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THE EUROPEAN UNION AND INVESTOR-STATE DISPUTE SETTLEMENT: FROM INVESTOR-STATE ARBITRATION TO A PERMANENT INVESTMENT COURT

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August Reinisch



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ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where governments, legal establishments and civil society groups have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government equivalent to those provided by contemporary investment protection agreements.

Contributors to the Investor-State Arbitration project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Howard Mann, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman.

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ACRONYMS

BITs	bilateral investment treaties
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding
ECT	Energy Charter Treaty
FET	fair and equitable treatment
FPS	full protection and security
FTAs	free trade agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
IAs	international investment agreement
ISDS	investor-state dispute settlement
ISA	investor-state arbitration
MAI	Multilateral Agreement on Investment
MFN	most-favoured nation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
SCC	Stockholm Chamber of Commerce
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

EXECUTIVE SUMMARY

Since the transfer of foreign direct investment powers from the European Union member states to the European Union itself in the 2009 Treaty of Lisbon, the European Commission, the main external trade actor for the European Union, has started to negotiate international investment agreements as well as investment chapters in enlarged free trade agreements (FTAs). Both contain substantive protection standards and enforcement mechanisms in case of disputes, usually both state–state and investor–state arbitration (ISA).

With regard to the latter, it was unclear whether the European Commission, the European Union’s experienced World Trade Organization (WTO) litigator, would continue to use the interstate template of trade disputes or venture into ISA. After an initial orientation period, the European Commission firmly endorsed ISA, as demonstrated by the negotiations with Canada on the Comprehensive Economic and Trade Agreement (CETA) and with the United States on the Transatlantic Trade and Investment Partnership (TTIP).

Meanwhile, however, public opposition to the TTIP, and to ISA in particular, has formed in unexpected dimensions. It even led the European Commission to partially interrupt its trade negotiations with the United States in order to conduct a public consultation on the investment aspects of the TTIP. Ever since, ISA has remained one of the most controversial parts of the planned trade agreements. Most recently, the European Commission tabled a TTIP proposal to set up a permanent investment court that would replace the system of ad hoc ISA.

This paper analyzes in detail the development of the European Union’s position toward the use of ISA as a means for settling investor-state disputes.

INTRODUCTION

A few years ago, ISA was hardly taken note of in the European Union’s external trade circles. With the 2009 Treaty of Lisbon, and the European Union’s new powers in the field of foreign direct investment, that has considerably changed. The European Commission, the European Union’s main external trade actor, asserted its newly won competence to negotiate investment agreements containing both substantive protection standards as well as an enforcement mechanism in case of disputes, with ISA being the most prominent form of investor-state dispute settlement (ISDS).

When EU trade negotiations started to include investment chapters, as in the negotiations with Canada on CETA,¹ with Singapore on an enlarged FTA² and with the United States on the TTIP, public interest in and opposition to what is sometimes portrayed as a secret parallel justice system for large multinational firms circumventing legitimate domestic courts intensified. Suddenly, the formerly technical questions of designing a cost-efficient, depoliticized and effective settlement mechanism for investment disputes became a major political issue in a number of EU member states. Growing opposition by grassroots movements and an alliance of various, often rather divergent political groupings threatened to halt trade deals the European Commission was negotiating. In a rare move, the European Commission interrupted its trade talks with the United States in order to conduct a public consultation in early 2014, focusing on the investment part of the TTIP. Ever since, ISA has remained the most controversial part of the planned trade agreements.

Against this background, this paper tries to analyze the position of the European Union toward the use of ISA as a means for settling investor-state disputes.

THE EUROPEAN UNION’S FIRST STEPS TOWARD ISA

In spite of the pre-eminent practical importance of ISA since the European Union gained explicit power to negotiate investment agreements through the Lisbon Treaty, the use of ISA by the European Union

1 Consolidated CETA text, published on 26 September 2014, online: <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>.

2 *EU-Singapore Free Trade Agreement*, authentic text as of May 2015, published on 29 June 2015, online: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>.

is not an entirely new phenomenon. In fact, already in the Energy Charter Treaty (ECT)³ of the mid-1990s, the European Union, as contracting party of this “mixed agreement,”⁴ for the first time assumed specific obligations regarding the treatment of foreign investment and, in this context, accepted ISA as a tool for settling investment disputes.

While the ECT led to a number of ISAs, among them the *Yukos*-related cases against the Russian Federation⁵ and most recently a wave of cases involving cutbacks on solar energy subsidy programs by EU member states such as the Czech Republic,⁶ Italy⁷ and Spain,⁸ no case has been instituted against the European Union so far.

Nevertheless, the ISA provisions in the ECT provide a useful template for current ISA negotiations, in particular in situations where both European Union and EU member states’ actions may be challenged. This has inspired EU internal legislation on the allocation of financial burdens arising from ISA awards.⁹

Under the ECT’s dispute settlement provisions, an investor alleging a breach of the treaty’s protection standards can either resort to domestic courts and administrative tribunals or institute arbitral proceedings before the International Centre for Settlement of Investment Disputes (ICSID), before a tribunal constituted under the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules or before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).¹⁰ Since an overlap between the European Union’s internal market freedoms and the ECT’s substantive protection standards is likely to occur, the determination of the proper respondent is, in some cases, of particular importance. In this regard, the European Community issued a statement pursuant to which the “Communities and the Member States will, if necessary, determine among them who is the respondent party [...]”¹¹ upon request of the investor within a period of 30 days. Article X.20 of CETA contains a similar but more elaborate provision on the determination of the respondent for disputes with the European Union or its member states.¹²

3 *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95, 34 ILM 360 (entered into force 16 April 1998) [ECT].

4 When the subject areas covered by an international agreement negotiated by the European Union are not entirely covered by the EU’s external powers, such agreements are entered into by the European Union and at least some of its member states. Because of the joint participation as treaty parties on the EU side, they are referred to as “mixed” agreements. See e.g. J Bischoff, “Just a little bit of ‘mixity’? The EU’s role in the field of international investment protection law” (2011) 48:5 CML Rev 1527. Generally on the issue of mixed agreements, see P Craig & G De Burca, *EU Law: Text, Cases, and Materials*, 5th ed (London, UK: Oxford University Press, 2011) at 334ff; P Eckhout, *External Relations Law*, 2nd ed (London, UK: Oxford University Press, 2011) at 213ff; C Hillion & P Koutrakos, eds, *Mixed Agreements Revisited* (Oxford, UK: Hart Publishing, 2010).

5 *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (2014), Award of 18 July 2014, PCA Case No AA 226 (UNCITRAL); *Yukos Universal Limited (Isle of Man) v The Russian Federation* (2014), Award of 18 July 2014, PCA Case No AA 227 (UNCITRAL); *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (2014), Award of 18 July 2014, PCA Case No AA 228 (UNCITRAL).

6 See *Antaris Solar and Dr. Michael Göde v Czech Republic* (UNCITRAL); *Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v Czech Republic* (UNCITRAL); *Voltaic Network GmbH v Czech Republic* (UNCITRAL); *ICW Europe Investments Limited v Czech Republic* (UNCITRAL); *Photovoltaik Knopf Betriebs-GmbH v Czech Republic* (UNCITRAL); *WA Investments-Europa Nova Limited v Czech Republic* (UNCITRAL); *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) v Czech Republic* (UNCITRAL).

7 See *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No ARB/14/3, registered 21 February 2014.

8 The following proceedings have been instituted under the auspices of ICSID: *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain*, ICSID Case No ARB/13/30; *Antin Infrastructure Services Luxembourg Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/31; *Eiser Infrastructure Limited v Kingdom of Spain*, ICSID Case No ARB/13/36; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1; *NextEra Energy Global Holdings BV v Kingdom of Spain*, ICSID Case No ARB/14/11; *InfraRed Environmental Infrastructure GP Limited v Kingdom of Spain*, ICSID Case No ARB/14/12 and *REENERGY Sàrl v Kingdom of Spain*, ICSID Case No ARB/14/18. Two cases have been registered at the Arbitration Institute of the SCC: *CSP Equity Investment Sarl v Spain* and *Charanne and Construction Investments v Spain*. At least one ECT claim-based tribunal has been constituted under the UNCITRAL Arbitration Rules, see *AES Solar and others v Spain* (UNCITRAL).

9 See *Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*, [2014] OJ L 257/121.

10 ECT, *supra* note 3, art 26.

11 *Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty*, [1998] OJ L 69/115. This notwithstanding, the statement further clarifies in a footnote that this does not exclude the right of an investor to institute proceedings against both the (then) Community and its member states.

12 Pursuant to Article X.20: Determination of the respondent for disputes with the European Union or its Member States, Consolidated CETA Text, *supra* note 1, the European Union is primarily competent for the determination of the proper respondent before the institution of arbitral proceedings. If the investor has not been informed of the determination within 50 days, the member state shall be respondent in cases where the measure allegedly breaching CETA’s protection standards is exclusively a measure of a member state. If the dispute at stake includes measures of the European Union, the European Union shall be respondent (art X.20(4)).

THE EUROPEAN UNION'S NEW LISBON POWERS IN THE FIELD OF INVESTMENT

With the Lisbon Treaty, entering into force in 2009,¹³ the European Union's external trade powers were significantly enlarged. They now include "foreign direct investment" as part of the Common Commercial Policy.¹⁴

Since the Lisbon Treaty explicitly speaks of "foreign direct investment" and not generally of "foreign investment," a controversy arose as to whether this new competence in the external trade field was indeed limited to foreign direct investment, or could be regarded as a full "investment" power. Not surprisingly, the European Commission came out in favour of the latter, arguing that portfolio investments were implicitly covered as a result of parallel internal powers under the *ERTA*-doctrine,¹⁵ while some member states remained adamant in limiting the European Union's powers strictly to direct investments.¹⁶ Given this controversy, the scope of the European Union's competence on foreign direct investment under article 207(1) remains to be clarified by the Court of Justice of the European Union (CJEU) in an opinion requested by the European Commission pursuant to article 218(11) of the Treaty on the Functioning of the European Union (TFEU).¹⁷

This seemingly academic question has, of course, important political implications. Mixed agreements require adherence of the 28 individual EU member states, which would imply a kind of *de facto*

13 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, [2007] OJ C 306/01, signed 17 December 2007.

14 *Consolidated version of The Treaty on the Functioning of the European Union*, [2008] OJ C 115/47, art 207(1) ("The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."). See also M Bungenberg, "Going Global? The EU Common Commercial Policy After Lisbon" in C Hermann & JP Terhechte, eds, *European Yearbook of International Economic Law* (Berlin: Springer, 2010) 123; J Chaisse, "Promises and Pitfalls of the European Union Policy on Foreign Investment: How will the new EU Competence on FDI affect the emerging global regime?" (2012) 15 *J Intl Econ L* 51; A Dimopoulos, *EU Foreign Investment Law* (Oxford, UK: Oxford University Press, 2011); F Hoffmeister & G Ünüvar, "From BITs and Pieces towards European Investment Agreements" in M Bungenberg, A Reinisch & C Tietje, eds, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Baden-Baden and Oxford, UK: Nomos/Hart Publishing, 2013) 57; Marc Bungenberg & Stephan Hobe, "The Relationship of International Investment Law and European Union Law" in M Bungenberg, J Griebel, S Hobe & A Reinisch, eds, *International Investment Law* (Baden-Baden and Oxford, UK: Nomos/Hart Publishing, 2015) 1602.

15 See European Commission, "Towards a comprehensive European international investment policy", Communication, COM(2010) 343 final at 8 ("[...] [T]he articulation of investment policy should be consistent with the Treaty's Chapter on capital and payments (Articles 63-66 TFEU) [...]. That chapter does not expressly provide for the possibility to conclude international agreements on investment, including portfolio investment. However, to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied [...].") [European Commission Communication]. See also Hoffmeister & Ünüvar, *supra* note 14 at 65.

16 See A Reinisch, "The EU on the Investment Path: Quo Vadis Europe? The Future of EU BITs and other Investment Agreements" (2014) 12:1 *Santa Clara J Intl L* 136. The German Federal Constitutional Court stressed this in its Lisbon Treaty judgment, *German Constitutional Court*, 2 BvE 2/08, 30 June 2009, para 379 ("The extension of the common commercial policy to 'foreign direct investment' (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term 'foreign direct investment' only encompasses investment which serves to obtain a controlling interest in an enterprise [...]. The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.") online: <www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>. See also M Bungenberg, J Griebel & S Hindelang, eds, *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (Berlin: Springer, 2011); C Tietje, "Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon" (2009) 83 *Beiträge zum Transnationalen Beiträge zum transnationalen Wirtschaftsrecht* 16; A Reinisch, "The Division of Powers between the EU and its Member States 'after Lisbon'" in M Bungenberg, J Griebel & S Hindelang, eds, *Internationaler Investitionsschutz und Europarecht* (Baden-Baden: Nomos, 2010) 99 at 107; F Meyer, *Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar?* ("Is the planned free trade agreement of the EU with Canada (Comprehensive Economic and Trade Agreement, CETA) a mixed agreement?") (Expert Opinion for the German Federal Ministry for Economic Affairs and Energy, published on 22 September 2014) 10ff, online: <www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen.property=pdf_bereich=bmwi2012,sprache=de,rwb=true.pdf>.

17 TFEU, art 218(11) ("Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties"). The Commission made use of this provision in the context of the envisaged EU-Singapore FTA (see *infra* note 52). See European Commission, "Decision of 30.10.2014 requesting an opinion of the Court of Justice pursuant to article 218(11) TFEU on the competence of the Union to sign and conclude a Free Trade Agreement with Singapore", C(2014) 8218 final, online: <www.statewatch.org/news/2015/feb/eu-com-fta-cjeu-com-8218-14.pdf>.

unanimity requirement,¹⁸ while agreements falling under the exclusive competence of the European Union are solely negotiated by the European Commission and require only majority approval of the Council of Ministers and the European Parliament.

A further competence issue regarding the scope of investment protection to be negotiated seems to have been tacitly resolved in favour of EU powers. One could question whether the European Union has external powers to agree on expropriation clauses, typically contained in international investment agreements (IIAs), since the TFEU expressly reserves the question of property ownership to the member states.¹⁹

Finally, and most importantly in the present context, doubts have been voiced whether the Lisbon Treaty powers concerning foreign direct investment also encompass ISA.²⁰ It seems, however, that procedural mechanisms to enforce substantive protection standards are seen as being implicitly covered by the latter power.²¹

While the European Union is asserting its powers concerning investment, it is also clear that — with the exception of the ECT²² — to date no EU IIA has entered into force. Thus, the roughly 1,400 bilateral investment treaties (BITs) of the European Union's member states²³ still form the basis for international investment protection of EU investors abroad and of investors in the European Union. Recognizing that the full transition to EU IIAs will require substantial time, the European Union has adopted a regulation establishing transitional arrangements for member states' BITs with third states, which basically permit the continued validity of such IIAs as well as the negotiation and conclusion of new ones.²⁴

Once the competence issues had been overcome, or at least pragmatically left open, the issue arose how the European Union would position itself toward ISA and other forms of ISDS, such as conciliation or mediation, as alternatives to recourse to domestic courts of the host states only.²⁵

18 Based on a proposal made by the Commission after the finalization of negotiations and subsequent to the consultation or consent of the European Parliament according to Article 218(6) TFEU, the council adopts a decision to conclude the agreement pursuant to Article 218(2) and (6) TFEU. Additionally, in the case of mixed agreements, the members states' consent pursuant to domestic law is warranted. It has been the practice of the European Union that the council will only conclude an agreement once all member states have given their consent. The effect of abstention of individual member states remains unclear. In particular, it is questionable whether such conduct would be in breach of the duty of cooperation under Article 4 TFEU and whether the non-approving member states would be bound by the parts of the respective agreement covered by exclusive competences of the European Union by virtue of Article 116(2) TFEU. In this context, one has to take into account Article 218(5) TFEU as well, which expressly provides for the possibility of provisional application of an envisaged agreement in the sense of Article 25 Vienna Convention on the Law of Treaties and thus for a means of circumventing the member state acceptance requirement. For more detail, see e.g. Eckhout, *supra* note 4, 258ff.

19 See Article 345 TFEU (“The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”). On this issue, see e.g. A Dimopoulos, “The Common Commercial Policy After Lisbon: Establishing Parallelism between Internal and External Economic Relations?” (2008) 4:4 *Croatian Yearbook of European Law and Policy* 101 at 115–116; B Akkermans & E Ramaekers, “Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations” (2010) 16(3) *ELJ* 292; A Dimopoulos, *EU Foreign Investment Law* (New York: Oxford University Press, 2011) at 108ff; S Hindelang, “Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen” in M Bungenberg & C Herrmann, eds, *Die Gemeinsame Handelspolitik der Europäischen Union nach Lissabon* (Baden-Baden: Nomos, 2011) 157 at 163. M Bungenberg, “The Division of Competences Between the EU and Its Member States in the Area of Investment Politics” in M Bungenberg, J Griebel & S Hindelang, eds, *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (Berlin: Springer, 2011) 29 at 36–37.

20 See Meyer, *supra* note 16 at 15–16; W Shan & S Zhang, “The Treaty of Lisbon: Half Way toward a Common Investment Policy” (2011) 21 *EJIL* 1049 at 1070; R Kläger, “The Impact of the TTIP on Europe's Investment Arbitration Architecture” (2014) 2 *Zeitschrift für Deutsches und Amerikanisches Recht* 68 at 69.

21 See e.g. S Schill, “Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements” in M Bungenberg, A Reinisch & C Tietje, eds, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Baden-Baden and Oxford, UK: Nomos/Hart Publishing, 2013) 37 at 40.

22 See ECT, *supra* note 3.

23 European Commission, “Investment Protection and Investor-to-State Dispute Settlement in EU Agreements”, Fact Sheet, November 2013, at 4, online: <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf>.

24 *Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, [2012] *OJ* L351/40.

25 See also C Brown & I Naglis, “Dispute Settlement in Future EU Investment Agreements” in M Bungenberg, A Reinisch & C Tietje, eds, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Oxford, UK: Nomos/Hart Publishing, 2013) 17.

Since the 1990s, with the increase of ISA under the ICSID Convention²⁶ and other arbitration systems, investment arbitration has been viewed as a crucial form of effective investment protection,²⁷ rendering the need for an espousal of claims under the traditional diplomatic protection paradigm unnecessary. Simultaneously, avoiding the political harassment factor of such espoused interstate claims²⁸ has been regarded as an important depoliticization of investment disputes.²⁹

According to recent statistics, more than 90 percent of all (approximately 3,200) IIAs contain ISA.³⁰ With regard to the actual use of ISA, the United Nations Conference on Trade and Development (UNCTAD) lists 608 initiated cases until the end of 2014.³¹ More than 75 percent of all ISA cases decided from 2011 to 2014 and won by investors were initiated against states in Latin America and Central and Eastern European states.³²

AN EMERGING EU INVESTMENT POLICY

In spite of the general recognition of these advantages, it was unclear after the European Union's new investment powers entered into force through the Lisbon Treaty whether the European Union would strive for ISA or settle for other forms of dispute settlement, possibly limited to the interstate level, for example, along the trade law paradigm to which the European Commission has become accustomed over years of experience with the General Agreement on Tariffs and Trade (GATT) and the WTO. One should also not forget that shortly before the European Union started to consider ISA, Australia and the United States had found it unnecessary to include ISA in a bilateral FTA between two developed states of the Organisation for Economic Co-operation and Development (OECD).³³

After an initial orientation phase, however, the EU institutions finally came out in favour of adopting ISA,³⁴ although the European Parliament, in particular, voiced concern about this form of ISDS.³⁵ This latter concern, together with increased pressure from various non-governmental organizations (NGOs) lobbying against ISDS in 2013, gained such political momentum that in early 2014 the EU Commissioner

26 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 [ICSID Convention].

27 See e.g. *Eastern Sugar B.V. v Czech Republic*, Partial Award of 27 March 2007, SCC Case No 088/2004, para 165 (“Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional or national legal systems, the investor’s right arising from the BIT’s dispute settlement clause to address an international arbitral tribunal independent from the host state is the best guarantee that the investment will be protected against potential undue infringements by the host state.”); *National Grid plc v Argentina*, Decision on Jurisdiction of 20 June 2006 (UNCITRAL), para 49 (“[...] assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.”).

28 On the so-called gun boat diplomacy, see D Wallace, “Fair and Equitable Treatment and Denial of Justice: From *Chattin v Mexico* to *Loewen v USA*” in T Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID* (London, UK: Cameron May, 2005) at 669ff, 674; OT Johnson Jr & J Gimblett, “From Gunboats to BITs: The evolution of modern international investment law” in K Sauvart, ed., *Yearbook on International Investment Law and Policy 2010–2011* (New York, Oxford University Press, 2012) 649.

29 See IFI Shihata, “Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA” (1986) 1:1 ICSID Rev 1; J Paulsson, “Keynote Address: Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration” (delivered at the PCA Peace Palace Centenary Seminar, 11 October 2013).

30 See J Pohl, K Mashigo & A Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Paper on International Investment No 2012/2 (November 2012) at 11; D Gaukroder & K Gordon, *Investor-state dispute settlement: A scoping paper for the investment policy community*, OECD Working Paper on International Investment No 2012/3 (2012) at 10, 64.

31 For the complete list of investor-state disputes including those on the basis of Intra-EU BITs, see online: <<http://unctad.org/en/Pages/DIAE/ISDS.aspx>>.

32 UNCTAD, ‘Latest Development in Investor-State Dispute Settlement’ (2012) IIA Issues Note– No 1 at 19, online: <http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf>; UNCTAD, ‘Recent Development in Investor State Dispute Settlement (ISDS)’ (2013) IIA Issues Note No. 1 at 31, online: <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>; UNCTAD, ‘Recent Development in Investor State Dispute Settlement’ (2014) IIA Issues Note No 1 at 32–33, online: <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf>; UNCTAD, ‘Investor-State Dispute Settlement: Review of Developments in 2014’ (2015) IIA Issues Note No 2 at 29–30, online: <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf>; see further online: <<http://unctad.org/en/Pages/DIAE/ISDS.aspx>>.

33 See Australia-United States FTA (2005), ATS 1, HR Doc No 108-199. See also Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011) at 14, online: <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf>. See Luke Nottage, “The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic’s View of Australia’s ‘Gillard Government Trade Policy Statement’”, online: (2011) 8:5 *Transnational Dispute Management* <www.transnational-dispute-management.com/article.asp?key=1767>; Leon E Trakman, “Investor State Arbitration or Local Courts: Will Australia Set a New Trend?”, (2012) 46 *JWT* 83; WS Dodge, “Investor-State Dispute Settlement between Developed Countries: Reflection on the Australia-United States Free Trade Agreement” (2006) 39 *Vand J Transnatl L* 1.

34 See e.g. European Commission Communication, *supra* note 15 at 10 (“ISDS is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others.”).

35 European Parliament Resolution, *infra* note 43, para 24 (“Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements.”).

in charge of trade and investment negotiations called for a reflection period to consult the European public on investment and ISDS.³⁶

Since the European Commission has chosen not to adopt a model BIT/IIA,³⁷ the actual position of the European Union toward ISA can only be deduced from policy papers and treaty negotiations.³⁸ Most important in this context is the September 2014 draft CETA text, which comprises a full investment chapter including ISA.³⁹

In addition, some documents emanating from the EU policy-making institutions provide guidance toward the European Union's stance on issues of ISA. In this context it is important to keep in mind certain basic division-of-powers principles of the European Union with regard to the negotiation and conclusion of trade (and now also investment) agreements. While the European Council (representing the member states) in the form of the External Trade Council has the final say in concluding trade agreements with a qualified majority, it also provides initial guidance to the European Commission in formulating negotiating directives. On the basis of the latter, the European Commission (as the European Union's supranational trade executive) is tasked with negotiating the agreements that have to gain final approval by the European Parliament as well.

Already in July 2010, the European Commission adopted a policy communication entitled "Towards a comprehensive European international investment policy,"⁴⁰ in which ISDS is referred to as an "established feature of investment agreements" that should be included in future EU IIAs.⁴¹

This communication received comments from the other EU institutions; most important among them were the European Council conclusions of October 25, 2010,⁴² and the European Parliament's Resolution of April 6, 2011.⁴³ Although containing rather general language, both documents displayed a positive attitude toward ISA. While the council emphasized the importance of an "effective investor-to-state dispute settlement mechanism"⁴⁴ in EU IIAs, the Parliament more cautiously expressed its view that "in addition to state-to-state dispute settlement procedures, investor-state procedures must also be applicable in order to secure comprehensive investment protection."⁴⁵

More details emanated from the Council Negotiating Directives of September 12, 2011,⁴⁶ concerning the negotiations with Canada, India and Singapore, which — although confidential — were leaked at some stage, and which contained valuable information on the European Union's official position with

36 See European Commission Press Release, *infra* note 99.

37 See European Commission Communication, *supra* note 15 at 6.

38 See also A Reinisch, "Putting the Pieces together ... an EU Model BIT?" (2014) 15 J World Investment & Trade (Special Issue: The Anatomy of the (Invisible) EU Model BIT) 679; G Lentner, "A Uniform European Investment Policy?: The unwritten EU Model BIT" (2014) 2 JL & Administrative Sciences 156.

39 Consolidated CETA Text, *supra* note 1. See on the negotiations with Canada also C Lévesque, "The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA" in M Bungenberg, A Reinisch & C Tietje eds, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Oxford, UK: Nomos/Hart Publishing, 2013) 121.

40 European Commission Communication, *supra* note 15.

41 *Ibid.* ("In order to ensure effective enforcement, investment agreements also feature investor-to-state dispute settlement, which permits an investor to take a claim against a government directly to binding international arbitration [footnote: The ECT, to which the European Union is a party, equally contains investor-state dispute settlement.]. Investor-state dispute settlement, which forms a key part of the inheritance that the Union receives from Member State BITs, is important as an investment involves the establishment of a long-term relationship with the host state which cannot be easily diverted to another market in the event of a problem with the investment. Investor-state is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others. For these reasons, future EU agreements including investment protection should include investor-state dispute settlement. This raises challenges relating, in part, to the uniqueness of investor-state dispute settlement in international economic law and in part to the fact that the Union has not historically been a significant actor in this field. Current structures are to some extent ill-adapted to the advent of the Union. To take one example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), is open to signature and ratification by states members of the World Bank or party to the Statute of the International Court of Justice. The European Union qualifies under neither. In approaching investor-state dispute settlement mechanisms, the Union should build on Member State practices to arrive at state-of-the-art investor state dispute settlement mechanisms.").

42 Council of the European Union, *Conclusions on a comprehensive European international investment policy*, 3041st Foreign Affairs Council Meeting, 25 October 2010, online: <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf>.

43 European Parliament, *Resolution of 6 April 2011 on the future European international investment policy*, [2011] OJ C 296 E/34, online: <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN> [European Parliament Resolution].

44 Council of the European Union, *supra* note 42 ("[...] stresses, in particular, the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements [...]").

45 European Parliament Resolution, *supra* note 43, para 32 ("Takes the view that, in addition to state-to-state dispute settlement procedures, investor-state procedures must also be applicable in order to secure comprehensive investment protection").

46 Council Negotiating Directives (Canada, India and Singapore), 12 September 2011; online: <www.bilaterals.org/spip.php?article20272&lang=en>.

regard to a number of investment-related issues. They suggested that an investment chapter should include provisions for fair and equitable treatment (FET), full protection and security (FPS), national treatment and most-favoured-nation (MFN) treatment, as well as guarantees against uncompensated expropriation and probably an umbrella clause. Regarding the level of detail, the instructions appeared to favour the traditional European approach by adhering to a rather concise treaty text, without clarifications limiting the scope of FET and indirect expropriation, as they are known within US and Canadian BITs as well as in the North American Free Trade Agreement (NAFTA).⁴⁷ With regard to dispute settlement, the need for direct ISA seemed to be unquestioned, although the precise contours were still open, given the difficulty of EU access to ICSID (and ICSID Additional Facility) dispute settlement since the European Union is an international organization and the ICISD Convention is open to states only.⁴⁸

The subsequent 2013 Council Negotiating Directives for the TTIP also called for the inclusion of “an effective and state-of-the-art investor-to-state dispute settlement mechanism.”⁴⁹ The qualifications that should be understood as “state-of-the-art” would reflect a number of the publicly criticized features of ISA and also take into account US practice in shaping ISA provisions. The European Union is currently negotiating BITs with China and Myanmar, as well as investment chapters as part of FTAs with Egypt, India, Japan, Jordan, Libya, Malaysia, Morocco and Tunisia, Thailand, Vietnam and the United States.⁵⁰ The negotiations with Canada⁵¹ and Singapore⁵² have already been concluded in substance.

As of mid-2015, the most advanced outcome likely to reflect the European Commission’s position on ISA is contained in the above-mentioned September 2014 CETA draft.⁵³

Before analyzing this in detail, however, it is useful to reflect on the public debate that has reached a remarkable intensity in some EU member states and that has even led to an interruption of the investment negotiations of the European Union, in particular those with the United States on the TTIP. In this contribution’s final section, the September 2015 suggestions of the European Commission on a future TTIP investment chapter⁵⁴ will be analyzed.⁵⁵

47 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].

48 See the leaked negotiating mandate “EU-Canada (CETA), India and Singapore FTAs – European Commission negotiating mandate on investment (2011)”, online: <www.bilaterals.org/spip.php?article20272&lang=en> (“Enforcement: the agreement shall aim to provide for an effective investor-to state- dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States’ bilateral investment agreements (BIT’s).”). Pursuant to Article 67 ICSID Convention, *supra* note 26, the convention is only accessible for member states of the International Bank for Reconstruction and Development or to any other state which is a party to the ICJ Statute. See M Burgstaller, “Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems” (2014) 15 *J World Investment & Trade* (Special Issue: The Anatomy of the (Invisible) EU Model BIT) 551 at 557. Notably, Article X.22 (4) Consolidated CETA text, *supra* note 1, makes a reference to the ICSID Convention, to the ICSID Additional Facility Rules and to the UNCITRAL Arbitration Rules. See also A Reinisch & L Stifter, “European Investment Policy and ISDS”, online: (2014) at 11–12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564018>.

49 Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, online: <<http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>> (“[...] Enforcement: the Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, including through the possibility of binding interpretation of the Agreement by the Parties. State-to-state dispute settlement should be included, but should not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanisms. It should provide for investors as wide a range of arbitration fora as is currently available under the Member States’ bilateral investment agreements. The investor-to-state dispute settlement mechanism should contain safeguards against manifestly unjustified or frivolous claims. Consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement, and to the appropriate relationship between ISDS and domestic remedies. [...]”).

50 The Overview of FTA and other Trade Negotiations of the Commission shows the current state of negotiations of international agreements currently negotiated by the European Union, online <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf>.

51 Consolidated CETA text, *supra* note 1.

52 On 20 September 2013, the European Union and Singapore have initialled the text of a comprehensive FTA. See online: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>. The authentic text as of May 2015 of the EU-Singapore Free Trade Agreement was published on 29 June 2015, online: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>.

53 Consolidated CETA text, *supra* note 1.

54 Commission draft text TTIP – investment, 16 September 2015, online: <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf>.

55 See *infra* text at note 185.

THE PUBLIC DEBATE ON ISA IN EU MEMBER STATES

While the CETA negotiations triggered some questions and critical comments on investor protection and ISA in particular,⁵⁶ the TTIP negotiations led to a major public debate in several EU member states.

It is interesting to note that this debate was sparked in some member states and has reached a high level of intensity, while in others it seems to be a non-issue. In Germany and Austria in particular, NGOs and a number of politicians have questioned the need for ISA. Given the fact that both countries have a long-standing practice of concluding BITs, this may appear surprising.⁵⁷

The underlying reasons for this skepticism are complex and can undoubtedly be better examined by political scientists. Nonetheless, one could argue that the negative stance toward the TTIP mirrors the widespread phenomenon of “euro-skepticism” and thus a certain degree of mistrust toward EU institutions, linking up with the anti-globalization movement of the 1990s that led to the demise of the Multilateral Agreement on Investment (MAI) in 1998.⁵⁸ Furthermore, it is interesting to note that the general TTIP criticism coincided with National Security Agency / WikiLeaks revelations about US spying activities in Europe,⁵⁹ feeding into the notion of the United States as an overwhelmingly powerful trade partner that would outwit Europeans on all fronts,⁶⁰ including forcing their low standards (in European public perception) for health, safety, environment and labour in the production of goods (“chlorine chicken” being just one example)⁶¹ on European consumers, as well as empowering US corporations to prevent legitimate European regulation via ISA.

From an institutional perspective, the European Council (still) seems to be in favour of the inclusion of an ISA mechanism in the TTIP.⁶² While the European Commission initially used to strongly advocate this option,⁶³ the new cabinet under Jean-Claude Juncker adopted a softer tone toward ISA.⁶⁴

From a member-state perspective, it is worth mentioning that in mid-2014 the German Federal Council expressly rejected the inclusion of a specific ISA mechanism in the TTIP.⁶⁵ In the following months, the public debate, in Germany and Austria in particular, become increasingly hostile to the idea of including ISA in an investment chapter of the TTIP. ISA was portrayed as a special right of large

56 See e.g. M Barlow, “CETA: A Threat to Local Democracy” (22 October 2011), *Huffington Post Canada* (blog), online: <www.huffingtonpost.ca/maude-barlow/ceta_b_1021782.html>; see S Trew, “Down with human rights! The Harper government’s peculiar objection to European trade deal” (22 November 2012), *rabble.ca* (blog), online: <<http://rabble.ca/blogs/bloggers/council-canadians/2012/11/down-human-rights-harper-governments-unfathomable-objection>>.

57 UNCTAD lists 65 BITs concluded by Austria (60 in force) and 134 BITs concluded by Germany (127 in force), numbers online: <<http://investmentpolicyhub.unctad.org/IIA>>.

58 See OECD Negotiating Group on the Multilateral Agreement On Investment (MAI), *The Multilateral Agreement On Investment Draft Consolidated Text*, OECD Doc DAF/MAI(98)7/REV1 (22 April 1998); see also P Muchlinski, “The Rise and Fall of the MAI: Lessons for the Regulation of International Business” in I Fletcher, L Mistelis & M Cremona, eds, *Foundations and Perspectives in International Trade Law* (London, UK: Sweet & Maxwell, 2001) 114.

59 The beginning of the negotiations in mid-2013 were already politically overshadowed by waves of new revelations concerning US spying activities directed against EU member state governments.

60 See e.g. R Mason, “Corporate Wolves’ will exploit TTIP trade deal, MPs warned”, *The Guardian* (15 January 2015), online: <www.theguardian.com/business/2015/jan/15/corporate-wolves-warning-ttip-trade-deal>.

61 See e.g. A Faiola, “Free trade with U.S.? Europe balks at chlorine chicken, hormone beef.”, *The Washington Post* (4 December 2014), online: <www.washingtonpost.com/world/europe/free-trade-with-us-europe-balks-at-chlorine-chicken-hormone-beef/2014/12/04/e9aa131c-6c3f-11e4-bafd-6598192a448d_story.html>; I Traynor & M Rice-Oxley, “US-EU trade deal - the Guardian briefing”, *The Guardian* (5 February 2015), online: <www.theguardian.com/business/2015/feb/05/us-eu-trade-deal-the-guardian-briefing>.

62 See Council of the European Union, *supra* note 49.

63 See European Commission Communication, *supra* note 15.

64 See President Juncker’s political guidelines of 15 July 2014 addressed to the next European Commission and entitled “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change”, at 25, online: <http://ec.europa.eu/priorities/docs/pg_en.pdf> (“The negotiating mandate foresees a number of conditions that have to be respected by such a regime [ISDS] as well as an assessment of its relationship with domestic courts. There is thus no obligation in this regard: the mandate leaves it open and serves as a guide.”).

65 German Federal Council Resolution of 11 July 2014, BR-Drs 295/14, online: <[www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14\(B\).pdf?__blob=publicationFile&v=1](http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14(B).pdf?__blob=publicationFile&v=1)> (“[...]9. Der Bundesrat hält spezielle Investitionsschutzvorschriften und Streitbelegungsmechanismen im Verhältnis Investor und Staat zwischen der EU und den USA für verzichtbar und mit hohen Risiken verbunden. Gründe dafür sind insbesondere: - Beide Partner gewährleisten für Investoren einen hinreichenden Rechtsschutz vor unabhängigen nationalen Gerichten. - Durch Investor-Staat-Schiedsverfahren können allgemeine und angemessene Regelungen zum Schutz von Gemeinwohlzielen, die in demokratischen Entscheidungen rechtsstaatlich zustande gekommen und rechtmäßig angewandt wurden, ausgehebelt oder umgangen werden. [...]”).

transnational corporations to circumvent domestic courts.⁶⁶ In early 2015, the Socialists and Democrats in the European Parliament, led by their German branch, proposed the establishment of a permanent investment court instead of the traditional ad hoc tribunals.⁶⁷

In May 2015, the European Commission published a concept paper entitled “Investment in TTIP and beyond — the path for reform,”⁶⁸ in which it highlighted the ideas of “strengthening governments’ right to regulate, making arbitral tribunals operate more like traditional court systems with a clear code of conduct for arbitrators, and guaranteeing access to an appeals system.”⁶⁹

Then, in the summer of 2015, the European Parliament adopted a resolution containing recommendations to the European Commission on the negotiations for the TTIP, pledging “[a] new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.”⁷⁰

In mid-September 2015, the most recent move was taken by the European Commission. It went public with a draft text of the TTIP investment chapter, which, in addition to some adaptations of the investment chapter already found in CETA, contains a very detailed section on investment dispute resolution, proposing an “Investment Court System.”⁷¹

Major Points of Criticism

The arguments brought forward against ISA were not wholly new, partly rehashing topics from the NAFTA debate, familiar to the Canadian and US public, and epitomized by a 2001 *New York Times* article that notoriously likened NAFTA panels to secret tribunals.⁷² The anti-investment groups relied on a number of serious concerns about the actual practice of ISA, combined with fears and anti-globalization rhetoric familiar from the Seattle anti-WTO campaigns of the 1990s. Recently, with the United States negotiating not only the TTIP with the European Union, but also a Trans-Pacific Partnership (TPP) with Asian countries, opposition to ISA has also grown in the United States, as is well illustrated by two

66 S Liebrich, “Diese Verträge werden das Leben unserer Kinder beeinflussen”, *Süddeutsche Zeitung* (5 May 2015), online: <www.sueddeutsche.de/wirtschaft/kritik-an-freihandelsabkommen-diese-vertraege-werden-das-leben-unserer-kinder-beeinflussen-1.2465023>; C Gerstetter & N Meyer-Ohlendorf, “Investor-state dispute settlement under TTIP – a risk for environmental regulation?”, (December 2013) Heinrich Böll Stiftung TTIP Series; see also the Internet campaign *Stop TTIP*, online: <<https://stop-ttip.org/de/wo-liegt-das-problem/>>; Greenpeace, “TTIP: Scharfe Kritik am ‘Ja’ zu ISDS” (8 July 2015), online <www.greenpeace.org/austria/de/News/Aktuelle-Meldungen/Gentechnik-News/2015/Scharfe-Kritik-am-Ja-zu-ISDS/>.

67 Socialists and Democrats Group, “S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations” (4 March 2015), online: <www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf> [S&D Position Paper].

68 European Commission, “Investment in TTIP and beyond — the path for reform” (6 May 2015), online <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>.

69 See European Commission, Press Release, “Commissioner Malmström consulted the European Parliament on reforms of investment dispute resolution in TTIP and beyond” (6 May 2015), online: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1303>>.

70 European Parliament, *Resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, online: <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0252&format=XML&language=EN>.

71 Commission draft text TTIP – investment, *supra* note 54. See in detail *infra* text at note 185.

72 See A DePalma, “Nafta’s Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say”, *New York Times* (11 March 2001), online: <www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> (“THEIR meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.”); see also CH Brower, “Investor-State Disputes under NAFTA: The Empire Strikes Back” (2001–02) 40 *Colum J Transnl L* 43 (mentioning the concern that the ISDS under NAFTA could have a “chilling effect” on regulation).

rounds of open letters from law professors, one urging congressional leaders to omit ISA from the TPP and the TTIP,⁷³ and a reply advocating a reformed inclusion of ISA.⁷⁴

Among the most prominent areas criticized by NGOs, and increasingly by the media in a number of EU member states, were the lack of transparency of the dispute-settlement procedure, the impossibility to appeal against investment decisions, the alleged pro-investor bias of tribunals and too-broad investor rights that would lead to a “chilling effect” on legitimate regulation by sovereign states.⁷⁵ With regard to the latter point, critics of the TTIP and CETA allege that ISA would lead to an overly broad investment protection, entailing a “regulatory chill.”⁷⁶ They refer to cases such as *Vattenfall v Germany*,⁷⁷ *Philip Morris v Australia*⁷⁸ or *Lone Pine v Canada*⁷⁹ — none of which has been decided on the merits yet — in order to argue that sovereign states will be deprived of their right to exit nuclear power generation, to protect against the risks of smoking or to prohibit “fracking.”⁸⁰ The regulatory chill debate is not new either, but largely resembles similar discussions concerning NAFTA’s investment chapter more than a decade ago.⁸¹

Interestingly, the public debate around investment law also turned to more technical aspects of the specific nature of ISA. The traditional confidentiality of arbitral proceedings was portrayed as a lack of

73 Open letter by the Alliance for Justice, March 2015, to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, at 1, online: <www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf> (“[...] we urge you to protect the rule of law and our nation’s sovereignty by ensuring ISDS is not included.”) [Open letter by the Alliance for Justice].

74 Open letter by law professors, 7 April 2015, to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, online: <www.mcgill.ca/fortier-chair/files/fortier-chair/isds_letter-april_20_final.docx> (“We the undersigned—professors and scholars of international law, arbitration, and dispute settlement—strongly support a robust, even-handed, and careful discussion about investment treaty arbitration (ITA), which is sometimes referred to as investor-state dispute settlement (ISDS). We believe, however, that the discussion should be based on facts and balanced representations, rather than on errors or skewed information.”) [Open letter by law professors]. *Ibid.* at 5 (“Contrary to the assertions contained in the Alliance for Justice letter, investment treaty arbitration does not undermine the rule of law. It ensures that, where a right is given, a remedy is also provided. It permits foreign investors to hold host states to the obligations they have undertaken in their treaties by means of a quasi-judicial process; and it also offers a forum for states to vindicate their policy choices.”).

75 See e.g. G Monbiot, “This transatlantic trade deal is a full-frontal assault on democracy”, *The Guardian* (4 November 2013), online: <www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> [Monbiot]; J Brühl, “Unbekannte Kläger, geheime Dokumente”, *Süddeutsche Zeitung* (12 August 2014), online: <www.sueddeutsche.de/wirtschaft/ttip-faktencheck-investorenschutz-unbekannte-klieger-geheime-dokumente-1.2085316>; P Pinzler, W Uchatius & K Kohlenberg, “Schattenjustiz: Im Namen des Geldes”, *Die Zeit* (27 February 2014), online <www.zeit.de/2014/10/investitionsschutz-schiedsgericht-icsid-schattenjustiz>.

76 In this vein, see e.g. the Seattle to Brussels Network in a brief from January 2014, entitled “Seattle to Brussels Network refutes European Commission’s defense of controversial investor-to-state dispute settlement”; online: <www.tni.org/sites/www.tni.org/files/download/s2b_response_to_dgtrade_long.pdf> (“There is clear evidence that proposed and even adopted laws on public health and environmental protection have been abandoned or watered down because of the threat of corporate claims for damages. [...] Through regulatory chill effects and the cost of arbitration and awards, ISDS provisions constitute a considerable and growing policy and financial risk. The exponential growth in the number of ISDS cases spurred on by international trade lawyers; frivolous claims; and pressures to shelve regulation under threat of investment claims are systemic flaws.”). Further on this issue, see E Neumayer, “Do countries fail to raise environmental standards? An evaluation of policy options addressing ‘regulatory chill’” (2001) 4:3 *Intl J Sustainable Development* 231; S Schill, “Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?” (2007) 24:5 *J Intl Arb* 469; K Tienhaara, “Regulatory Chill and the Threat of Arbitration: A View from Political Science” in C Brown & K Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge, UK: Cambridge University Press, 2011) 607.

77 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, registered 31 May 2012.

78 *Philip Morris Asia Limited v The Commonwealth of Australia* (2011), Notice of Arbitration, 21 November 2011, PCA Case No 2012-12 (UNCITRAL).

79 *Lone Pine Resources Inc. v The Government of Canada*, ICSID Case No UNCT/15/2, Notice of Arbitration, 6 September 2013 (UNCITRAL, NAFTA).

80 See e.g. a report released on 6 March 2015 by the Sierra Club, “No fracking way: how the EU-US trade agreement risks expanding fracking”, Issue Brief, March 2014, at 5, online: <http://action.sierraclub.org/site/DocServer/FoEE_TTIP-ISDS-fracking-060314.pdf?docID=15241> (“The proposed investment chapter in the TTIP is expected to include far-reaching rights for foreign investors that could undermine government decisions to ban and regulate fracking. US companies investing in Europe could directly challenge fracking bans or regulations at private international tribunals – potentially paving the way for millions of euro in compensation, paid by European taxpayers.”). Further on this issue, see The Council of Canadians, “The CETA Deception: The right to regulate – health and environmental standards”, online: <www.canadians.org/ceta-deception-2> (“Free trade, whether in Canada’s agreements with other countries or at the World Trade Organization, is absolutely designed to limit when, where and how governments regulate. [...] These deals also contain investment chapters that give corporations tools to enforce their rights to be free from what they consider overly burdensome regulation. [...] The investor-to-state dispute settlement process [...] fundamentally undermines health and environmental regulation. Governments may continue to regulate where a policy has been found to violate investment rights, but only after paying fines of tens and even hundreds of millions of dollars.”). See also P Eberhardt, T Feodoroff, E Lui, C Olivet & S Trew, “The right to say no: EU–Canada trade agreement threatens fracking bans”, Issue Brief, May 2013, online: <<http://corporateeurope.org/sites/default/files/publications/ceta-fracking-briefing.pdf>>.

81 See L Dhooge, “Foreign Investors versus Environmentalists: Whose Green Counts in the North American Free Trade Agreement?” (2001) 10 *Minn J Global Trade* 209; BW Jenkins, “The Next Generation of Chilling Uncertainty: Indirect Expropriation Under CAFTA and Its Potential Impact on Environmental Protection” (2007) 12:2 *Ocean & Coastal LJ* 269.

transparency and a threat to public, democratic decision making because anonymous arbitrators could “force” sovereign states to undo their policy decisions.⁸²

While a number of ISA-specific issues did indeed raise concerns and had been discussed in investment arbitration and policy-making circles for quite a while, the anti-ISA campaign of the 2010s appeared to overlook, or chose to ignore, the multiple developments in investment arbitration over the last decade. In fact, many of these developments addressed core aspects of the criticism raised against ISA.

The perceived secrecy or lack of transparency of ISA, resulting from the confidentiality prevalent in commercial arbitration — although never as pervasive in ISA — has been significantly reduced, mostly through the work of institutions active in the role of administering ISA, but also by policy makers negotiating IIAs. In 2006, the ICSID Arbitration Rules were amended with a view to more transparency, now permitting *amicus curiae* participation as well as more general publication of awards.⁸³ In a similar effort, UNCITRAL adopted its Rules on Transparency in Investor-State Arbitration in 2013.⁸⁴ Pursuant to the 2015 Mauritius Convention, these transparency rules can even be made to apply retroactively to existing investment treaties concluded before April 1, 2014.⁸⁵

At the same time, treaty negotiators have increasingly provided for transparency in the ISA chapters of IIAs. These range from publication obligations for awards and even submissions to permit access to ISA to third parties through *amicus* briefs and the possibility of public hearings.⁸⁶ As a result, ISA is often more transparent, and its outcomes more easily accessible to the public, than the normal domestic court system.⁸⁷

82 See e.g. Open letter by the Alliance for Justice, *supra* note 73 at 1 (“Essentially, corporations use ISDS to challenge government policies, actions, or decisions that they allege reduce the value of their investments. These challenges are not heard in a normal court but instead before a tribunal of private lawyers.”).

83 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006, online: <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf> [2006 Amendments to the ICSID Rules and Regulations]. See also A Antonietti, “The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules” (2006) 21 ICSID Rev 427.

84 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, adopted by UN GA Res 68/109, 16 December 2013, online: <www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

85 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by UN GA RES 69/116, 18 December 2014, opened for signature on 17 March 2015, not yet in force, art 1(1). As of 2 November 2015, sixteen countries have signed (Article 1: “This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014”); see also Arbitration Institute of the Stockholm Chamber of Commerce, “Mauritius Convention and UNCITRAL Rules on Transparency in SCC cases” (22 May 2015), online: <<http://sccinstitute.com/media/72819/mauritius-convention-and-uncitral-rules-on-transparency-in-scc-cases.pdf>>; S Schill, “The Mauritius Convention on Transparency: A Model for Investment Law Reform?” (2015), *EJIL:Talk* (blog), online: <www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/>.

86 As for the publication of awards under NAFTA’s Chapter 11, see NAFTA, 32 ILM 289, Annex 1137.4: Publication of an Award, pursuant to which either the investor or the respondent may make an award public in cases where Canada or the United States is/are disputing parties. No similar allowance is contained for Mexico. However, the publication of documents submitted to an arbitral tribunal constituted under NAFTA Chapter 11 became mandatory by virtue of a binding interpretation of the NAFTA Free Trade Commission (*Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), online: <www.state.gov/documents/organization/38790.pdf>). While the possibility for *amicus* briefs has not been formally provided for in NAFTA itself, it has been, first of all, permitted within arbitral practice (see *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*amici curiae*” of 15 January 2001 (UNCITRAL), para 53) and subsequently confirmed by the Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation (7 October 2003), online: <www.state.gov/documents/organization/38791.pdf>. Similarly, NAFTA does not regulate public access to hearings. This issue had, however, been addressed by a joint statement of the Governments of Canada and the United States guaranteeing public hearings in NAFTA proceedings to which they are a disputing party (see Office of the US Trade Representative, Press Release, “NAFTA Commission Announces New Transparency Measures” (7 October 2003), online: <https://ustr.gov/archive/Document_Library/Press_Releases/2003/October/NAFTA_Commission_Announces_New_Transparency_Measures.html>). This step was subsequently followed by Mexico, see Office of the US Trade Representative, Press Release, “NAFTA Free Trade Commission Joint Statement – ‘A Decade of Achievement’” (16 July 2004), online: <https://ustr.gov/archive/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html>. See also N Jansen Calamita, “Dispute Settlement Transparency in Europe’s Evolving Investment Treaty Policy” (2014) 15 J World Investment & Trade (Special Issue: The Anatomy of the (Invisible) EU Model BIT) 645 at 653ff. Generally on transparency, see e.g. VV Veeder, “The Transparency of International Arbitration: Process and Substance” in L Mistelis & J Lew, eds, *Pervasive Problems in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2006) 89; H Mann, “Transparency and Consistency in International Investment Law: Can the Problem be fixed by Tinkering?” in K Sauvart, ed, *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008) 213; J Delaney & D Magraw, “Procedural Transparency” in P Muchlinski et al, eds, *The Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008) 721; J Maupin, “Transparency in International Investment Law: The Good, the Bad, and the Murky” in A Bianchi & A Peters, eds, *Transparency in International Law* (New York: Cambridge University Press, 2013).

87 See Open letter by law professors, *supra* note 74 at 5 (“The United States and Canada have been champions of transparency in investment treaty arbitration. Each has, since 2001, maintained a website where they post the awards rendered in the cases they defend. They also post pleadings, memorials, and procedural decisions. Mexico has followed the same practice in NAFTA Chapter 11 proceedings. These materials are available for free. In that respect they are more easily and widely available than documents in most U.S. courts. The U.S. federal government maintains an electronic records system for domestic litigation, but users must pay for access (\$.10 per page).”).

Similarly, the notion that investors enjoy too-broad rights by being able to invoke unpredictably vague standards whenever their profits may be threatened⁸⁸ has been recognized by host states as inherently against their own interest and has led to a number of treaty changes, leading to ever more detailed formulations of the substantive standards of investment protection.⁸⁹ In parallel, IIA treaty negotiators have started to include clauses expressly recognizing the host state's right to regulate.⁹⁰

At the same time, it should not be overlooked that investment tribunals have refined their jurisprudence over the years, clarifying that investment standards are not intended to limit the legitimate regulatory space ("right to regulate") of host countries.⁹¹ Further, IIA treaty makers have increasingly resorted to the use of joint commissions or committees consisting of representatives of the contracting parties empowered to give authoritative interpretations of IIAs.⁹²

Much time and effort has also been spent by various arbitration institutions and treaty makers to consider how appellate structures could be inserted into ISA. This started with proposals for amending the ICSID Convention a decade ago,⁹³ and also led to the inclusion of possible appellate mechanisms in individual IIAs.⁹⁴

88 See e.g. Open letter by the Alliance for Justice, *supra* note 73 at 1 ("ISDS grants foreign corporations a special legal privilege, the right to initiate dispute settlement proceedings against a government for actions that allegedly cause a loss of profit for the corporation. Essentially, corporations use ISDS to challenge government policies, actions, or decisions that they allege reduce the value of their investments.").

89 See also *infra* text at note 105.

90 See e.g. Norwegian Draft Model BIT (2007), art 12, online: <www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf> ("Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns."); Finland-China BIT (2004), art 6(6), online: <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/733>> ("Provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restrict, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order."); see also EFTA-Singapore FTA (2002), art 43, online: <www.efta.int/media/documents/legal-texts/free-trade-relations/singapore/EFTA-Singapore%20Free%20Trade%20Agreement.pdf> ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns"); Consolidated CETA text, *supra* note 1, Preamble ("Recognizing that the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity").

91 See e.g. *Parkerings v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332 ("It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power."); *Plama v Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, para 177 ("The stability of the legal framework has been identified as 'an emerging standard of fair and equitable treatment in international law.' However, the State maintains its legitimate right to regulate, and this right should also be considered when assessing the compliance with the standard of fair and equitable treatment."); *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award, 21 June 2011, para 290 ("[...] In the Tribunal's understanding, fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements."); *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para 153 ("This applicable [FET] standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. [...]"); *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v Argentina*, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010, para 216 ("In interpreting the meaning of 'just' or 'fair and equitable treatment' to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with [the] right to regulate the provision of a vital public service."). See also C Yannaca-Small, "Indirect Expropriation and the 'Right to Regulate' in International Investment Law" in OECD, ed, *International Investment Law: A Changing Landscape* (OECD, 2005) 43; A Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014); C Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration" (2012) 15:1 J Intl Econ L 223.

92 See e.g. NAFTA, *supra* note 47, art 1131, or the 2012 US Model BIT, art 31.

93 See ICSID Secretariat, "Possible Improvements of the Framework for ICSID Arbitration", Discussion Paper, 22 October 2004; KP Sauvant & M Chiswick-Patterson, eds, *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008).

94 2012 US Model BIT, art 28(10); US-Rwanda BIT (2012), art 28(10), Annex D, online: <www.state.gov/documents/organization/101735.pdf>; US-Uruguay BIT (2006), art 28(10), Annex E, online: <https://ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf>.

With regard to the perceived dominance of self-interested, unaccountable lawyers as arbitrators, who “rotate between being arbitrators and bringing cases for corporations against governments,”⁹⁵ various arbitration institutions have adopted and revised their conflict-of-interest rules, which subject arbitrators to strict ethical rules concerning their independence and impartiality.⁹⁶ Failure to comply with these demands leads to disqualification from sitting on a tribunal. Furthermore, investment arbitration practice since 2000 demonstrates that tribunals have become more sensitive to allegations of actual or perceived lack of independence or impartiality of arbitrators, resulting in a number of successful arbitrator challenges.⁹⁷

Further, and linked to the argument that ISA merely serves big corporate interests, it is sometimes asserted that investors often resort to abusive litigation by bringing highly expensive proceedings before investment tribunals, which forces host states into costly settlements.

Finally, critics argue that ISA circumvents the national judiciary and is thus a form of “privatized” dispute settlement lacking democratic legitimacy⁹⁸ and offering a preferential procedural treatment not enjoyed by domestic investors.

The European Commission’s Reflection Period and Consultations on ISA

Toward the end of 2013, public criticism of investment protection, and of ISA in particular, gained such momentum that the European Commission interrupted the TTIP negotiations and announced a “reflection period” in late January 2014.⁹⁹ This led to a public consultation in which the European Commission invited the public to comment on various issues of its trade policy. The questions posed included specific sections dealing with ISA.¹⁰⁰

In the course of this public consultation, the European Commission received a total of 149,399 online contributions. The largest number of replies was received from the United Kingdom (52,008), followed by Austria (33,753) and Germany (32,513).¹⁰¹ Depending on the specific interests of the respective participants of this survey, the opinions submitted to the European Commission have been divided. However, the general outcome of the consultation fairly unambiguously reflects a broad opposition

95 See Open letter by the Alliance for Justice, *supra* note 73 at 1 (“ISDS proceedings lack many of the basic protections and procedures of the justice system normally available in a court of law. There is no appeals process. There is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments. The system is also a one-way ratchet because corporations can sue, forcing governments to spend significant resources, while governments impacted by foreign corporations cannot bring any claims.”); J Weisman, “Trans-Pacific Partnership seen as Door for Foreign Suits against US”, *New York Times* (25 March 2015), online: <www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html>.

96 See, *inter alia*, UNCITRAL Arbitration Rules 2010, art 6(7) (“The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.”); ICSID Convention, *supra* note 26, art 14(1) (“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”); see also International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration*, approved on 22 May 2004 by the Council of the International Bar Association, online: <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

97 See A Reinisch & C Knahr, “Conflict of Interest in International Investment Arbitration” in A Peters, L Handschin & D Hoegger, eds, *Conflict of Interest in Governance – An Interdisciplinary Outlook on the Global, Public, Corporate and Financial Sphere* (Cambridge, UK: Cambridge University Press, 2012) 103; A Sheppard, “Arbitrator Independence in ICSID Arbitration” in C Binder, U Kriebaum, A Reinisch & S Wittich, eds, *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (Oxford, UK: Oxford University Press, 2009) 131.

98 See e.g. Open letter by the Alliance for Justice, *supra* note 73 at 1 (“This practice [of ISA] threatens domestic sovereignty and weakens the rule of law by giving corporations special legal rights, allowing them to ignore domestic courts, and subjecting the United States to extrajudicial private arbitration.”); See also S Broß, “Freihandelsabkommen, einige Anmerkungen zur Problematik der privaten Schiedsgerichtsbarkeit”, Hans Böckler Stiftung, Report No 4 (January 2015), online: <www.boeckler.de/pdf/p_mbf_report_2015_4.pdf>.

99 EU Trade Commissioner de Gucht launched a public consultation on the European Union’s investment chapter within the EU-US Free Trade negotiations. See European Commission, Press Release, “Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement” (21 January 2014), online: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1015>>.

100 Among them: Question 6: Transparency in ISDS; Question 7: Multiple claims and relationship to domestic courts; Question 8: Arbitrator ethics, conduct and qualification; Question 9: Reducing the risk of frivolous and unfounded cases; Question 10: Allowing claims to proceed (filter); Question 11: Guidance by the Parties (the EU and the US) on the interpretation of the agreement; and Question 12: Appellate Mechanism and consistency of rulings.

101 For further details, see European Commission, “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)”, Preliminary report (statistical overview), July 2014, at 2, online: <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf>.

to ISA in the TTIP or in general and, in some cases, even to the TTIP as such.¹⁰² As the European Commission's assessment noted, out of nearly 150,000 responses, almost 145,000 were more or less identical answers, sent in a copy/paste fashion by individuals on the basis of answers prepared by NGOs.¹⁰³ Nevertheless, some 3,000 individuals, as well as 450 organizations representing EU civil society (business organizations, trade unions, consumer organizations, law firms, academics, etc.) participated in the consultation.

THE MAIN FEATURES OF ISA IN THE CANADA-EU CETA

While ISA was negotiated together with the substantive investment protection provisions in the agreement with Canada, the public debate not only called for various reforms with regard to the perceived deficiencies of ISA, as contained in most of the traditional EU member state IIAs, it also led to increased opposition toward ISA in general.¹⁰⁴

Since much of the specific criticism voiced against traditional ISA coincided with the ISA skepticism debated within NAFTA countries, the European Commission found a ready interlocutor on the Canadian side to negotiate a number of new features in response to ISA criticism.

In fact, a number of issues raised by critics of ISA relate not only to the dispute-settlement method of ISA, but also to the scope of protection under IIAs and the scope of rights granted to investors under typical IIA substantive protection standards. Thus, these issues and the way treaty negotiators tried to cope with them will be addressed as well. As can be seen in the following analysis, the draft CETA text contains a number of novel features that reflect the negotiators' attempt to limit investor rights quite considerably, compared to traditional IIAs and BITs.

Limits to Investor Rights in Order to Secure Host States' Right to Regulate

As already mentioned, many of the points of criticism voiced against ISA in the most recent anti-ISA debate in some EU member states were not entirely new and have already been addressed on various levels.

The draft CETA text similarly demonstrates that EU negotiators have attempted to seriously react to perceived pro-investor bias in traditional IIAs. The resulting investment chapter of the CETA clearly limits investor rights, compared to the texts of previous IIAs, and it specifically uses language aimed at improving ISA.

More Precise and Limited Protection Standards

The concern that investment protection standards would be too vague and imprecise, potentially leading to an investor protection level that could threaten the regulatory freedom of host states and the legitimate exercise of their right to regulate,¹⁰⁵ has been addressed by incorporating clear language that host state rights should not be unduly limited.

The traditional IIA or BIT concluded by EU member states in the past contained similar substantive treatment standards: typically, the twin obligations of FET as well as FPS (often even contained in a single provision) and the two non-discrimination obligations of national treatment and MFN, frequently supplemented by prohibitions against arbitrary or discriminatory treatment. A further cornerstone of European BITs has always been the guarantee that investors would not be expropriated — directly or indirectly — except in the public interest, in a non-discriminatory way, according to due process and — most important in practice — under the condition that they receive adequate, prompt and effective

102 European Commission, Commission Staff Working Document, "Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement", Report, SWD(2015) 3 final, online: <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>.

103 *Ibid.* at 3.

104 In this regard, it is telling that according to the European Commission a significant number of the questions on specific issues regarding ISA (see *supra* text atnote 100) posed by the European Commission in its public consultation on ISDS were frequently answered with phrases such as "no comment – I don't think that ISDS should be part of TTIP", see *ibid.* at 10.

105 See *supra* text at note 89.

compensation. Less uniformly contained in BITs are so-called umbrella clauses, while “free transfer of funds” guarantees are regularly found in IIAs.

The often laconic language of such protection standards has increasingly been regarded as a potential threat to the regulatory sovereignty of host states. Thus, a number of BITs, in particular the Canadian and US Model BITs of 2004,¹⁰⁶ and subsequent treaty practice have started to adopt more restrictive language aimed at ensuring that investor rights are not interpreted too broadly. In parallel, investment arbitration decisions have become increasingly cautious and tribunals have started to explicitly balance investor and host state rights.

A Specific Restriction of the FET Standard

The most critically viewed investment protection standard is FET, which is also the most often invoked one. The detailed wording of the CETA’s FET standard can be regarded as a “codification” of the more restrictive elements of FET jurisprudence by investment tribunals, which have emphasized the sovereign right to regulate of host states and held that mere changes in the regulatory environment or legitimate regulatory actions do not normally constitute violations of FET.¹⁰⁷

In fact, the usual short FET clause stipulating that “[e]ach Party shall accord in its territory to investors and to covered investments of the other Party fair and equitable treatment”¹⁰⁸ is accompanied by a paragraph defining a breach of the FET obligation as a measure or series of measures constituting:

- denial of justice in criminal, civil or administrative proceedings;
- fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
- manifest arbitrariness;
- targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- abusive treatment of investors, such as coercion, duress and harassment; or
- a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.¹⁰⁹

Apparently, the CETA drafters incorporated many elements found in arbitration practice, although, presumably intentionally, not all of them. For instance, “stability,” an element usually identified by investment tribunals in attempts to define the content of FET,¹¹⁰ and normally serving investor interests, is clearly missing in the draft CETA text. This indicates that the negotiating parties intended not to make CETA’s FET version too “investor-friendly.” It seems to underline the intention expressed in the November 2013 European Commission factsheet, “Investment Protection and Investor-to-State Dispute Settlement in EU agreements,” to “confirm, as a standing principle, the Parties’ right to regulate and to pursue legitimate public policy objectives” and to “set out precisely what elements are covered and thus prohibited” by FET in EU investment agreements.¹¹¹

106 Canada Model FIPA 2004; US Model BIT 2004.

107 See *supra* text at note 91.

108 Consolidated CETA text, *supra* note 1, art X.9(1).

109 Consolidated CETA text, *supra* note 1, art X.9(2).

110 See e.g. *Occidental Exploration and Petroleum Company v The Republic of Ecuador*, LCIA Case No UN3467, Award, 1 July 2004 (UNCITRAL), para 183 (“Although fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment ‘is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources’. The stability of the legal and business framework is thus an essential element of fair and equitable treatment.”); see also *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, paras 276–277 (“276. In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. [...] 277. It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.”). See also R Dolzer & C Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford, UK: Oxford University Press, 2012) 145ff [Dolzer & Schreuer].

111 European Commission Fact Sheet, *infra* note 123 at 2, 7f.

FPS Limited to Physical Security

The overall limiting tendency underlying CETA's substantive treatment provisions is also evident in the context of FPS. However, it is not in the sense that FPS would be limited by the customary international law minimum standard, as one might have expected, given the NAFTA heritage of such an approach.¹¹² Rather, the limiting element derives from another strand of FPS jurisprudence. While the draft CETA article containing FPS, combined with FET, merely requires that "[e]ach Party shall accord in its territory to investors and to covered investments of the other Party [fair and equitable treatment and] full protection and security," paragraph 6 of this article clarifies that "full protection and security" is limited to "physical security."¹¹³ This limitation must be understood against the background of a jurisprudential divide according to which some investment tribunals have held that FPS would be limited to prevent actual physical security of investors and investments,¹¹⁴ whereas others have considered that the standard would go "beyond physical security."¹¹⁵

While the clarification in the draft CETA text will ensure that FPS can be invoked only in cases concerning physical interferences with investments, it is questionable whether this will imply a significant reduction of protection for investors, since most non-physical interferences constitute violations of the FET standard.

Expropriation and the Right to Regulate

Similarly, the expropriation provision of CETA, which resembles the typical expropriation clause found in many European BITs,¹¹⁶ is expressly made subject to clarifications in an annex on expropriation. This annex reproduces the shared understandings already expressed in the Canadian Model BIT 2004¹¹⁷ and the US Model BIT 2012.¹¹⁸

This understanding within CETA sets out that a finding of indirect expropriation requires a case-by-case, fact-based inquiry and provides a number of relevant factors, such as the economic impact of the measure, its duration, the extent to which it interferes with "distinct, reasonable investment-backed expectations," and the character of the measure or series of measures, notably their object, context and intent, in order to determine whether specific measures constitute indirect expropriation. Finally, the understanding contains language inspired by the police powers doctrine,¹¹⁹ aimed at ensuring that

112 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, *supra* note 86 ("The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.") See also e.g. J Salacuse, *The Law of Investment Treaties* (New York: Oxford University Press, 2010) at 216; R Lorz, "Protection and Security (Including the NAFTA Approach)" in M Bungenberg, J Griebel, S Hobe & A Reinisch, eds, *International Investment Law* (Baden-Baden and Oxford, UK: Nomos/Hart Publishing, 2015) 764 at 766ff.

113 Consolidated CETA text, *supra* note 1, art X.9(6) ("For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.").

114 See e.g. *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para 484 ("The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010, para 169 ("[...] the absence of the word 'full' or 'fully' in the full protection and security provisions [...] supports this view of an obligation limited to providing physical protection and related legal remedies for the Spanish Claimants and their assets.").

115 See e.g. *Siemens A.G. v Argentina*, ICSID Case No ARB/02/08, Award, 6 February 2007, para 303 ("[...] the obligation to provide full protection and security [was] wider than 'physical' protection and security" because it was "difficult to understand how the physical security of an intangible asset would be achieved."); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.15 ("If the parties to the BIT had intended to limit the obligation to 'physical interferences', they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.").

116 Consolidated CETA text, *supra* note 1, art X.11.

117 Canada Model BIT 2004, Annex B.13(1).

118 US Model BIT 2012, Annex B.

119 B Mostafa, "The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law" (2008) 15 Aust ILJ 267; M Bungenberg, "Towards a More Balanced International Investment Law 2.0?" in C Herrmann, B Simma & R Streinz, eds, *Trade Policy between Law, Diplomacy and Scholarship* (Heidelberg: Springer, 2015) 15, at 28; see also UNCTAD, "Expropriation: UNCTAD Series on Issues in International Investment Agreements II" (2012), at 79, online: <http://unctad.org/en/Docs/unctaddiaa2011d7_en.pdf>.

bona fide regulation in the public interest should not be considered expropriatory,¹²⁰ which in turn is reflective of investment arbitration jurisprudence on the limits of indirect expropriation.¹²¹ While such language will not be able to solve all issues, it clearly constitutes helpful guidance to investment tribunals.

The approach is also in line with the November 2013 European Commission factsheet, which specifically stated that “future EU agreements will provide a detailed set of provisions giving guidance to arbitrators on how to decide whether or not a government measure constitutes indirect expropriation. In particular, when the state is protecting the public interest in a non-discriminatory way, the right of the state to regulate should prevail over the economic impact of those measures on the investor.”¹²² It seems that the European Commission thereby adopted not only the Canadian approach, but also followed the wishes of the European Parliament to find a “clear and fair balance between public welfare objectives and private interests” in defining indirect expropriation.¹²³

MFN Treatment Excluding *Maffezini*

Also with regard to the non-discrimination standard of MFN treatment, the draft CETA text contains two significant limitations, which contrast with the considerable extension of the national treatment obligation to the pre-investment phase.¹²⁴

Reacting to the uncertainty created by investment tribunals in the aftermath of the *Maffezini* case,¹²⁵ whether an MFN clause should permit claimants to invoke more favourable procedural (possibly even jurisdictional¹²⁶) provisions in third-country BITs or at least to overcome procedural obstacles, such as waiting periods,¹²⁷ or whether it would not permit them to do so,¹²⁸ the draft MFN clause of the CETA expressly excludes ISA.¹²⁹

Secondly, the CETA MFN clause contains innovative language aimed at preventing not only the “importation” of more favourable dispute-settlement provisions, but also, more generally, of better

120 Consolidated CETA text, *supra* note 1, Annex X.11(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, non-discriminatory measures by 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.”).

121 See e.g. *Telenor v Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006, para 64 (“It is well established that the mere exercise by government of regulatory powers that create impediments to business or entail the payment of taxes and other levies does not of itself constitute expropriation.”).

122 European Commission, “Investment Protection and Investor-to-State Dispute Settlement in EU agreements”, Fact Sheet, November 2013, at 2, online: <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf> [European Commission Fact Sheet].

123 European Parliament Resolution, *supra* note 43, para 19 (“[Calling for] protection against direct and indirect expropriation, giving a definition that establishes a clear and fair balance between public welfare objectives and private interests.”).

124 Consolidated CETA text, *supra* note 1, art X.6(1) (“Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.”). This follows the Canada/United States approach to ensure market access/admission obligations by extending national treatment to the establishment phase. See e.g. US Model BIT 2012, art 3(1). See also Dolzer & Schreuer, *supra* note 110, 89; A Reinisch, “Most Favoured Nation Treatment” in M Bungenberg, J Griebel, S Hobe & A Reinisch, eds, *International Investment Law* (Baden-Baden and Oxford, UK: Nomos/Hart Publishing, 2015) 807 at 816.

125 *Emilio Agustín Maffezini v Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000.

126 *RosInvestCo UK Ltd. v The Russian Federation*, SCC Case No Arb. V079/2005, Award on Jurisdiction 2007.

127 See e.g. *Siemens A.G. v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Impreglio S.p.A. v Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011; *Hochtief AG v Argentina*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011; *Gas Natural SDG, S.A. v The Argentine Republic*, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005; *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005; *National Grid plc v The Argentine Republic*, Decision on Jurisdiction, 20 June 2006 (UNCITRAL); or *AWG Group Ltd. v The Argentine Republic*, Decision on Jurisdiction, 3 August 2006 (UNCITRAL); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012.

128 In *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 223, the tribunal held that “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.” See also *Daimler Financial Services AG v The Argentine Republic*, ICSID Case No ARB/05/1, Decision on Jurisdiction, 22 August 2012. The tribunal in *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008, even denied the avoidance of waiting periods.

129 Consolidated CETA text, *supra* note 1, art X.7 (“4. For greater certainty, the “treatment” referred to in Paragraph 1 and 2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. [...]”).

treatment standards contained in third-country IIAs,¹³⁰ something routinely allowed in investment arbitration.¹³¹ CETA will thereby ensure that the specifically negotiated limitations of the scope of FET, FPS and indirect expropriation cannot be circumvented by reliance on more favourable provisions in third-country IIAs.

Overall, the substantive treatment provisions in the draft CETA demonstrate a very cautious approach to investment protection, which has led commentators to conclude that they will provide only a low level of protection and a great deal of freedom for host states to regulate.¹³²

Treaty Interpretation by the Contracting Parties

While the more detailed formulation of the precise scope of the substantive protection standards is guided by the goal of securing host states' right to regulate, the same purpose is intended to be served by a legal device allowing the parties to CETA to amend the treaty in a flexible way through a joint committee, without the need to resort to formal renegotiation.

According to the draft text, CETA will set up a Trade Committee empowered to adopt interpretations and amendments of some of the CETA provisions.¹³³ With regard to the investment chapter, CETA also envisages a Committee on Services and Investment, which is intended to serve as a forum for consultations between the parties on "possible improvements of this Chapter, in particular in the light of experience and developments in other international fora."¹³⁴ In addition to its various advisory functions in the field of the planned appellate structure of CETA,¹³⁵ the Committee on Services and Investment should have the power to recommend to the Trade Committee interpretations and clarifications of substantive investment protection standards of CETA.

This emphasizes the mutual interdependence of treaty makers and investment tribunals, in particular in regard to the FET clause by offering the contracting parties (through the Trade Committee and the Committee on Services and Investment) the possibility of reviewing and clarifying the specific content of FET by adding further elements.¹³⁶ This is an interesting alternative to the authoritative interpretation approach pursued by NAFTA article 1131, which has led to a number of sometimes controversial interpretations, including the one that stipulated that NAFTA's FET does not go beyond the customary international law minimum standard.¹³⁷

130 *Ibid.* ("4. [...] Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.").

131 See e.g. *Berschader v Russian Federation*, SCC Case No 080/2004, Award, 21 April 2006, para 179 ("It is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties [...]."); *MTD Equity v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 100 ("[...] [T]he Tribunal considers it appropriate to examine the MFN clause in the BIT and satisfy itself that its terms permit the use of the provisions of the Denmark BIT and Croatia BIT as a legal basis for the claims submitted to its decision.").

132 See S Schill, *Auswirkungen der Bestimmungen zum Investitionsschutz und zu den Investor-Staat-Schiedsverfahren im Entwurf des Freihandelsabkommens zwischen der EU und Kanada (CETA) auf den Handlungsspielraum des Gesetzgebers (Kurzgutachten)* ("Impact of the provisions on investment protection and on investor-state dispute settlement in the draft Free Trade agreement between the EU and Canada (CETA) on the scope for the legislature to act") (expert opinion for the German Federal Ministry for Economic Affairs and Energy, published on 22 September 2014) 32, online: <www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-investitionsschutz,property=pdf,be_reich=bmwi2012,sprache=de,rwb=true.pdf>. Similarly, C Tietje & F Baetens, *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands (24 June 2014), paras 108, 111, 115, 116; online: <www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf>.

133 Pursuant to Article X.02 of the final provisions of the draft CETA, while the Parties may amend the agreement itself, the "Trade Committee may decide to amend the Annexes, Appendices, Protocols and Notes of this Agreement. The Parties may approve the decision subject to their respective applicable internal requirements and procedures. The decision shall enter into force on such date as the Parties may agree." Consolidated CETA text, *supra* note 1, art X.02.

134 Consolidated CETA text, *supra* note 1, art X.42.

135 See *infra* text at note 154.

136 Consolidated CETA text, *supra* note 1, art X.9(3) ("The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision."), in conjunction with art X.9(2)(f).

137 NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decisions of 31 July 2001, online: <www.worldtradelaw.net/nafta/chap11interp.pdf> ("B. 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.").

But the CETA text also follows the NAFTA experience, which allows for authoritative treaty interpretation by the contracting parties,¹³⁸ in providing that “[w]here serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), 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 a specific date.”¹³⁹

The parties will thus be able to correct “unexpected” or otherwise “unwelcome” interpretations of substantive treaty provisions by investment tribunals.

SPECIFIC ISA-RELEVANT ASPECTS OF CETA

In addition to spelling out very clearly, in regard to the applicable substantive investment protection standards, that investment tribunals should not limit the policy space of host states, the draft CETA text also specifically addresses a number of the major points of criticism raised against the system of ISA itself, ranging from the perceived or actual lack of transparency, of appellate review, of arbitrator independence or pro-investor or pro-state bias, among others.

What Relationship to the National Judiciary? Avoidance of Parallel Proceedings

The argument that ISA allows investors to bypass or circumvent domestic adjudication is often an oversimplification. While ISA is frequently portrayed as a dangerous avoidance of domestic courts,¹⁴⁰ one should not forget that one of the initial purposes of ISA was precisely to have access to a more neutral international forum instead of the local courts of the host state that is a party to the dispute¹⁴¹ and, of course, to serve as an alternative to diplomatic protection.

A related issue is the question of whether investors should have both domestic and international recourse. Traditional rules of diplomatic protection required the exhaustion of local remedies before international dispute-settlement options could be accessed. While this requirement is expressly dispensed within the ICSID Convention in general,¹⁴² most other investment tribunals have also permitted investors to sue without requiring them to exhaust local remedies. Some IIAs expressly address the issue of parallel litigation and try to design rules to avoid such duplication, which range from fork-in-the-road to exhaustion of local remedies clauses.¹⁴³

The draft CETA text also contains language to this effect. It neither requires nor prohibits investors to first litigate their claims in domestic fora; rather, it seeks to prevent parallel proceedings by permitting access to ISA only when a final determination has been made or the investor claims have been effectively withdrawn.¹⁴⁴

138 NAFTA Article 2001 established the Free Trade Commission. According to NAFTA Article 1131(2), interpretations adopted by the Free Trade Commission shall be binding upon arbitral tribunals constituted under NAFTA Chapter 11. See also S Matiation, “Arbitration with Two Twists: Loewen v United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes” (2003) 24 U Pa J Intl Econ L 451; CH Brower, “Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105” (2006) 46 Va J Intl L 347; CH Brower, II, “Structure, Legitimacy, and NAFTA’s Investment Chapter” (2003) 36 Vand J Transnatl L 37; A Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States” (2010) 104 AJ IL 179; G Kaufmann-Kohler, “Interpretive Powers of the Free Trade Commission and the Rule of Law” in E Gaillard & F Bachand, eds, *Fifteen Years of NAFTA Chapter 11 Arbitration* (Huntington, NY: Jurisnet, 2011) 175.

139 Consolidated CETA text, *supra* note 1, art X.27(2).

140 See *supra* text at note 98.

141 See C Schreuer, L Malintoppi, A Reinisch & A Sinclair, eds, *The ICSID Convention: A Commentary*, 2nd ed (New York: Cambridge University Press, 2009) at 416 [Schreuer, Malintoppi, Reinisch & Sinclair].

142 ICSID Convention, *supra* note 26, art 26 (“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention”).

143 See C Schreuer, “Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration” (2005) 4 LPICT 1; C Schreuer, “Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road” (2004) 5 JWIT 231; Z Douglas, *The International Law of Investment Claims* (New York: Cambridge University Press, 2009) at 152. See also ICSID Convention, *supra* note 26, art 26 (“A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention”).

144 Consolidated CETA text, *supra* note 1, art X.21 (“An investor may submit a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) only if the investor: [...] where it has initiated a claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that: a final award, judgment or decision has been made; or it has withdrawn any such claim or proceeding; [...].”).

A related issue is the fear that ISA may be used to circumvent the domestic judiciary for purely contractual claims against host states.¹⁴⁵ In fact, this is a complex problem that needs careful attention.

The main tool to raise claims that are usually settled by domestic courts before investment tribunals are so-called umbrella or observance-of-obligations clauses, which require states to respect the obligations they entered into with regard to a specific investment.¹⁴⁶ A good example is found in the ECT to which the European Union is a party. It provides that host states shall observe “any obligations” they have “entered into with an Investor.”¹⁴⁷ In other words, umbrella clauses potentially bring contractual and other individual obligations within the ambit of an IIA and thus make them enforceable through ISA.

In this context, it is important to note that Canada has traditionally resisted umbrella clauses and that while the draft CETA investment text of November 21, 2013, contained an EU suggestion for an umbrella clause,¹⁴⁸ the current final draft agreement does not contain such a clause.¹⁴⁹ This implies that contractual disagreements and disputes cannot be brought under the protection of CETA.

Further, article X.17 of the CETA draft is unambiguous in permitting only so-called treaty claims.¹⁵⁰ Hence, this provision excludes investment disputes concerning contractual issues from being litigated under the ISDS chapter of the treaty. This is evident when comparing the current formulation with broader dispute settlement clauses in other IIAs.¹⁵¹

An Appellate Mechanism

The CETA draft also reacts to a political demand, countering the threat of an unpredictable and inconsistent jurisprudence by envisaging the creation of an appellate mechanism similar to some of the new US IIAs and the US Model BIT.¹⁵² The CETA draft specifically entrusts the Committee on Services and Investment to provide a consultation forum for the CETA parties to consider whether such a mechanism “to review, on points of law, awards rendered by a tribunal,” pursuant to the ISDS chapter, should be created in the future.¹⁵³

This relates to a long-standing debate in investment law circles about the feasibility and usefulness of the creation of a “second instance” in this form of dispute settlement.¹⁵⁴ Although an appellate mechanism would clearly prolong proceedings and lead to higher litigation costs, it is often asserted that such a mechanism would foster the uniformity and predictability of the outcomes of investment

145 See *supra* text at note 98.

146 See Dolzer & Schreuer, *supra* note 110 at 166ff. With regard to the question whether an umbrella clause transforms the applicable law to the underlying obligation, there has been a controversial discussion; on this issue see M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law* (Alphen aan den Rijn: Kluwer Law International, 2010) at 180ff.

147 See e.g. ECT, *supra* note 3, art 10(1) (“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”).

148 In November 2013, the Trade Justice Network leaked draft texts on CETA at <www.tradejustice.ca/leakeddocs>, accessed in early 2014 (those documents have been removed from the internet since). The “Draft CETA Investment Chapter” contained the following suggestion on page 13: “[EU: Article X Each Party shall observe any specific written obligation it has entered into with regard to an investor of the other Party or an investment of such an investor.]” This would have been in accordance with the European Commission’s initial position on this issue; see European Commission Communication, *supra* note 15 at 8.

149 See C Lévesque & A Newcombe, “Canada” in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford, UK: Oxford University Press, 2013) 53 at 60ff. Also, NAFTA’s Chapter 11 on investments does not contain such a clause.

150 Consolidated CETA text, *supra* note 1, art X.17 (“Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), an investor of a Party may submit to arbitration under this Section a claim that the respondent has breached an obligation under: Section 3 (Non-Discriminatory Treatment) of this Chapter, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or Section 4 (Investment Protection) of this Chapter; and where the investor claims to have suffered loss or damage as a result of the alleged breach.”).

151 E.g. Article 139 of the 2009 China-Peru Free Trade Agreement (FTA) which empowers the arbitral tribunal to decide on “[a]ny dispute between an investor of one Party and the other Party in connection with an investment in the territory of the other Party”. Some treaties opt for a median approach by providing for an exhaustive list of causes of actions covered by the ISDS mechanism and by defining the breaches listed therein; see e.g. 2003 Singapore-United States FTA, art 15.15 (“(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim: (i) that the respondent has breached (A) an obligation under Section B, (B) an investment authorization, or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.”).

152 US Model BIT 2012, art 28(10); *United States – Singapore Free Trade Agreement*, 6 May 2003 (entered into force 1 January 2004); see also *United States – Morocco Free Trade Agreement*, 15 June 2004 (entered into force 1 January 2006).

153 Consolidated CETA text, *supra* note 1, art X.42.

154 See e.g. C Tams, “An Appealing Option? The Debate about an ICSID Appellate Mechanism” in G Kraft & R Sethe, eds, *Beiträge zum Transnationalen Wirtschaftsrecht* (Berlin: BMV, 2006); C Tams, “Is There A Need for an ICSID Appellate Structure?” in R Hofmann & C Tams, eds, *The International Convention for the Settlement of Investment Disputes: Taking Stock After 40 Years* (Baden-Baden: Nomos, 2007); KP Sauvart & M Chiswick-Patterson, eds, *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008); R Platt, “The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?” (2013) 30:5 J Intl Arb 531.

disputes. In this context, the WTO dispute-settlement system, which has provided for an appellate mechanism in the form of the Appellate Body since 1995,¹⁵⁵ is frequently invoked as a reference point.¹⁵⁶

Nevertheless, the draft CETA text falls short of establishing an appellate mechanism. Rather, it merely outlines some of the main features mentioned in the treaty mandate given to the Committee on Services and Investment, which are to be taken into account when designing such a system. These features include:

- the nature and composition of an appellate mechanism;
- the applicable scope and standard of review;
- transparency of proceedings of an appellate mechanism;
- the effect of decisions by an appellate mechanism;
- the relationship of review by an appellate mechanism to the arbitration rules that may be selected under article X.22 (Submission of a Claim to Arbitration); and
- the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.¹⁵⁷

Arbitration Made More Transparent

One of the main public concerns about ISA is its perceived lack of transparency. ISA is often portrayed as secret justice by private arbitrators, taking place behind closed doors and leaving the public affected by its outcome in the dark.¹⁵⁸ This criticism ignores major changes in investment arbitration over the last 10 to 15 years, which have developed the commercial arbitration hallmark of confidentiality into far-reaching transparency features. Today all ICSID cases, the primary ISA venue, are publicly registered with basic information about the parties and claims. A large majority of ICSID awards and annulment committee decisions are available on the ICSID homepage as well as on other publicly accessible Internet sites.¹⁵⁹

Further, many ISDS institutions have adopted new rules on transparency, such as the 2006 Amendments to the ICSID Rules¹⁶⁰ or the 2013 UNCITRAL Transparency Rules.¹⁶¹

CETA integrates the UNCITRAL Transparency Rules;¹⁶² it even foresees the possibility of open hearings.¹⁶³

Arbitrator Independence and Ethics

Linked to a perceived lack of transparency, critics of ISA also often call for “ethical requirements for arbitrators.” Such demands seem to be inspired by concerns about private justice operating in secrecy, and thus beyond scrutiny, as it was first formulated in the context of the NAFTA anti-ISDS discussion.¹⁶⁴

155 *WTO Dispute Settlement Understanding*, 33 ILM 1226 (1994) [WTO DSU].

156 The identical or at least similar composition of the actual decision-makers should enhance the likelihood of a consistent case-law. Apparently, the major advantage expected from introducing an appellate mechanism lies in securing more coherence and consistency of investment awards. Clearly, appeals to be decided by a limited number of largely identical decision-makers are likely to be consistent.

157 Consolidated CETA text, *supra* note 1, art X.42.

158 See *supra* text at note 72.

159 See e.g. “investment treaty arbitration law”, online: <www.italaw.com/>; “investment claims”, online: <<http://oxia.ouplaw.com/>>.

160 See *supra* note 83.

161 See *supra* note 84.

162 Consolidated CETA text, *supra* note 1, art X.33(1) (“The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter.”).

163 Consolidated CETA text, *supra* note 1, art X.33(5) (“Hearings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. Where the tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection. [...]”).

164 See *supra* note 72.

Meanwhile, the lack of oversight of private lawyers deciding ISA claims is equally deplored in the European debate.¹⁶⁵

As already mentioned, many of these concerns have been taken into account by a number of amendments to the arbitrator ethics rules.¹⁶⁶

To further strengthen this development it should be noted that, for instance, in the EU-Singapore FTA, negotiated in parallel to CETA, a code of conduct for arbitrators has been included.¹⁶⁷ In substance, however, this code does not add much to the existing obligations under most arbitration rules demanding independence and impartiality of arbitrators.¹⁶⁸

Limitation of Claims to Lawfully Made Investments: Avoidance of Frivolous and Harassing Claims

ISA critics often deplore the harassment factor of investment claims forcing host states to take out expensive legal representation. Thus, various demands have been made to ensure that unmeritorious or frivolous claims, as well as claims based on unlawfully made investments, should be excluded from benefiting from ISA.

A number of legal devices have already been developed, both in IIA treaty making as well as in arbitral practice. So-called “in accordance with host State law” clauses in IIAs, as well as an inherent legality requirement of the notion of an “investment” under article 25 ICSID Convention have been used to extend ISA protection only to lawfully made investments. As well, tribunals have used their discretionary powers to allocate costs in order to punish “frivolous” or “harassing” litigants.

CETA incorporates some of these developments and makes them mandatory for ISA, pursuant to its rules. An interesting provision thus limiting the scope of potential arbitration claims can be found in article X.17 CETA, which provides: “For greater certainty, an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.”¹⁶⁹

What this novel provision aims at is the exclusion of claims made by investors in cases such as *Inceysa v El Salvador*¹⁷⁰ and *Phoenix v Czech Republic*, where it has been argued that the investments were made in an unlawful way.¹⁷¹ In those cases the claims have been held inadmissible because they were considered to be contrary to the “in accordance with host State law” clause. However, a closer analysis of, in particular, the *Inceysa* case demonstrates that such reasoning was a bit complicated and not wholly

165 See e.g. Monbiot, *supra* note 75; P Muchlinski, H Muir Watt, H Schepel & G Van Harten, “Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)” (2014) at 20, online: <www.kent.ac.uk/law/downloads/ttip_isds_public_consultation_final.pdf>.

166 See, *supra* text at note 96.

167 *EU-Singapore Free Trade Agreement*, *supra* note 2, Annex 9-F to the ISDS Section.

168 *Ibid.* (“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 organisation or government with regard to matters before a tribunal. Former arbitrators must comply with the obligations established in paragraphs 15, 16, 17 and 18 of this Code of Conduct.”).

169 Consolidated CETA text, *supra* note 1, art X.17.

170 *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006 [*Inceysa*].

171 *Phoenix Action, Ltd. v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009.

convincing.¹⁷² The *Phoenix* award, with its enlargement of the *Salini* criteria¹⁷³ by the “in accordance with host State law” clause and a bona fide requirement¹⁷⁴ has also remained controversial.¹⁷⁵

The above-quoted CETA language avoids these uncertainties by clearly establishing that fraud, concealment, corruption or other abusive conduct deprives investors of access to ISA.

In addition, article X.3 CETA requires an investment, more generally, to be “made in accordance with the applicable law at that time” in order to constitute a “covered investment” for the purpose of the investment chapter.

The draft CETA text furthers aims at excluding, or at least limiting, unfounded claims or abusive litigation by investors by adopting the “loser pays” principle. Article X.36(5) CETA provides that an ISDS tribunal “shall” order that the costs of arbitration be borne by the unsuccessful disputing party.

Further, the consolidated CETA text contains two provisions, articles X.29(1)¹⁷⁶ and X.30,¹⁷⁷ which are intended to allow ISA tribunals to dismiss claims that are “manifestly without legal merit” or otherwise unsuitable to lead to a finding of liability. Practice under the comparable ICSID standard, introduced by the 2006 amendments to the ICSID Arbitration Rules,¹⁷⁸ shows that investment tribunals are using this rule to screen out manifestly ill-founded claims at an early stage.¹⁷⁹

Other Procedural ISA Innovations

Further, the CETA negotiators included alternative dispute-resolution mechanisms such as mediation or non-disputing party participation through *amicus curiae* briefs.

Most interesting in this context is probably the idea of an obligatory alternative dispute-settlement procedure preceding recourse to ISA. The overarching goal seems to be the prevention of arbitral proceedings by way of amicable settlement of disputes. In this connection, CETA contains elaborate provisions in article X.18 (consultations¹⁸⁰) as well as article X.19 (mediation). The latter includes

172 In its scrutiny whether the investment had been made in accordance with the law of the host State, the tribunal did not restrict itself to a consideration of the law of El Salvador. Instead, it reasoned that – because treaties formed part of the law of El Salvador – the BIT with its reference to generally recognized rules and principles of international law allowed it to look at these sources in order to establish the legality or illegality of the investment. Relying on a number of general principles of law, such as *Nemo Auditor Propriam Turpitudinem Allegans*, the tribunal found, *inter alia*, “that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, ‘nobody can benefit from his own fraud.’” *Inceysa*, *supra* note 171, para 242.

173 *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52.

174 *Phoenix v Czech Republic*, *supra* note 172, para 114 (“1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*.”).

175 See *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, 14 July 2010, para 110 (“[...] the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal’s opinion, this approach reflects an objective definition of ‘investment’ that embodies specific criteria corresponding to the ordinary meaning of the term ‘investment’, without doing violence either to the text or the object and purpose of the ICSID Convention.”); *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award, 31 October 2012, para 295 (“The development of ICSID case law suggests that only three of the above criteria, namely contribution, risk and duration should be used as the benchmarks of investment, without a separate criterion of contribution to the economic development of the host State and without reference to a regularity of profit and return. It should also be recalled that the existence of an investment must be assessed at its inception and not with hindsight.” (footnote omitted)).

176 Consolidated CETA text, *supra* note 1, art X.29(1) (“The respondent may, no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. [...]”).

177 Consolidated CETA text, *supra* note 1, art X.30(1) (“Without prejudice to a tribunal’s authority to address other objections as a preliminary question or to a respondent’s right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article X.22 (Submission of a Claim to Arbitration) is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.”).

178 2006 Amendments to the ICSID Rules and Regulations, *supra* note 83. Rule 41(5) permits parties within 30 days after the constitution of the tribunal to object to claims that are “manifestly without legal merit”. See also Schreuer, Malintoppi, Reinisch & Sinclair, *supra* note 142 at 684; A Parra, “The New Amendments to the ICSID Regulations and Rules and Additional Facility Rules” (2004) 3 LPICT 181; A Antoniotti, “The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules” (2006) 21 ICSID Rev 427.

179 See *Trans-Global Petroleum, Inc. v Jordan*, ICSID Case No ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, in which some claims were dismissed as “manifestly without legal merit”.

180 Consolidated CETA text, *supra* note 1, art X.18 (“Any dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the arbitration has been commenced. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 3. [...]”).

an innovative provision on alternative dispute settlement by providing for a permanent option of mediation,¹⁸¹ clearly inspired by the WTO conciliation/mediation possibilities, which are also available during the entire process of settling trade disputes.¹⁸² Additionally, Annex III to CETA (“Mediation Procedure”) provides detailed procedural guidelines for the finding of mutually agreed solutions through mediation. While the extremely short time period of 60 days¹⁸³ does not appear to provide a realistic option for the resolution of often highly technical and complex investment disputes, this language is clearly hortatory only and will not prevent disputing parties from continuing to engage in mediation.

THE SEPTEMBER 2015 PROPOSAL

Many of the ISA ideas formulated in the draft CETA and the EU-Singapore agreement were taken up and further refined in the mid-September 2015 “Commission draft text TTIP — investment.”¹⁸⁴ Apparently without any prior consultation of the US negotiating partner,¹⁸⁵ the European Commission integrated the demands for a permanent investment court raised by the Socialists and Democrats in the European Parliament as well as by many TTIP-critical voices in Europe into a new proposal for an investment chapter of the TTIP. The most remarkable part of that proposal, which reinforces the idea of “taming” the unpredictable outcomes of ISA, is the idea of an investment court to handle future investment disputes.

But the draft text of the TTIP’s investment chapter also contains a few additions on substantive issues aimed at preserving the right to regulate and clarifying that investor protection should not be too high. For instance, a new article specifically states that all protection standards in the investment chapter shall not affect the sovereign “right to regulate” of host states and to pursue legitimate policy objectives.¹⁸⁶ Countering the frequently heard,¹⁸⁷ but erroneous,¹⁸⁸ criticism that ISA would offer a right of investors to sue when they consider their profits reduced, the new text proposal clarifies that none of the investment protection standards should be interpreted as an implied stabilization clause that would trigger a right to recover expected lost profits if breached.¹⁸⁹ It even contains a *Micula*-inspired¹⁹⁰ clause, pursuant to which state aid should become insulated from investment law to the effect that the latter cannot lead to an obligation to compensate for the discontinuance of the granting of subsidies.¹⁹¹

The investment court ideas are found in section 3 of the September draft text of the TTIP.¹⁹² It contains a number of further procedural details aimed at embedding the new “investment court” system into the broader system of investment dispute settlement and at further eliminating the risk of too many claims.

181 Consolidated CETA text, *supra* note 1, art X.19 (“The disputing parties may at any time agree to have recourse to mediation. [...]”).

182 WTO DSU, *supra* note 156, art 5, para 1 (“Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.”).

183 Consolidated CETA text, *supra* note 1, art X.19, para 4 (“The disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator.”).

184 Commission draft text TTIP – investment, *supra* note 54.

185 According to the European Commission, the document “is not a formal text proposal to the United States in the TTIP negotiations but an internal document of the European Union. The Commission will consult the EU’s Member States in the Council and will discuss the proposal with the European Parliament before presenting a formal text proposal to the United States.” *Ibid.* at 1.

186 Commission draft text TTIP – investment, *supra* note 54, art 2(1) (“The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.”).

187 See *supra* text in note 88.

188 Open letter by law professors, *supra* note 74 at 2 (“It is not correct that investment treaty arbitration permits corporations to initiate dispute settlement against governments ‘for actions that allegedly cause a loss of profit for the corporation.’ ‘Lost profits’ is merely a measure of damages, not a cause of action, which must be predicated on allegedly wrongful government acts, such as discriminating against foreigners or failing to provide them with due process, that violate the express terms of a treaty.”).

189 Commission draft text TTIP – investment, *supra* note 54, art 2(2) (“For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor’s expectations of profits.”).

190 In *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No ARB/05/20, Final Award, 11 December 2013, an ICSID tribunal came to the conclusion that the termination of a state aid program constituted a violation of FET. When the investors tried to enforce their award, the European Commission took various steps to prevent this; J Chevre, “*Micula v Romania*” (2015) 14 World TR 540; IA Laird et al, “International Investment Law and Arbitration: 2013 in Review” in A Bjorklund, ed, *Yearbook on International Investment Law & Policy 2013–2014* (New York: Oxford University Press, 2015) 69 at 114ff.

191 Commission draft text TTIP – investment, *supra* note 54, art 2(4) (“For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex III.”).

192 Commission draft text TTIP – investment, *supra* note 54, section 3.

The New Two-tier Permanent “Investment Court”

The most novel aspect of the European Commission proposal is the idea of setting up both a Tribunal of First Instance and an Appeal Tribunal to hear investment claims brought under the TTIP. These tribunals are, in fact, hybrids between courts and arbitral tribunals. They consist of appointed “judges” serving for renewable six-year terms, but they render “awards” in order to make them enforceable under the rules of the ICSID Convention or, more likely, under the New York Convention.¹⁹³

Qualifications for appointment resemble those of other international courts and tribunals by requiring specific knowledge in the field.¹⁹⁴ Interestingly, the demand to limit appointments to judges and academics (apparently in order to exclude practising lawyers)¹⁹⁵ has not been adopted. Rather, the office is open to all “jurists of recognised competence.” In order to prevent the new investment court bench from being filled by lawyers wearing two hats (that is, serving as adjudicators and also advising clients in other, but sometimes similar cases),¹⁹⁶ the rules for judges provide that “upon appointment, they shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.”¹⁹⁷ Further incompatibility provisions, aimed at excluding governmental or other influence, and a separate code of conduct, seek to minimize the risk of adjudicator bias. In practice, it may, of course, limit the pool of experienced adjudicators available. Investment specialists may also be deterred by the envisaged retainer fee (equivalent to only one-third of that paid to WTO Appellate Body members¹⁹⁸), and the planned fee schedule (which follows the rather low ICSID figures).¹⁹⁹ In any event, an increased number of academics instead of corporate lawyers on the bench of a new investment court will not be feasible, given the strict prohibition of any other occupation in case the tribunal is converted into a permanent court.²⁰⁰

A major organizational step away from traditional ISA, in which the disputing parties have a right to select their arbitrators, lies in the idea of a random allocation of cases to chambers of three Tribunal and Appeal Tribunal judges each.²⁰¹ The only “influence” of the parties lies in making the initial selection. Here the proposal departs again from traditional ISA practice, which does not allow nationals of disputing parties to hear individual claims,²⁰² and more closely resembles the structure of the Iran-US Claims Tribunal. It suggests that an equal number of EU, US and third-country nationals will be appointed as judges.²⁰³

193 As to potential problems concerning the envisaged enforcement regime, see *infra* text at note 211.

194 Commission draft text TTIP – investment, *supra* note 54, section 3, art 9(4) (“The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.”).

195 See S&D Position Paper, *supra* note 67.

196 See *supra* text at note 95.

197 Commission draft text TTIP – investment, *supra* note 54, section 3, art 11(1).

198 Commission draft text TTIP – investment, *supra* note 54, section 3, art 9(12) (“In order to ensure their availability, the Judges shall be paid a monthly retainer fee to be fixed by decision of the [...] Committee. [Note: the retainer fee suggested by the EU would be around 1/3rd of the retainer fee for WTO Appellate Body members (i.e. around €2,000 per month).] [...]”).

199 Commission draft text TTIP – investment, *supra* note 54, section 3, art 9(14).

200 Commission draft text TTIP – investment, *supra* note 54, section 3, art 9(15) (“In that event, the Judges shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal.”).

201 Commission draft text TTIP – investment, *supra* note 54, section 3, art 9(6)(7) (“6. The Tribunal shall hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one a national of the United States and one a national of a third country. The division shall be chaired by the Judge who is a national of a third country. 7. Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.”). See also Commission draft text TTIP – investment, *supra* note 54, section 3, art 10(8)(9), for the Appeal Tribunal.

202 See e.g. ICSID Convention, *supra* note 26, arts 38, 39.

203 Commission draft text TTIP – investment, *supra* note 54, section 3, art 9(2) (“The [...] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries.”). See also Commission draft text TTIP – investment, *supra* note 54, section 3, art 10(2), for the Appeal Tribunal (“The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries.”).

The Appellate Option

Clearly the most interesting aspect of the new permanent structure is the appeals possibility. It combines the limited annulment grounds of the ICSID Convention,²⁰⁴ also reflected in the set-aside reasons pursuant to the New York Convention,²⁰⁵ with not only the power to review errors of law, but also manifest errors in the appreciation of facts.

Pursuant to draft article 29(1) of the European Commission proposal:

Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are:

- (a) that the Tribunal has erred in the interpretation or application of the applicable law;
- (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
- (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).²⁰⁶

Distinct from an ICSID annulment committee, the Appeal Tribunal will decide the dispute finally, modifying the award in whole or in part.²⁰⁷ The Appeal Tribunal does not function as a mere court of cassation, but rather as a court of last instance. Thus, there is no need for a new tribunal decision. Combined with the mandate to decide appeal cases within six months,²⁰⁸ this should lead to an acceleration of investment dispute settlement. Whether this acceleration idea, inspired again by the WTO's Dispute Settlement Understanding (DSU), will work in practice needs to be seen.²⁰⁹

The Enforcement of Awards

The European Commission's draft TTIP text also elaborates on the enforcement of the new "investment court" decisions. These provisions are largely shaped by the template of the ICSID Convention's rules. They provide for the final and binding nature of "final awards," that is, awards of the Appeal Tribunal or non-appealed awards of the Tribunal of First Instance.²¹⁰ Further, article 30(2) provides: "Each Party shall recognize an award rendered pursuant to this Agreement as binding [and] enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party."²¹¹

204 ICSID Convention, *supra* note 26, art 52(1) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

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

205 See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958, 330 UNTS 38, art v(1) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.").

206 Commission draft text TTIP – investment, *supra* note 54, section 3, article 29(1).

207 Commission draft text TTIP – investment, *supra* note 54, section 3, art 29(2) ("If the Appeal Tribunal rejects the appeal, the provisional award shall become final. If the appeal is well founded, the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part. [...]").

208 Commission draft text TTIP – investment, *supra* note 54, section 3, art 29(3).

209 In particular, whether the limited extension possibility to a total of 9 months, provided for in Section 3, Article 29(3), will be sufficient.

210 Commission draft text TTIP – investment, *supra* note 54, section 3, art 30(1) ("Final awards issued pursuant to this Chapter by the Tribunal or the Appeal Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy."). Compare with ICSID Convention, *supra* note 26, art 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.").

211 Commission draft text TTIP – investment, *supra* note 54, section 3, art 30(2).

This provision mirrors article 54(1) of the ICSID Convention.²¹² However, the strength of the ICSID provision lies in the fact that it imposes an enforcement obligation on all contracting parties of the ICSID Convention and thus considerably broadens the possibility of enforcement measures against assets found in third states. Since the ICSID Convention will not be applicable to EU IIAs, as long as the problem of an EU accession to it is not solved,²¹³ the duty of all ICSID parties to enforce ICSID awards will not apply to the awards of any TTIP tribunal awards. Thus, the obligation to comply with final awards is limited to the parties to the TTIP, that is, the United States, the European Union and probably its member states. Equally, the obligation to enforce pecuniary obligations, which is usually sought in third states, is limited to the parties of the TTIP. Given recent experiences with European Commission opposition to the enforcement of ICSID awards, it remains at least open to question to what extent an enforcement obligation will add to the principal obligation to accept TTIP final awards as binding, pursuant to article 30(1).²¹⁴

Finally, the suggested enforcement rules leave intact the state immunity provisions regarding enforcement measures, additionally limiting the chances of an involuntary enforcement of TTIP awards.²¹⁵ Experience under similar provisions of the ICSID Convention²¹⁶ has demonstrated that this constitutes the major legal hurdle in cases where an award is not voluntarily complied with and it becomes necessary to resort to enforcement measures against host state assets located in third countries.²¹⁷ In the future, where such attempts will be made in either the United States or the European Union with regard to assets of the other party, this is likely to lead to major political friction — a development that may run counter to the idea of depoliticizing investment disputes.²¹⁸

Other Procedural Safeguards to Ensure a Speedy and Transparent Settlement of Investment Disputes

The September 2015 draft text also incorporates many procedural innovations already found in the CETA chapter on investment dispute settlement.

It incorporates the UNCITRAL Transparency Rules.²¹⁹ It provides for an expedited dismissal of claims that are “unfounded as a matter of law.”²²⁰ It also offers the option of mediation and even contains a separate annex²²¹ that no longer contains the strict 60-day time limit of CETA.²²²

THE NEW INVESTMENT COURT AND EU LAW FROM A CJEU PERSPECTIVE

When analyzing the new investment court plans of the European Commission, one should not forget another powerful player: the CJEU. In particular, after the court’s opinion on the European Union’s accession to the European Court of Human Rights,²²³ it appears questionable whether it will accept

212 ICSID Convention, *supra* note 26, art 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [...]”).

213 See *supra* note 48.

214 See *supra* note 211.

215 Commission draft text TTIP – investment, *supra* note 54, section 3, art 30(3) (“Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.”).

216 ICSID Convention, *supra* note 26, art 55 (“Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”).

217 See A Reinisch, “Enforcement of Investment Awards” in C Yannaca-Small, ed, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford, UK: Oxford University Press, 2010) 671.

218 See Shihata, *supra* note 29.

219 Commission draft text TTIP – investment, *supra* note 54, section 3, art 18(1) (“The ‘UNCITRAL Transparency Rules’ shall apply to disputes under this Section, with the following additional obligations.”).

220 Commission draft text TTIP – investment, *supra* note 54, section 3, art 17(1) (“Without prejudice to the Tribunal’s authority to address other objections as a preliminary question or to a respondent’s right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article 6, even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.”).

221 Commission draft text TTIP – investment, *supra* note 54, Annex I.

222 See *supra* note 184, with regard to the 60-day framework of CETA.

223 CJEU, Opinion 2/13 of 18 December 2014.

an international investment tribunal as a competing judicial means of dispute resolution.²²⁴ While the Luxembourg Court has not generally ruled out the possibility of the European Union submitting to international dispute settlement with binding outcomes on the European Union,²²⁵ it has clearly drawn a line in favour of the autonomy of the union's legal order by insisting that EU law should ultimately be interpreted and determined only by EU organs, preferable by the court itself. This demand, already voiced in the opinions on the European Patent Court²²⁶ and, most recently, in the relationship to the European Court of Human Rights,²²⁷ has obviously been taken into consideration by the European Commission in its draft TTIP text.

While this problem is not expressly addressed in the draft text, a number of specific provisions indicate the European Commission's awareness of the sensitivities of the court. Article 13 on applicable law, together with article 1 of the investment dispute settlement chapter of the new proposal, explicitly allow only treaty disputes. Technically, this is ensured by providing for the tribunals' power not to broadly decide "any dispute relating to an investment," as found in other IIAs,²²⁸ but rather by limiting claims to violations of the substantive standards of the investment chapter.²²⁹ The draft TTIP dispute settlement provisions clearly permit the latter treaty claims only.²³⁰ In addition, article 13 on applicable law expressly removes EU law from the interpretation and to a certain extent even from the application by the tribunals. It does so by declaring domestic law not to form part of the applicable law,²³¹ by stressing that any interpretation given to EU law by the tribunal shall not be binding on EU institutions, and by insisting that the tribunals do not have the power to exercise judicial review of EU acts.²³² Clearly, all these form elements of the core power of the CJEU's exclusive "interpretative monopoly," as asserted in its above-mentioned decisions. By removing EU law from investment court scrutiny, the European Commission obviously intends to make the latter EU-compatible. Whether the CJEU will concur remains to be seen.

224 See also M Burgstaller, "Investor-State Arbitration in EU International Investment Agreements with Third States" (2012) 39 LIEI 207; Matthew Parish, "International Courts and the European Legal Order" (2012) 23 EJIL 141; A Dimopoulos, "The Compatibility of Future EU Investment Agreements with EU Law" (2012) 39 LIEI 447; S Hindelang, "The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-related Agreements" (2013) EYIEL (Special Issue (Common Commercial Policy after Lisbon)) 187; S Hindelang, "Repellent Forces: The CJEU and Investor-State Dispute Settlement" (2015) 53 Archiv des Völkerrechts 68; Stephan W Schill, "Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements" in M Bungenberg, A Reinisch & C Tietje, eds, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Oxford, UK: Nomos/Hart Publishing, 2013) 37.

225 ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR I-6079.

226 ECJ, Opinion 1/09, *European and Community Patent Court*, [2011] ECR I-1137.

227 CJEU, Opinion 2/13, Opinion pursuant to Article 218(11) TFEU, 18 December 2014 [nyr].

228 See e.g. Austrian 2008 Model BIT, art 9(1) ("Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute."); Austria-Chile BIT 1997, art 2(4) ("In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations."); Argentina-France BIT 1991, art 8 ("1. Any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned. [...]").

229 See e.g. NAFTA, *supra* note 47, art 1116(1) ("An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach."). "Section A" only mentions treaty standards of the NAFTA, not domestic legislation.

230 Commission draft text TTIP – investment, *supra* note 54, section 3, art 13(1) ("The Tribunal shall determine whether the treatment subject to the claim is inconsistent with any of the provisions referred to in Article 1(1) alleged by the claimant."); Section 3, Article 1(1) provides: "This Section shall apply to a dispute between, on the one hand, a claimant of one Party and, on the other hand, the other Party concerning treatment alleged to breach [investment protection provisions, i.e. the investment protection section and the national treatment and the most-favoured nation treatment provisions concerning post-establishment], which breach allegedly causes loss or damage to the claimant or its locally established company."

231 Commission draft text TTIP – investment, *supra* note 54, section 3, art 13(3) ("For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.")

232 Commission draft text TTIP – investment, *supra* note 54, section 3, art 13(4) ("For greater certainty, the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.")

CONCLUSION

In recent years, the position of the European Union toward ISA has gradually evolved. Since the European Union is a complex entity comprising often divergent member states as well as organs, it is not possible to identify a single, unified EU position on any current issue. Rather, the institutions, the member states and different political groups within the European Union may have divergent views. The question of ISA is a perfect example of a seemingly technical legal problem that has attracted unexpected public interest. While some groups want to stop the TTIP altogether, others aim at a reform of ISA and yet others want to maintain the status quo of effective investor protection. Thus, the position of the European Commission, the main external trade negotiating actor of the European Union, is shaped by constant and sometimes conflicting demands. The European Commission itself has tried to react to this by gradually adopting a position that has shifted from reluctance to endorse ISA as a meaningful mechanism to enforce investment protection standards to reforming the system by proposing the substitution of ISA by a permanent investment court. The European Commission has reacted to many of the concerns and criticisms voiced against ISA, and ISDS more broadly, without depriving investment protection of its major procedural guarantee to effectively enforce the (already lowered) standards promised by the contracting parties.

This evolution of the European Union's position toward ISA is reflected by numerous internal documents of the European Union's law-making institutions as well as the European Commission's negotiating outcomes, in particular the Canada-EU draft CETA text of September 2014 and the EU-Singapore FTA. These texts provide useful hints not only with regard to the European Union's position on ISA, but also on what is feasible to negotiate with third parties. In addition, the most recent (September 2015) reform proposals by the European Commission, calling for an investment court, provide useful insights. With its appellate structure and a number of other features, the investment court draws inspiration from the WTO. The European Commission, the European Union's external trade actor, which not only negotiates agreements but also litigates disputes before the WTO's DSU institutions, has reintroduced WTO features into ISDS. From its initial preference for state-to-state dispute settlement following the WTO paradigm, the European Commission has endorsed ISA and has now reinstalled WTO features into ISDS. Whether this will be acceptable to the negotiating partners of the European Union is unclear.

Even if these changes prove acceptable to negotiating partners, the CJEU is left out of the present picture. As already mentioned, however, one should not underestimate this organ's power, in particular when it comes to vetoing the European Union's submission to external dispute settlement systems. As is often the case, the court will have the final say.

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