the alleged lack of transparency of proceedings a defect of arbitration tribunals or is it a procedural defect which may be solved by changing the rules? Investment arbitration has been mainly organized and administered either by ICSID or in accordance with UNCITRAL Rules through ad hoc arbitration with the cooperation of the Permanent Court of Arbitration located in The Hague.

12. The EU proposal to the US with regard to the TTIP negotiations includes some procedural documents, in addition to the award, which must be made available to the public.

    Why shouldn't the same regime be followed in existing arbitration rules? Is this such a sensitive matter for arbitrators? I do not believe so. As already mentioned, the UNCITRAL Rules on Transparency and the UN Mauritius Transparency Convention were conceived to be applied to investment arbitration, not only to create a set of rules specifying which documents should be made public, in addition to the award, but also to create a repository of documents dealing with arbitration as subject to UNCITRAL Rules that is aimed at setting up a publication service.

13. Another major criticism made about investment arbitration is the alleged lack of independence and impartiality of arbitrators resulting in a tendency to benefit the investors than public entities.

14. I do not know of any reliable statistics that show the number of arbitrations in which arbitrators or a majority of arbitrators with a decisive influence in the award have been set aside for showing partiality or lack of independence.

15. On the contrary, statistics published by UNCTAD (a United Nations agency) show that (see World Investment Report 2014, page 124) between 1987 and 2013:

    - the total number of investment arbitration was 568. European countries were involved in 53% of these arbitral cases. Of that total number, 43% were decided in favour of public entities; 31% in favour of investors and 26% ended in settlements.

16. But, more importantly than these considerations, it is imperative to ask:

    If, by shifting the power of decision from arbitrators to judges, can we be absolutely certain that judges will demonstrate more independency and impartiality than arbitrators? After all, judges are civil servants nominated and paid by the states involved, or else academics or retired politicians, who may also be chosen to

be judges and were probably trained in the public sector with the consequent tendency to favour public interest.

17. It should be highlighted that there is a setting aside regime of awards in arbitration, in which lack of independence may be scrutinized and declared null and void by courts of law, that is by independent and professional judges in ordinary courts of law.

    Is there any guarantee that the Appellate Court provided for in the EU proposal, which is made up of judges of similar background to those of the first instance court, have the independence of mind to scrutinize awards affected by lack of independence that favours public entities?

18. Other criticisms can be made of the EU proposal in favour of international courts in lieu of traditional arbitration, such as:

    18.1. How to enforce a judgment adjudicated by the International Court against the European Union bearing in mind Article 1 of the NY Convention?

    I have a few remarks to make on this matter.

    1. Under Regulation No. 912/2014, the EU bears financial responsibility for consequences that result from how the EU and its organisms and agencies treat investment protection agreements (BITs, MITs, etc) entered upon by the EU or by the latter one and its member states or the treatment assumed by any member state alone in compliance with EU laws.
    2. It should be borne in mind that the EU enjoys immunity vis-à-vis any court of law.
    3. It is not enough that the TTIP proposal provides for the application of the NY Convention (article 8.41(5) to the decisions adjudicated by the ICS. This is not that simple because the EU is not a member state of this Convention.

18.2. Another issue is how to decide who bears the costs of any EU charge? Which of the states? All of them? Only some of them? Should there be a compensation fund? If so, provided with funds from which resources?

18.3. On the other hand, article 8.21 of the proposal provides that the EU shall designate, on a case by case basis, who the respondent party should be. Is that the EU? Some member state? Both?
And what kind of appeal exists if a member state does not accept the designation? The proposal has no mention of this possibility.
And what is the position of the investor in this matter of designation of the respondent? There is nothing about this either in the proposal.

18.4. Another pertinent question if we are going to have increased judicial bureaucracy with legalistic minded judges rather than arbitrators selected case by case by the parties? In sum, more delays and further backlogs?

18.5. Are we going to have a system involving more protection for host countries and consequently a reduction of investments?

18.6. Everybody knows the ways that international arbitration, which has boosted international trade and investment particularly since 1958, has developed.
Then the EU proposal suddenly thought that it would be possible to create - by the mere wave of magician's wand - an international court composed of judges to solve investment disputes but "travestied" by? of arbitrators. And this has only happened because of criticisms leveled at arbitration and arbitrators, criticisms that have not been validated.
In short, is this not really simply an exercise of parochial and protectionist movement against modernity and progress?

18.7. Even in the most democratic countries, nomination of judges falls within the competence of a body of judges. They are not nominated by the state seeing that states are, directly or indirectly, interested parties with regard to disputes. So why should the EU commission not opt for ICSID or UNCITRAL Rules?

18.8. A number of challenges for judges may be raised with the "Code of Conduct for Judges" provided for in article 5 of the proposal. This code requires an appointed judge to show real "purification status" (no pressure of any kind, at present and in past, no political considerations, no influence through political clamour, no loyalty to disputing party and no fear of criticism).

18.9. In addition, the Appellate Court has only six members, two of them to be nationals of a third country, who shall chair the Court. Only two neutrals is clearly too few when there are backlogs.

18.10. The UNCITRAL Rules on Transparency and the UN Mauritius Convention on Transparency may be applied not only to judges but also to arbitrators. This has already been the case since 2014.

18.11. The US Chamber of Commerce has already criticized the EU proposal saying that it is not perfect and the US Government should not use it as a model to follow. It should also be pointed out that the US adopted the traditional arbitration system in the Trans-Pacific Partnership Agreement.

18.12. It is a rule in arbitration that if an arbitrator commits any serious fault or mistake in their functions, they should be removed from further arbitration cases. What sanctions for judges in similar circumstances are provided for in TTIP's proposal?

18.13. Finally, and although time limitations won't permit me to mention here a few more critical issues): do we know what the relationship will be like between the International Court and the EU Court of Justice? It should be noted that the International Court is the only entity with the competence to construe and fix jurisprudence in the EU about community laws.

Lisbon, July 1, 2016

Manuel Pereira Barrocas