

INVESTOR-STATE DISPUTE SETTLEMENT IN THE EU: CERTAINTIES AND UNCERTAINTIES

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ABSTRACT

Since the entry into force of the Treaty of Lisbon in 2009, the EU has undertaken the negotiation of a series of trade and investment agreements with other states, such as Canada, the United States, Vietnam and Singapore. The inclusion of ISDS (investor-State dispute settlement) in these agreements concluded by the EU has raised, in particular, a number of legal issues and met significant opposition in European civil society. Following from this, the EU has carried out reforms which include, inter alia, the creation of an Investment Court System (ICS). In Opinion 2/2015, concerning the Free Trade Agreement between the European Union and the Republic of Singapore, the CJEU has had the opportunity to rule on the competence of the EU on investment policy and on certain aspects of investor-State dispute settlement. However, the Court has not yet ruled on the conformity of ISDS with EU law. This article deals with some of the certainties and uncertainties regarding ISDS from a European perspective. Particular attention is paid to whether the alleged constitutional obstacles posed by ISDS are also present in the proposed Investment Court System. Ultimately, it attempts an assessment of the viability of investor-State dispute settlement in the context of the EU's external action.

Key words: European Union, foreign investments, ISDS, ICS, TTIP, CETA, EU-Singapore Agreement

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I. INTRODUCTION

Trade policy has become one of the pillars of the external action of the European Union with the entry into force of the Treaty of Lisbon in 2009, which also confers on the Union exclusive competence on foreign direct investments.¹ In

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accordance with this new competence, the European Union has adopted regulations, on the one hand, to articulate the transition from the old model of bilateral investment treaties (BITs) signed by Member States² and, on the other hand, to clarify the financial responsibility between the Member States and the European Union in case of conflict.³ It has also undertaken the negotiation of a series of investment agreements with other states, such as Canada, the United States, Vietnam and Singapore.⁴ The inclusion of ISDS in these agreements has raised, in particular, a number of legal issues and has met significant opposition in European civil society and amongst prominent politicians in the Member States. The European Parliament, too, has witnessed an increasing hostility towards ISDS in relation to both The Transatlantic Trade and Investment Partnership (TTIP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). In June 2015, for instance, it had to postpone voting on the ongoing Transatlantic Trade and Investment Partnership (TTIP) because of the high number of amendments tabled on this issue.⁵

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1. Consolidated Version of the Treaty on the Functioning of the European Union, arts. 3, 207, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 231 [hereinafter Treaty of Lisbon]; *Treaty of Lisbon Enters into Force—Implications for the EU's Trade Policy*, EUR. COMM'N (Dec. 1, 2009), <http://trace.ec.europa.eu/doclib/press/index.cfm?id=493>.

2. See Regulation 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 O.J. (L. 351/40) 5 (stating that bilateral investment agreements will remain binding on Member States and will be replaced by Union agreements as the Union exercises its competence).

3. See Regulation 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 O.J. (L 257/121) 7 (explaining the allocation of financial responsibility between the European Union and a Member State in case of agreement conflicts).

4. Directorate-General for Trade, *Investment*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/accessing-markets/investment/> (last updated Sept. 5, 2017).

5. Christian J. Tams, *Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach?*, 15 J. WORLD INV. & TRADE 585, 586–87 (2014); see

Against this backdrop, the European Commission seems to have backed away from supporting ISDS. Indeed, it has carried out reforms and proposed a new approach based on the creation of a Permanent International Investment Tribunal or Investment Court System (ICS) to replace traditional ISDS mechanisms.⁶

It remains to be seen whether the proposed Court will be implemented. TTIP negotiations have been put on standby following the protectionist approach of the Trump Administration and European disapproval.⁷ The future of CETA and its Investment Tribunal is also uncertain.⁸ On February 15, 2017, CETA was approved by the European Parliament, but the

Chiara Coppotelli, Comment, *Investor-State Adjudication Mechanism Negotiations in the TTIP: An Unpopular Endeavor Into the Potential Politicization of Dispute Settlement*, 39 *FORDHAM INT'L L.J.* 1355, 1359 (2016) (discussing the various concerns from civil society against ISDS mechanisms as illustrated by the 280 organizations across Europe which issued a statement calling on the European Commission to exclude the ISDS from all trade agreements); *EP Vote & Debate on TTIP Recommendations Postponed: What's Next?*, EUROPEAN PARLIAMENT (June 11, 2015), www.europarl.europa.eu/news/en/headlines/eu-affairs/20150610STO65005/ep-vote-and-debate-on-ttip-recommendations-postponed-what-s-next.

6. *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II—Investment* subsec. 4 (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [hereinafter TTIP]; Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part, art. 8.27, *Can.-Eur.*, Oct. 30, 2016, 2017 O.J. (L 11) 66 [hereinafter CETA]; Wolfgang Koeth, *Can the Investment Court System (ICS) Save TTIP and CETA?* 1–2 (EIPA, Working Paper No. 2016/W/01), http://www.eipa.eu/files/repository/product/20161019072755_Workingpaper2016_W_01.pdf.

7. Katie Allen, *Trump's Economic Policies: Protectionism, Low Taxes and Coal Mines*, *GUARDIAN* (Nov. 9, 2016), <https://www.theguardian.com/us-news/2016/nov/09/trumps-economic-policies-protectionism-low-taxes-and-coal-mines>. Both 2016 U.S. presidential candidates opposed the conclusion of further trade deals. Dan Roberts & Ryan Felton, *Trump and Clinton's Free Trade Retreat: A Pivotal Moment for the World's Economic Future*, *GUARDIAN* (Aug. 20, 2016), <https://www.theguardian.com/us-news/2016/aug/20/trump-clinton-free-trade-policies-tpp>. In countries like Germany and France, prominent politicians have called TTIP negotiations a failure. Alexandra Sims & Jon Stone, *TTIP Has Failed—But No One is Admitting It, Says German Vice-Chancellor Sigmar Gabriel*, *INDEPENDENT* (Aug. 28, 2016), <http://www.independent.co.uk/news/world/europe/ttip-trade-deal-agreement-failed-brexite-latest-news-eu-us-germany-vice-chancellor-a7213876.html>.

8. Alan Beattie, *Ceta Failure Will Undermine Basis of EU Trade Policy*, *FINANCIAL TIMES* (Oct. 25, 2016), <https://www.ft.com/content/a8381c72-9aa4-11e6-8f9b-70e3cabccfae>.

agreement is of mixed nature and therefore requires ratification by at least 36 national and provincial parliaments of the Member States.⁹ Until then, it can be provisionally applied, excluding the investment protection provisions and pending the Member States' parliaments voting on it.¹⁰ In this regard, the Regional Parliament of Wallonia in Belgium vetoed CETA but dropped its veto on the condition that the Court of Justice of the European Union (CJEU) issue a ruling on the conformity of the ICS with EU law.¹¹ Some Member States such as Germany have questioned the compatibility of CETA with those States' Constitutions but provisionally accepted CETA,¹² whereas other Member States are still undecided on CETA.¹³

In any case, investor-State dispute settlement does not only meet political opposition but is also likely to face legal pitfalls. In order to be operative, ISDS and its alternative, the ICS, must be

9. *The EU-Canada Trade Deal: Fear of the Maple Menace*, *ECONOMIST* (July 14, 2016), <http://www.economist.com/news/europe/21702231-one-brussels-biggest-trade-deals-looks-uncertain-after-brex-it-fear-maple-menace>; Proposal for a Council Decision on the Provisional Application of the Comprehensive Economic and Trade Agreement Between Canada of the One Part, and the European Union and its Member States, of the Other Part COM (2016) 470 final (July 5, 2016), www.ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-470-EN-F1-1.PDF.

10. *CETA Explained*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/#provisional-application> (last updated Jan. 24, 2017).

11. *Statement by the Kingdom of Belgium on the Conditions Attached to Full Powers, on the Part of the Federal State and the Federated Entities, for the Signing of CETA*, COUNCIL OF THE EUROPEAN UNION (Oct. 27, 2016), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.011.01.0009.01.ENG; Jennifer Rankin, *Belgian Politicians Drop Opposition to EU-Canada Trade Deal*, *GUARDIAN* (Oct. 27, 2016), <https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement>.

12. *See Applications for a Preliminary Injunction in the "CETA" Proceedings Unsuccessful*, BUNDESVERFASSUNGSGERICHT (Oct. 13, 2016), www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html ("[T]he Second Senate of the Federal Constitutional Court rejected several applications for a preliminary injunction directed against the approval by the German representative in the Council of the European Union of the signing, the concluding and the provisional application of [CETA]").

13. Philip Blenkinsop & Shadia Nasralla, *EU, Canada Seek to Win Over Trade Doubters with Declaration*, *REUTERS* (Sept. 21, 2016), <http://ca.reuters.com/article/businessNews/idCAKCN11R1OZ> (citing countries such as Slovenia, Romania and Bulgaria).

in conformity with the legal systems of the parties involved.¹⁴ In Opinion 2/2015, concerning the Free Trade Agreement between the European Union and the Republic of Singapore, the CJEU has had the opportunity to rule on the competence of the EU regarding investment policy and certain aspects of investor-State dispute settlement.¹⁵ But the compatibility of ISDS with EU law or the domestic laws of the Member States is still uncertain.¹⁶

The present work deals with some core issues relating to investor-State dispute settlement from an EU law perspective. It begins with an overview of ISDS, the ICS, and the general political debate on these issues.¹⁷ Later, it analyzes the CJEU's position hitherto regarding investment policy and ISDS¹⁸ and discusses core issues not yet ruled on by the CJEU.¹⁹

By drawing a parallel between the constitutional challenges attributed to investor-state arbitration,²⁰ the analysis may also provide sufficient ground to determine if the alternative to ISDS—the ICS—is a genuine mechanism of investor-State dispute resolution, different and independent from traditional ISDS.²¹ Ultimately, the article attempts an assessment of the

14. See *infra* Section 5.1.

15. Opinion 2/15 of the Court (Full Court) of 16 May 2017 pursuant to Article 218 (11) TFEU (EU-Singapore Free Trade Agreement), made on 10 July 2015 by the European Commission, 2017 E.C.R. 2/15 (May 16, 2017), at ¶¶ 27, 39, 78–110, 285–93. TFEU, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=190727&occ=first&dir=&cid [hereinafter Opinion 2/15 (EU-Singapore Free Trade Agreement)].

16. Laurens Ankersmit, *Is ISDS in EU Trade Agreements Legal under EU Law?*, INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT: INVESTMENT TREATY NEWS (Feb. 29, 2016), <https://www.iisd.org/itn/2016/02/29/is-isds-in-eu-trade-agreements-legal-under-eu-law-laurens-ankersmit/>.

17. See *infra* Sections 2 and 3.

18. See *infra* Section 4.

19. See *infra* Section 5.

20. See *infra* Section 5.1. For a further discussion on the constitutional challenges of ISDS, see Inge Govaere, *TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order*, RESEARCH PAPERS IN LAW, Department of Legal Studies, College of Europe (Jan. 2016), www.coleurope.eu/research-paper/ttip-and-dispute-settlement-potential-consequences-autonomous-eu-legal-order.

21. See *infra* Section 6.

future of investor-State dispute settlement in the context of the EU's external action.

II. ISDS: FEATURES AND ALLEGED DRAWBACKS

Investment arbitration (ISDS) emerged in the mid-20th century as a dispute settlement mechanism aimed at providing legal certainty and protecting foreign investors against the risks of policy changes and the possible lack of neutrality and impartiality of judges and domestic courts of the host State.²² ISDS allows to resolve disputes against the host State in a delocalized forum under a neutral legal framework, the international law of investment.²³ This protection, earlier unknown to foreign investors, has resulted in the proliferation of arbitration clauses in bilateral (BITs) and multilateral investment treaties (MITs).²⁴

A. Features

The major forum for ISDS is the International Center for Settlement of Investment Disputes (ICSID).²⁵ ICSID is an institution of the World Bank headquartered in Washington, created as a result of the Convention on the Settlement of Investment disputes between States and Nationals of other States, which came into force in 1965.²⁶ All Member States of the EU, with the exception of Poland, are Parties to this Convention.²⁷

22. OFF. OF THE U.S. TRADE REPRESENTATIVE, FACT SHEET: INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) (2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.

23. U.N. Conference on Trade and Development, *Investor-State Dispute Settlement: A Sequel*, at 23–24, U.N. DOC. UNCTAD/DIAE/IA/2013/2 (May 2014) [hereinafter UNCTAD].

24. *Id.* at 18, 20; see also Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 392, 392–93 (2012) (discussing the investor protections under international investment law and noting that investors are increasingly bringing bilateral and multilateral international investment agreement disputes before international arbitral tribunals).

25. UNCTAD, *supra* note 23, at 64–65.

26. *Id.* at 65–66, 66 n.57.

27. See *Database of ICSID Member States*, INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES [ICSID], <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx#>.

The ICSID arbitration regime is applicable to disputes between nationals of Contracting States and other Contracting States of the ICSID, where the first has made an investment.²⁸ It is a delocalized arbitration, in the sense that it is subject to the provisions of the ICSID Convention and rules that are completely independent of any State law.²⁹ The only access to appellate review is internally, within the ICSID.³⁰

Other venues for ISDS are *ad-hoc* arbitration under the UNCITRAL Arbitration Rules³¹ and the Arbitration Institute of the Stockholm Chamber of Commerce.³² Arbitrations conducted under these fora are different in many aspects from ICSID arbitrations. For example, whereas ICSID awards are final and directly enforceable, excluding any review in national courts,³³ other awards need the support of the traditional mechanisms of enforcement, such as the Convention on the Recognition and the Enforcement of Foreign Arbitral Awards.³⁴ Here, awards can be refused recognition and enforcement under the same grounds as commercial awards and are subject to the assessment of domestic judges and courts.³⁵

Investment arbitration is closely related to commercial arbitration, although it has its own features, for example, that

28. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, art. 25, 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 174.

29. UNCTAD, *supra* note 23, at 66.

30. Convention on the Settlement of Investment Disputes, *supra* note 28, arts. 52–53.

31. CLYDE CROFT ET AL., A GUIDE TO THE UNCITRAL ARBITRATION RULES (1st ed. 2013); UNCTAD, *supra* note 23, at 64–65.

32. KARL GUTERSTAM ET AL., *SCC Arbitration Rules*, in CONCISE INTERNATIONAL ARBITRATION 709 (Loukas A. Mistelis ed., 2d ed. 2015); Nils Eliasson, Chapter 2: *Stockholm as a Forum for Investment Arbitration*, in INTERNATIONAL ARBITRATION IN SWEDEN 25 (Ulf Franke et al. eds., 2013).

33. Convention on the Settlement of Investment Disputes, *supra* note 28, art. 54.

34. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 21 U.S.T. 2519 [hereinafter CREFTAA]; *see also* Abby Cohen Smutny et al., *Enforcement of ICSID Convention Arbitral Awards in U.S. Courts*, 43 PEPP. L. REV. 649, 650–51 (2016) (distinguishing the ICSID Convention and the New York Convention, which relies on national courts for the enforcement of arbitral awards).

35. CREFTAA, *supra* note 34, arts. I–II, V.

investment arbitration is “arbitration without privity,”³⁶ monetary damages are the primary remedy for breach, and most awards are self-executing.³⁷ Aspects of investment arbitral proceedings are similar to those of commercial arbitral proceedings, including the constitution of the tribunal, the applicable principles, and the rendering of the award. Yet, the resolution of the dispute rests on an international treaty governed by public international law and is based on principles aimed at protecting the investor, such as the principle of fair and equitable treatment or the principles of national treatment, most favored nation or full protection and security.³⁸ As these principles usually come in terms of open and flexible clauses in BITs and MITs, arbitrators have to interpret and construe them referring to the literal wording, but also to arbitral precedent, this playing a more prominent role than in commercial arbitration.³⁹ In any case, arbitral tribunals are not bound by the principle of *stare decisis* and do not have the duty to decide the case based on the rulings of previous decisions in similar issues.⁴⁰ Therefore, there is a potential risk of inconsistency between arbitral awards, which may decide similar cases, differently.⁴¹

36. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. L.J. 232, 232 (1995). In investment arbitration, the host State’s consent to arbitrate is not limited to a specific investor, an investment project, or a dispute or series of conflicts arising from a given event, but it authorizes the initiation of compulsory arbitration proceedings by any member of an indeterminate group of potential claimants—foreign investors—in relation to a very wide range of conflicts. *Id.* at 234.

37. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 131, 134 (2006); see also Edward Baldwin et al., *Limits to Enforcement of ICSID Award*, 23 J. INT’L ARB. 1, 1 (2006) (acknowledging that many observers assume that final awards in investor-state arbitrations are self-executing).

38. Stephan W. Schill, *Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT’L L. 57, 59, 62, 87–88 (2011).

39. *Id.* at 66–67, 80–83.

40. Cf. Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT’L L. 401, 414 (2010) (observing the lack of *stare decisis* and system of binding precedent in investment treaty arbitration, but noting that arbitral tribunals systematically look at earlier decisions for guidance).

41. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV.

B. Alleged drawbacks

ISDS is very attractive for foreign investors because it provides a level playing field where States shed their privileges and litigate on an equal basis with private companies.⁴² However, for the same reason, the legitimacy of ISDS is questioned, because it places on the same level private interests and the general interest.⁴³

The main argument against ISDS is that investment disputes do not arise in a relationship of reciprocity, but in a regulatory context.⁴⁴ ISDS applies a commercial arbitration procedure to disputes which deal with the conformity of the exercise of the regulatory and administrative authority of the host State under the perspective of international law.⁴⁵ These may include, *inter alia*, disputes relating to environmental issues, the control over public services, the prohibition of harmful substances or the protection of cultural property, all matters which require public oversight and accountability.⁴⁶ From this point of view, the resolution of investment disputes is closer to the judicial control of the activity of the public administration than to commercial arbitration, where only the interests of the parties are paid attention to.⁴⁷ As a result, ISDS is an intolerable “privatization of justice.”⁴⁸

1521, 1545–46 (2005).

42. *Opinion of the European Economic and Social Committee on Investor Protection and Investor to State Dispute Settlement in EU Trade and Investment Agreements with Third Countries*, 2015 O.J. (C 332) 45, 48.

43. See Lise Johnson & Lisa Sachs, *The Outsized Costs of Investor-State Dispute Settlement*, 16 AIB INSIGHTS (Acad. of Int'l Bus.), at 11, Feb. 2016, <http://ccsi.columbia.edu/files/2016/02/AIB-Insights-Vol.-16-Issue-1-The-outsized-costs-of-ISDS-Johnson-Sachs-Feb-2016.pdf>.

44. Van Harten & Loughlin, *supra* note 37, at 145–47; Marco Bronckers, *Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, 18 J. INT'L ECON. L. 655, 668–69 (2015).

45. Van Harten & Loughlin, *supra* note 37, at 145–47; David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Community*, (OECD, Working Papers on Int'l Inv., No. 2012/03, 10, 2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf.

46. Schill, *supra* note 40, at 410, 412.

47. *Id.* at 412.

48. *Id.* at 404.

Another point of argument is that in ISDS, as in commercial arbitration, the parties decide the appointment of the arbitrators, who still can act as counsels in other disputes.⁴⁹ This may result in a conflict of interests, real or apparent. In addition, the *ad-hoc* appointment of arbitrators may be perceived by some as a financial incentive to bring more claims and increase arbitration requests.⁵⁰

ISDS is also criticized for its lack of predictability and transparency, especially regarding UNCITRAL *ad hoc* arbitrations, which are confidential.⁵¹

Other alleged drawbacks of ISDS are the complexity of the procedures, the lack of consistency of solutions, the risk of regulatory chill and that it amounts to a “parallel dispute settlement mechanism entirely outside the State’s judicial framework.”⁵² A mechanism which, furthermore, is banned *de facto* due to its high cost for small and medium-sized enterprises.⁵³

C. Proposals for reform

The arguments against the legitimacy of ISDS have led to a series of proposals for both substantive and procedural reforms.⁵⁴ These have originated both in the doctrine and in the arbitral practice and should inspire decision makers when adopting measures to improve investor-State dispute settlement.

On the substantive level, it has been alleged that the

49. *Commission Concept Paper on Investment in TTIP and Beyond—The Path for Reform* 9 (May 4, 2015), <http://data.consilium.europa.eu/doc/document/ST-8555-2015-INIT/en/pdf>; Gus Van Harten, *A Case for an International Investment Court* 13–15 (Soc’y of Int’l Econ. Law (SIEL) Inaugural Conference, Working Paper No. 22, 2008).

50. *Commission Concept Paper on Investment in TTIP and Beyond*, *supra* note 49.

51. Franck, *supra* note 41, at 1544 & n.87, 1584, 1586–87 (2005); Matthew Carmody, *Overtuning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration?*, 19 INT’L TRADE & BUS. L. REV. 96, 96, 108–09, 129–30 (2016).

52. Franck, *supra* note 41, at 1584, 1586; Ankersmit, *supra* note 16 (citing *EURAM v. Slovakia*).

53. Gaukrodger & Gordon, *supra* note 45, at 23.

54. Nathalie Bernasconi-Osterwalder, *Rethinking Investment-Related Dispute Settlement*, INVESTMENT TREATY NEWS (May 21, 2015), <https://www.iisd.org/itn/2015/05/21/rethinking-investment-related-dispute-settlement/>.

resolution of investment disputes must necessarily take into account public interest implications.⁵⁵ The adjudicators' decision shall be impregnated with arguments and considerations addressed not only to the parties but to interested third parties (other investors, other States) and the public in general.⁵⁶ Likewise it is suggested that the standards of protection for foreign investors shall be defined with greater precision along with the creation of a global administrative law of investment, a sort of a public *lex mercatoria*, to balance all interests at stake.⁵⁷

On the procedural level, following the amendment of the ICSID Convention Arbitration Rules in 2006, some tribunals have reacted to the concerns against ISDS and are increasingly introducing public international law principles such as transparency in arbitral proceedings and accepting the intervention of *amicus curiae*.⁵⁸ Concerning NAFTAs Chapter 11,⁵⁹ Canada, the United States, and Mexico have agreed to make available to the public all documents submitted to or issued by a Chapter 11 Tribunal.⁶⁰ Moreover, UNCITRAL adopted in 2013 the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules") together with a new Article 1(4) of the UNCITRAL Arbitration Rules.⁶¹ The Transparency Rules introduce a significant degree of publicity of

55. See Gaukrodger & Gordon, *supra* note 45, at 61.

56. Schill, *supra* note 40, at 417–18.

57. See Schill, *supra* note 38, at 60 (proposing the integration of international investment law into a public law model that transcends territorial borders); Caroline Foster, *A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'*, 64 INT'L & COMP. L.Q. 461, 465 & n.21 (2015) (referring to the postulates of Schill).

58. Ciaran Cross & Christian Schliemann-Radbruch, *When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions Through Amicus Curiae Submissions by Regional Organisations*, 6 L. & DEV. REV. 67, 79–80 (2013).

59. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1120, 32 I.L.M. 643 (1993) [hereinafter "NAFTA"].

60. Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine*, 78 N.Y.U. L. REV. 30, 46 (2003).

61. United Nations Comm'n on Int'l Trade Law [UNCITRAL], *Preamble, in UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 1, 1-2* (2014) [hereinafter TRANSPARENCY RULES], as adopted by G.A. Res. 68/109, U.N. Doc. A/68/462, at 1–3 (Dec. 16, 2013), www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

the arbitral proceedings, by providing, *inter alia*, for the public disclosure of awards and other key documents (Articles 2 and 3), open hearings (Article 6) and submissions by non-disputing parties (Articles 4 and 5).⁶² They apply automatically to arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to treaties concluded on or after April 1, 2014 (“subsequent” treaties), unless the parties to such treaties have agreed otherwise.⁶³ In relation to UNCITRAL arbitrations started pursuant to treaties concluded before April 1, 2014, the Transparency Rules apply provided that the parties to such treaties or that the parties to the dispute have agreed to their application.⁶⁴ Therefore, the Mauritius Convention was adopted on December 10, 2014 by the General Assembly of the United Nations to gather State consent to apply the Transparency Rules to the around 3000 treaties concluded before the adoption of the Transparency Rules.⁶⁵ Twenty-one countries have signed the Convention, including the U.S., the U.K., Canada, Sweden, Finland and Germany. So far only Canada, Mauritius, and Switzerland have ratified it, but with the three ratifications, it entered into force.⁶⁶ Also, the risk of inconsistent decisions is usually underlined as one of the major shortcomings of ISDS that needs to be resolved, but all attempts to establish an appeal mechanism at the ICSID have failed so far.⁶⁷ This issue connects with the doctrinal suggestion to create an International Investment Court to provide consistency and to ensure the

62. *Id.* at 7–10.

63. *Id.* at 5.

64. *FAQ—UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_FAQ.html (last visited Sept. 17, 2017).

65. Directorate-General for Trade, European Commission, *EU Welcomes More Transparency in Investor-to-State Dispute Settlement Globally* (Mar. 17, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1278>.

66. *Status: United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&clang=_en (last updated Sept. 17, 2017).

67. Franck, *supra* note 41, at 1545–46; *see also* Been & Beauvais, *supra* note 60, at 46.

neutrality and impartiality of decisions in investor-State disputes.⁶⁸ The idea has recently gained political attention as the preferable mechanism of the European Commission for investor-State dispute settlement.⁶⁹ Indeed, the European Commission has proposed a new approach based on the creation of a Permanent International Investment Tribunal or Investment Court System (ICS) to replace traditional ISDS mechanisms.⁷⁰ This new approach has been included in the last European draft in TTIP negotiations,⁷¹ in CETA⁷² and the free trade agreement with Vietnam.⁷³

III. FROM ISDS TO ICS

The Treaty of Lisbon confers the Union the exclusive competence on foreign direct investments.⁷⁴ And this circumstance has been interpreted by the Union as a great opportunity to undertake comprehensive approach to trade and investment at EU level, but also for a profound reform of the traditional approach to investment protection and the associated ISDS system.⁷⁵ The Union's goal is to achieve a fair balance

68. Van Harten, *supra* note 49, at 1; *see also* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 475 (2009) (observing the perceived shortcomings of the dispute-settlement mechanism, including a neutrality deficit, that have led calls for alternatives such as the establishment of a permanent international investment court).

69. Shiva Ghahremani & Ivan Prandzhev, *Multilateral Investment Court: A Realistic Approach to Achieve Coherence and Consistency in International Investment Law?*, EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION (EFILA) BLOG (Mar. 14, 2017), <https://efilablog.org/2017/03/14/multilateral-investment-court-a-realistic-approach-to-achieve-coherence-and-consistency-in-international-investment-law/>.

70. European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

71. TTIP, *supra* note 6.

72. *Id.*

73. *Id.*

74. TFEU, *supra* note 1, art. 207.

75. *Commission Concept Paper on Investment in TTIP and Beyond*, *supra* note 49, at 2. The first step was taken with the launching of the *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy*, at 2, 10 COM (2010) 343 final (July 7, 2010), which sets

between the protection of investments and the protection of the right to regulate, necessary for the implementation of public policies and above all, to set up a system of dispute settlement which is fair and independent.⁷⁶ The European Union has already concluded negotiations on bilateral trade agreements with Canada,⁷⁷ Singapore⁷⁸ and Vietnam⁷⁹ where the new approach has been introduced, innovating both in terms of substance (key substantive concepts like “fair and equitable treatment” and “indirect expropriation” have been defined in order to prevent abuse) and procedure (mechanisms to prevent *forum shopping*, mandatory transparency,⁸⁰ governmental control over the interpretation of the rules, inclusion of a code of conduct for arbitrators, early dismissal of unfounded claims and prohibition of parallel proceedings).⁸¹ However, the most revolutionary rules concern the creation of an Investment Court and an appellate mechanism to ensure consistency and predictability of the system. CETA is the first agreement where the new vision has been materialized,⁸² followed by the EU TTIP draft,⁸³ and the EU-

forth the objectives and strategies for a future European policy on investments through the negotiation and conclusion of agreements with third countries.

76. *Commission Concept Paper on Investment in TTIP and Beyond*, *supra* note 49, at 3, 7.

77. CETA, *supra* note 6, art. 30.11, at 196.

78. Directorate-General for Trade, European Commission, *EU-Singapore Free Trade Agreement: Authentic Text as of May 2015*, arts. 9.16–9.18 (May 2015), EUROPA.EU, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> [hereinafter EUSFTA].

79. Directorate-General for Trade, European Commission, *EU-Vietnam Free Trade Agreement: Authentic Text as of January 2016*, subsec. 4, art. 12 (Jan. 2016), EUROPA.EU, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> [hereinafter EU-Vietnam Free Trade Agreement].

80. CETA incorporates the UNCITRAL rules on transparency, in force since 2014. See CETA, *supra* note 6, art. 8.36.

81. *Commission Concept Paper on Investment in TTIP and Beyond*, *supra* note 49, at 3–5.

82. CETA, *supra* note 6, arts. 8.27–29; see also *Commission Concept Paper on Investment in TTIP and Beyond*, *supra* note 49, at 5 (“CETA is the first agreement to which the U.S. is not a party which contains a clear commitment to the possible creation of an appeal mechanism”).

83. TTIP, *supra* note 6, arts. 9–10, 12; see also *Commission Concept Paper on Investment in TTIP and Beyond*, *supra* note 49, at 12 (remarking that the TTIP contains the first EU negotiating directives which explicitly mention an appellate mechanism).

Vietnam Trade Agreement,⁸⁴ putting an end to the traditional approach to ISDS in the European Union.

A. The political debate against ISDS in Europe

At first, the European Union supported the inclusion of ISDS in post-Lisbon Agreements, stating that “[i]nvestor-state [arbitration] 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.”⁸⁵ So there is no doubt that the introduction of the proposed Investment Court and an appellate mechanism has been done, in part, to overcome the fierce opposition to ISDS in certain member States and sectors of the European public opinion. This is so, in particular, regarding the introduction of ISDS mechanisms in the TTIP draft. TTIP negotiations, which concern the world’s two largest economies, have attracted a significant interest from the public and civil society organizations.⁸⁶ An important segment of the European public opinion is against TTIP under the fear of a probable loss of social, labor, and environmental rights following the liberalization of markets and the harmonization of legislation.⁸⁷ But much of the opposition has focused on the provisions on investment protection and ISDS.⁸⁸ In a public consultation

84. European Commission Press Release IP/16/399, CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement (Feb. 29, 2016), http://europa.eu/rapid/press-release_IP-16-399_en.htm.

85. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions*, *supra* note 75, at 10.

86. *Commission Concept Paper on Investment in TTIP and Beyond*, *supra* note 49, at 5.

87. *GMB Trade Union Response to European Commission Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, GMB 2–3, 5, 10 (July 2014), [http://www.gmb.org.uk/assets/media/gmbbrussels/GMB%20response%20to%20EC%20consultation%20on%20ISDS%20in%20TTIP%20\(July14\).pdf](http://www.gmb.org.uk/assets/media/gmbbrussels/GMB%20response%20to%20EC%20consultation%20on%20ISDS%20in%20TTIP%20(July14).pdf).

88. *See Behind Closed Doors*, *ECONOMIST* (Apr. 23, 2009), <http://www.economist.com/node/13527961> (discussing concerns regarding the veil of

launched by the European Commission in 2014, on the modalities for investment protection and ISDS in TTIP,⁸⁹ 97% of the responses were against the introduction of ISDS mechanisms in TTIP.⁹⁰ This rejection found support, among others, in countries such as France and Germany⁹¹ or in the European Parliament, which suggested in its resolution of July 8, 2015

to replace the ISDS system with 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.⁹²

secrecy that shrouds investment arbitration cases). Social rejection of the TTIP has a strong presence on the internet. *E.g.*, *¿Qué es el TTIP?*, INICIATIVA EUROPEA CONTRA EL TTIP Y CETA, <http://www.noalttip.org/que-es-el-ttip/#51> (last visited Feb. 24, 2017); *European Initiative Against TTIP and CETA*, STOP TTIP, https://stop-ttip.org/?noredirect=en_GB (last visited Feb. 24, 2017).

89. See *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, at 2 (European Commission Working Document, No. SWD (2015) 3 final, Jan. 13, 2015), <http://trade.ec.europa.eu/doclib>

/docs/2015/january/tradoc_153044.pdf (reporting on the public consultation on matters concerning ISDS in TTIP launched by the European Commission in 2014); *Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, at 1 (Mar. 2014), EUR. COMM'N TRADE, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf (discussing the EU's introducing provisions to clarify the meaning of investment protection standards that have raised concerns in the past, to confirm the right to regulate as a basic underlying principle, and to ensure all necessary exceptions and safeguards are in place for retaining essential public policy space to deal).

90. Nearly 150,000 persons responded with 97 percent of them rejecting ISDS in TTIP. Pia Eberhardt, *The Seven Sins of the EU Investment Court*, EU OBSERVER (Mar. 1, 2016, 9:16 AM), <https://euobserver.com/opinion/132504>.

91. Cécile Barbière, *France and Germany to Form United Front Against ISDS*, EURACTIV, www.euractiv.com/section/trade-society/news/france-and-germany-to-form-united-front-against-isds/ (last updated Jan. 15, 2015).

92. European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the

Also, the Economic and Social Committee, in its Opinion of 27 May 2015, suggested the introduction, *inter alia*, of an appellate mechanism and of a multilateral, international court, in the long term.⁹³

The European Parliament has played a crucial role in changing the position of the European Commission regarding the settlement of investor-State disputes.⁹⁴ The common commercial policy is governed by the ordinary legislative procedure (art. 207.2 TFEU).⁹⁵ This implies that the Parliament must consent as a precondition for the conclusion of international agreements.⁹⁶ The possibility of a veto has therefore influenced the decisions of the European Commission.⁹⁷ It has been somehow forced to change its original support of ISDS and introduce a new approach based on the creation of a Permanent International Investment Tribunal or Investment Court System (ICS) to replace traditional ISDS mechanisms.⁹⁸

B. *The ICS*

The European Commission's final proposal for Investment protection and Court System for TTIP was presented to the U.S.

Transatlantic Trade and Investment Partnership (TTIP), (2014/2228(INI)), para. 2(d)xv.

93. *Opinion of the European Economic and Social Committee on Investor Protection and Investor to State Dispute Settlement in EU Trade and Investment Agreements with Third Countries*, 2015 O.J. (C 332) 45, 62.

94. Siegfried Fina & Gabriel M. Lentner, *The Scope of the EU's Investment Competence after Lisbon*, 14 SANTA CLARA J. INT'L L. 419, 435–36 (2016).

95. TFEU, *supra* note 1, art. 207.2.

96. Evarts Anosovs, *Parliament's Enhanced Role in International Agreements*, EUR. PARLIAMENTARY RES. SERV. BLOG (Oct. 22, 2013), <https://epthinktank.eu/2013/10/22/parliaments-enhanced-role-in-international-agreements/>.

97. *See, e.g.*, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *The Role of National Parliaments in the EU After Lisbon: Potentialities and Challenges*, EUR. PARLIAMENT 11 (Mar. 2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583126/IPOL_STU\(2017\)5831_26_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583126/IPOL_STU(2017)5831_26_EN.pdf) (explaining that national parliaments have substantial influence in treaty revisions because of their veto power).

98. Davor Jančić, *The Role of the European Parliament and the US Congress in Shaping Transatlantic Relations: TTIP, NSA Surveillance, and CIA Renditions*, 54 J. COMMON MKT. STUD. 896, 900–01 (2016).

on November 12, 2015.⁹⁹ In like manner, CETA also includes the creation of an Investment Tribunal.¹⁰⁰

The structure and main features of the ICS, which is also envisioned in the EU-Vietnam FTA, have been analyzed in detail by the Investment Treaty Working Group of the International Arbitration Committee, of the American Bar Association Section on International Law.¹⁰¹ Here, the ICS is briefly explained regarding the TTIP draft and CETA, as follows:

1. The Investment Court System in TTIP

The Commission's proposal for TTIP consists of a Tribunal of First Instance and an Appeal Tribunal.¹⁰² The Tribunal of First Instance shall be made up of fifteen judges appointed jointly by the EU and the U.S. Government.¹⁰³ 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.¹⁰⁴ Appointment shall be made for a period of six years, renewable once among professionals that possess the qualifications required in their respective countries for appointment to domestic courts or international tribunals such as the International Court of Justice or the WTO Appellate Body.¹⁰⁵ The parties shall not be entitled to choose the judges and each case shall be heard 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.¹⁰⁶ The division shall be chaired by the Judge who is a national of a third country.¹⁰⁷ The disputing parties, however, may agree that a case be heard by a sole Judge who is a national of a third country, to be selected by the President of the

99. TTIP, *supra* note 6, at 1.

100. CETA, *supra* note 6, art. 8.27.

101. Investment Treaty Working Group of the International Arbitration Committee, *Task Force Report on the Investment Court System Proposal*, 2016 A.B.A. SEC. INT'L L. 1, 1–4, 15.

102. TTIP, *supra* note 6, arts. 9–10.

103. *Id.* art. 9(2).

104. *Id.*

105. *Id.* art. 9(4)–(5).

106. *Id.* art. 9(6)–(7).

107. *Id.* art. 9(9).

Tribunal.¹⁰⁸

The Appeal Tribunal shall operate under principles similar to the WTO Appellate Body. It shall be composed of six Members, jointly appointed by the EU and the United States, 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, who must chair the Tribunal as President and Vice-President.¹⁰⁹ Both the Judges of the Tribunal and the Members of the Appeal Tribunal shall be subject to strict ethical and professional requirements, and they shall be appointed for a period of six years, renewable once.¹¹⁰

A significant aspect of the Commission's proposal is that it prohibits both the judges of the Tribunal of First Instance and of the Appeal Tribunal to act as counsel in other investment disputes.¹¹¹ This prohibition significantly reduces the number of professionals who can be appointed as judges. Considering that the average salary of top lawyers is well above the €7,000 per month retainer suggested by the Commission, the list of professionals willing to be part of the Court may be limited to academics, former judges or retired attorneys.¹¹²

2. The Investment Tribunal in CETA

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) also includes the creation of an Investment Tribunal. The Tribunal shall be made up of fifteen judges with competence to entertain claims on alleged breaches of the standards of protection included in CETA.¹¹³ Judges shall be appointed jointly by the EU and Canada amongst highly qualified professionals of irreproachable ethics. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of

108. *Id.*

109. *Id.* art. 10(2)–(3), (6).

110. *Id.* arts. 9(5), 10(5), 11(1).

111. *Id.* art. 11.

112. *Id.* art. 10(12); Koorosh Ameli et al., *EFILA Task Force Paper Regarding the Proposed International Court System (ICS)*, *EFILA* 56, 60 (Feb. 1, 2016), http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf [hereinafter *EFILA Report*].

113. CETA, *supra* note 6, art. 8.27(2), (4).

whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.¹¹⁴ The revised text of the CETA actually follows the new vision of the EU on foreign investments enshrined in the recently concluded EU-Vietnam Free Trade Agreement¹¹⁵ and the Commission's proposal on TTIP. That includes, *inter alia*, the creation of an Appellate Tribunal.

3. The Pursuit of a Multilateral Investment Court

The vision of the European Union goes beyond the creation of bilateral investment tribunals. The TTIP negotiation proposal,¹¹⁶ CETA,¹¹⁷ and the EU-Vietnam Free Trade Agreement¹¹⁸ all include the commitment to join efforts with other partners to create a permanent multilateral investment tribunal and appellate mechanism. In this regard, Cecilia Malmström, the EU Commissioner for Trade, has emphasized that “[a] multilateral court would be a more efficient use of resources and have more legitimacy.”¹¹⁹ Therefore, in parallel to ongoing negotiations, the European Commission intends to work together with other countries for the creation of a Permanent International Investment Tribunal and is currently collaborating with experts from various international organizations in this direction. The Commission's objective is to, over time, replace all investment dispute resolution mechanisms in EU agreements, in EU Member States' agreements with third countries, and trade in investment treaties concluded between non-EU countries, with the International Investment Tribunal.¹²⁰ “This would lead to the full

114. *Id.* art. 8.27(6).

115. *Cf., id.* art. 8.27 (detailing the establishment and composition of the proposed Investment Court), *with* EU-Vietnam Free Trade Agreement, *supra* note 79, art. 12 (providing for the establishment of a Tribunal system closely resembling the proposed Investment Tribunal in CETA).

116. TTIP, *supra* note 6, art. 12.

117. CETA, *supra* note 6, art. 8.29.

118. EU-Vietnam Free Trade Agreement, *supra* note 79, art. 15.

119. Cecilia Malmström, Comm'r for Trade, Eur. Comm'n, Discussion on Investment in TTIP at the Meeting of the International Trade Committee of the European Parliament (Mar. 18, 2015).

120. European Commission Press Release IP/15/5651, Commission Proposes New

replacement of the ‘old ISDS’ mechanism with a modern, efficient, transparent and impartial system for international investment dispute resolution”.¹²¹ It is unclear, however, which will be the model to follow for multilateralizing an International Investment Court. The Commission’s model where the tribunal is constituted by judges from the EU and USA/Canada in equal parts with only one third of the judges being nationals of third countries does not seem to be a model that can function as the starting point for the creation of a Multilateral Investment Court. Besides, the perceived shortcomings of current ISDS in terms of dispersion of solutions, inconsistencies etc. are derived in part from the fact that more than 3,000 bilateral investment treaties and free trade agreements are in force, concluded by virtually all countries of the world.¹²² The International Investment Court would then have to be open to all countries. Insofar the proposal for an International Investment Tribunal is geographically restricted to TTIP, CETA and some other bilateral agreements, a Multilateral Investment Court is unlikely to change the situation of global dispersion.

IV. THE CJEU’S POSITION ON INVESTMENT POLICY AND ISDS

The new generation of trade agreements concluded by the EU does not only raise political issues but it also poses complex legal considerations. In relation to investment policy and ISDS, the question arises as to whether the Union has exclusive competence to conclude agreements on foreign direct investment and refer to investor-State dispute settlement mechanisms. Moreover, the issue of the material compatibility of ISDS with EU Treaties is problematic.

Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

121. European Commission Press Release IP/15/6059, EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), http://europa.eu/rapid/press-release_IP-15-6059_en.htm.

122. Brower & Schill, *supra* note 68, at 473 (observing the perceived shortcomings of the dispute-settlement mechanism, including a neutrality deficit, that have led calls for alternatives such as the establishment of a permanent international investment court); Kavaljit Singh & Burghard Ilge, *Introduction* to RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHANGES 2, 3, 4 (Kavaljit Singh & Burghard Ilge eds., 2016).

The first question was recently decided by the CJEU in Opinion 2/15,¹²³ regarding the EU-Singapore Free Trade Agreement, which was structured in 2013 as an EU-only agreement, without the participation of the Member States.¹²⁴ The latter argued that the envisaged FTA fell outside exclusive EU competence and demanded to become parties to the agreement.¹²⁵ As a result, the Commission referred the issue to the CJEU using the procedure embodied in Article 218.11 TFEU.¹²⁶

The EU-Singapore Free Trade Agreement is the first FTA to be considered by the Court of Justice since the entry into force of the Treaty of Lisbon.¹²⁷ It belongs to the new generation of post-Lisbon agreements which does not merely address trade-related questions but also a variety of issues such as sustainable development, labor rights and investment protection.¹²⁸ Hence, Opinion 2/2015 is significant because it defines the competence of the EU to conclude such agreements.¹²⁹ In particular, the CJEU has interpreted the notion of ‘foreign direct investment’ under Articles 207.1 and 3.1(e) TFEU, as well as the EU competence to include provisions relating to ISDS.¹³⁰

The CJEU, in agreement with Advocate General

123. Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15.

124. Court of Justice of the European Union Press Release No. 147/16, Advocate General, Advocate General Sharpston Considers That the Singapore Free Trade Agreement Can Only Be Concluded by the European Union and the Member States, (Dec. 21, 2016).

125. Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15.

126. TFEU, *supra* note 1, art. 218.11; Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15.

127. See generally *The European Court of Justice Renders Its Opinion on the EU-Singapore Free Trade Agreement*, LEXOLOGY (May 23, 2017), <https://www.lexology.com/library/detail.aspx?g=e2568c28-1a23-47fa-874d-8959bd2f8b97> (explaining that the EU-Singapore Free Trade Agreement was the first to be considered by the European Court of Justice since the entry into force of the Lisbon Treaty).

128. Directorate-General for External Policies, Policy Department, *Trade and Investments in Energy in the Context of the EU Common Commercial Policy*, EUR. PARLIAMENT 31 (Oct. 2015), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535001/EXPO_STU\(2015\)535001_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535001/EXPO_STU(2015)535001_EN.pdf).

129. Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15.

130. *Id.*; TFEU, *supra* note 1.

Sharpston,¹³¹ held that the EU-Singapore FTA should be concluded as a “mixed agreement” and not as an “EU-only” agreement. Trade policy falls within the exclusive external competences of the EU under Article 207 TFEU, relating to common commercial policy.¹³² Article 3(2) of the TFEU also establishes the exclusive competence of the Union to conclude agreements in other areas, in particular where the agreement would affect common EU rules or alter their scope.¹³³ However, the exclusive competence of the EU does not extend to the entire scope of the agreement, which besides trade-related issues also covers other concerns.¹³⁴ Therefore, the use of mixed form is necessary.¹³⁵ Accordingly, competence to conclude a pure trade agreement with a third state lies within the EU, whereas competence to conclude provisions relating to investment protection, in so far as they relate to non-direct investment; investor-State dispute settlement and the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of the agreement, in so far as those provisions relate to the provisions of Chapter 9 (Investment Protection), is shared between the EU and the Member States.¹³⁶

The immediate consequence of Opinion 2/2015 is that portfolio investment and dispute settlement between investors and the State require the consent of the Member States.¹³⁷ In relation to ISDS, the Court highlighted that this is so because

131. Opinion of Advocate General Sharpston Delivered on 21 December 2016. Opinion Procedure 2/15 initiated following a request made by the European Commission (Request for an Opinion pursuant to Article 218(11) TFEU—Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore—Allocation of competences between the European Union and the Member States), para. 7. http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=186494&occ=first&dir=&cid=1859121 (last visited Aug. 18, 2017).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15.

137. Opinion of Advocate General Sharpston, *supra* note 131.

under an ISDS clause the investor may decide to submit the dispute to arbitration and thereby exclude the jurisdiction of the courts of a Member State without the latter being able to oppose this.¹³⁸ Thus, the CJEU seems to have reacted to political opposition against ISDS clauses in Europe.¹³⁹ By declaring the mixed competence to approve treaties containing ISDS clauses, the Court has given the last word to the Member States.¹⁴⁰

As a significant drawback, the Member States' *de facto* veto powers in issues falling outside trade policy will lead to more cumbersome and time-consuming trade negotiations with third states.¹⁴¹ For instance, in the event of an EU-U.K. FTA following Brexit, the involvement of the Member States will make the negotiations lengthier and more intense. This is likely to hinder the treaty-making activities of the EU and complicate its role as an international actor,¹⁴² which is otherwise one of the main objectives of the new generation of FTAs.¹⁴³ Moreover, ratification by the Member States also means that FTAs will also need more time to enter into force. Here, the solution, as in CETA,¹⁴⁴ seems to be the provisional application of provisions relating to areas of exclusive competence of the Union. But even this approach poses

138. Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15.

139. Anthea Roberts, *A Turning of the Tide against ISDS?*, EJIL: TALK! (May 19, 2017), www.ejiltalk.org/a-turning-of-the-tide-against-isds/.

140. *Id.*

141. Eirini Kikarea, *EU-Singapore Free Trade Agreement: "Mixed" Feelings*, POST, CAMBRIDGE INT'L L.J. (Feb. 26, 2017), www.cilj.co.uk/2017/02/26/eu-singapore-free-trade-agreement-mixed-feelings/.

142. *Id.*

143. Daniel Hamilton & Steven Blockmans, *The Geostrategic Implications of TTIP: Paper No. 5 in the CEPS-CTR Project "TTIP in the Balance" and CEPS Special Report No. 105*, CTR. EUR. POL'Y STUD. (April 2015), www.ceps.eu/system/files/SR105%20Geopolitics%20of%20TTIP%20Hamilton%20and%20Blockmans.pdf.

144. *Council Decision on the Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and its Member States, of the Other Part*, Council of the European Union 2016/0220 (NLE), (Oct. 5, 2016), www.data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/en/pdf (explaining that Parts of the Agreement falling within the competence of the Union may be applied on a provisional basis, pending the completion of the procedures for its conclusion).

legal pitfalls.¹⁴⁵

In response to these difficulties, it has been suggested that the EU could remove ISDS clauses from its FTAs altogether and make them the subject of a side agreement.¹⁴⁶ This solution has been applied, for instance, in the Australia-U.S. Free Trade Agreement and more recently, in the Japan-Australia Deal, neither of which refer to investor-State arbitration.¹⁴⁷ The European Union could then have a parallel agreement or an optional protocol to FTAs where the treaty parties agree to adopt a form of ISDS, with only this agreement being subject to mixed competence.¹⁴⁸

With the inclusion of the ICS in CETA and the TTIP draft, the European Commission seems to favor the creation of an investment court to replace traditional ISDS mechanisms, but this new approach would not change the need for Member States' consent to issues being removed from the jurisdiction of their national courts. In this regard, it's been proposed that the European Commission, as already envisaged in CETA and other post-Lisbon FTAs, works toward adopting a Multilateral Investment Court Convention along the lines of the Mauritius Convention that would be ratified by both the European Union and its Member States.¹⁴⁹

While we wait for a Multilateral Investment Court,¹⁵⁰ nonetheless, there is a risk of distortions within the internal market. According to article 59.1 of the 1969 Vienna Convention on the Law of Treaties

“[a] treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the

145. Mauro Gatti, *Provisional Application of EU Trade and Investment Agreements: A Pragmatic Solution to Mixity Issues*, in *EU POLICY ON INT'L INV. LAW* (Fach Gomez ed., 2017), 69–83, <http://hdl.handle.net/10993/31598>.

146. Roberts, *supra* note 139.

147. Luke Nottage, *Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?*, *SYDNEY L. SCH.*, 37, 38 (2015).

148. Roberts, *supra* note 139.

149. *Id.*

150. *Id.*

parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”¹⁵¹

Currently, many third-party countries have FTAs with the EU, including Canada,¹⁵² Singapore,¹⁵³ and Vietnam;¹⁵⁴ others, such as the United States, are still in negotiations with the EU to finalize an FTA.¹⁵⁵ In the event the Union chooses to remove ISDS/ICS clauses from its FTAs and make them the subject of a side agreement, existing FTAs between Member States and third countries would remain in force.¹⁵⁶ Indeed, many of these FTAs include ISDS provisions and they will be only terminated if the later FTA, although subject to Member State consent, relates to the same subject-matter.¹⁵⁷ This is why a number of EU Member States that have not concluded FTAs with Canada and the United States of America–Spain, for instance–requested the European Commission in 2014 to maintain the chapter investment protection in fear that American investors–in a scenario where TTIP has been put in standby and CETA only provisionally and partially applied–choose to settle in those EU Member States that have FTA/ISDS provisions in force with Canada and the United States.¹⁵⁸

Not to forget, Opinion 2/15 only relates to the nature of the competence of the European Union to sign and conclude post-

151. Vienna Convention on the Law of Treaties art. 59, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 345–46.

152. CETA, *supra* note 6.

153. EUSFTA, *supra* note 78.

154. EU-Vietnam Free Trade Agreement, *supra* note 79.

155. OFF. OF THE U.S. TRADE REPRESENTATIVE, Transatlantic Trade and Investment Partnership (T-TIP), <https://ustr.gov/ttip> (last visited Sept. 13, 2017).

156. Laurens Ankersmit, *Opinion 2/15 and the Future of Mixity and ISDS*, EUR. L. BLOG J. (May 18, 2017), <http://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/>.

157. Francisco Pascual Vives, *El futuro del Arbitraje de Inversión en los Acuerdos Internacionales Celebrados por la Unión Europea*, REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES, (June 7, 2017), www.reei.org.

158. Reinhard Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, 49:2 J. WORLD TRADE, 199, 203 (2015).

Lisbon FTAs, such as the Singapore Agreement.¹⁵⁹ The question whether the content of the agreement's provisions is compatible with EU law, remains uncertain.

V. LEGAL UNCERTAINTIES: THE COMPATIBILITY OF ISDS/ICS WITH EU LAW

So far, the CJEU, commentators and the public opinion have focused on the analysis of the competence and legitimacy of ISDS,¹⁶⁰ but the issue of compatibility with EU law has attracted little attention. This question is significant, especially considering the somehow hard line drawn by the CJEU regarding the legal relationship between the Court of Justice and other courts and international tribunals.¹⁶¹ Also, legal issues directly related to EU Law, like the autonomy of the EU legal order, the competence to hear actions for damages or the principles of direct effect and non-discrimination based on nationality call for a closer analysis.

A. *The autonomy and primacy of EU Law*

The CJEU has declared in relation with the European Patent Court¹⁶² and the accession to the European Convention on Human Rights (Opinion 2/13),¹⁶³ the incompatibility with EU law of any judicial body or international tribunal that jeopardizes the principles of autonomy and primacy of EU law and the exclusive

159. Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15.

160. *E.g.*, NATACHA CINGOTTI ET AL., INVESTMENT COURT SYSTEM PUT TO THE TEST 7–8 (2016), http://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/icstest_web.pdf; *Investment Court System: ISDS in Disguise*, FRIENDS EARTH EUR. (Dec. 2015), http://ttip2016.eu/files/content/docs/Full%20documents/investment_court_system_isds_in_disguise_10_reasons_why_the_eus_proposal_doesnt_fixed_a_flawed_system_english_version_0.pdf.

161. See Marco Bronckers, *Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, 18 J. INT'L ECON. L. 655, 673 (2015) (highlighting the CJEU's aversion to accepting the jurisdiction of other courts to pronounce on the legality of EU measures); Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, 38 FORDHAM INT'L L.J. 955, 958 (2015) (explaining that CJEU rulings emphasize the need to protect the autonomy of EU law in relation to the possible roles played by non-U.S. courts).

162. Case C-1/09, Opinion 1/09 of the Court, 2011 E.C.R. I-1142, I-1175.

163. Case C-2/13, Opinion 2/13 of the Court, 2014 EUR-Lex CELEX 2454, ¶ 258 (Dec. 18, 2014).

competence of the CJEU in its interpretation and application. Certainly, Opinion 2/13 on the accession of the EU to the European Convention on Human Rights (ECHR), reiterates and even deepens the reticence already expressed by the CJEU in Opinions 1/91,¹⁶⁴ 1/00,¹⁶⁵ and 1/09,¹⁶⁶ declaring that the EU could not access the Convention to the extent that the European Court of Human Rights (ECtHR) would undermine the competences conferred upon the CJEU by the Treaties.¹⁶⁷ The main reasons given by the CJEU,¹⁶⁸ are in short:

a) the need to respect the primacy and autonomy of EU law and the exclusive competence of the CJEU to interpret and apply EU law;¹⁶⁹ b) the need to preserve the exclusive competence of the CJEU in any dispute between the Member States concerning the interpretation or application of the Treaties, enshrined in art. 344 TFEU;¹⁷⁰ c) the need to guarantee the exclusive competence of the CJEU to rule on the distribution of responsibility for breach of an international agreement between the EU and its Member States and on the proper respondent in a proceeding;¹⁷¹ and d) the need to avoid further reviews of EU law, including secondary law, by the ECtHR or any other International Tribunal.¹⁷²

The above arguments can be applicable to both ISDS and ICS, as they define the generic relationship between EU law and

164. Case C-1/91, Opinion 1/91 of the Court, 1991 E.C.R. I-6099, I-6111–12 (holding that the EEC Treaty, creating a European Economic Area, is incompatible with EU law).

165. Case C-1/00, Opinion 1/00 of the Court, 2002 E.C.R. I-3498, I-3528, I-3530 (holding that the ECAA Agreement, establishing a European Common Aviation Area, is compatible with the EC Treaty because it would not bind the European Community to a particular interpretation).

166. C-1/09, E.C.R. at I-1175 (holding that the proposed unified patent litigation system is incompatible with EU law because it grants exclusive jurisdiction to an outside international court).

167. Case C-2/13, 2014 EUR-Lex CELEX, ¶ 194.

168. *Id.* ¶ 189.

169. *Id.* ¶¶ 184, 194.

170. *Id.* ¶¶ 201–14.

171. *Id.* ¶¶ 215–35.

172. *Id.* ¶¶ 236–48.

International Law, as well as between the European Court of Justice and other courts and international tribunals. Being so, ISDS/ICS may face important obstacles from a legal point of view that seem to have gone largely unnoticed. It is true that some of the obstacles posed by the CJUE in Opinion 2/13 would not stand in the way of investor-State dispute settlement. For instance, art. 344 TFEU only applies to disputes between Member States, leaving out investor-state disputes, which would be subject to ISDS/ICS.¹⁷³ Likewise, the safeguard of the distribution of responsibility or the determination of the proper respondent, issues which are internally addressed in the EU by the so-called Financial Responsibility Regulation,¹⁷⁴ could be done by the inclusion of a specific provision thereof in the given Bilateral Treaty.¹⁷⁵ This solution is referred to in art. 5.3 of EU's TTIP draft, which provides that the European Union shall, after having made a determination, inform the claimant within 60 days of the receipt of the notice of claim as to whether the European Union or a Member State of the European Union shall be the respondent, being the Investment Court bound by such determination.¹⁷⁶ However, the Commission's proposal in this regard is not entirely satisfactory and may haul more problems than solutions. This can be the case, for example, of the Investment Court concluding that there has been a violation of investor rights under the agreement but that it cannot award damages on the ground that the respondent is not responsible for the damage suffered. As the Court would be bound by the EU determination as to who shall be the respondent, the problem could not be resolved. Furthermore, enforcement options would be considerably limited. If the EU determines that it is the appropriate defendant, and not a Member State, the ICSID

173. Stephan W. Schill, *Opinion 2/13—The End for Dispute Settlements in EU Trade and Investment Agreements?*, 16 J. WORLD INV. & TRADE 379, 384 (2015).

174. 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 a Party, 2014 O.J. (L 257) 122, 127; Schill, *supra* note 173, at 384.

175. Schill, *supra* note 173, at 384.

176. TTIP, *supra* note 6, art. 5(3), (6).

Convention would not be applicable, as the EU is not a contracting party.¹⁷⁷ This would exclude the direct enforceability of the decision under article 54 of the ICSID Convention, forcing investors to follow a much longer and burdensome process.¹⁷⁸

Nonetheless, the most challenging argument of Opinion 2/13 is the need to guarantee the principles of autonomy and primacy of EU law. In relation to ISDS, the Commission already argued in its intervention as *amicus curiae* in *Achmea c. Slovakia* that the arbitration tribunal should decline jurisdiction because “an investor–State arbitral mechanism [. . .] conflict[s] with EU law on the exclusive competence of the EU court for claims which involve EU law, even for claims where EU law would only partially be affected.”¹⁷⁹ This argument is equally applicable to the proposed ICS, so the Commission has articulated mechanisms to keep EU law and investment law totally separated. These mechanisms include:

- a) to limit the competence of the Court to the settlement of claims on possible violations of investor rights under the Agreement, with the exclusion of any violation of EU law; b) to regard any interpretation of domestic law as an incidental question and not as a principal finding; c) to consider any interpretation of domestic law as matter of fact; and d) the declaration that any meaning given to domestic law by the Tribunal shall not be binding upon domestic courts.¹⁸⁰

Accordingly, art. 8.31, section 2 CETA and arts. 13.3 and 13.4 of EU’s TTIP draft prescribe the following:

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. For greater

177. Louise Woods, *Fit for Purpose? The EU’s Investment Court System*, KLUWER ARB. BLOG (Mar. 23, 2016), <http://kluwerarbitrationblog.com/2016/03/23/to-be-decided/>.

178. *Id.*

179. *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability, and Suspension, ¶ 193 (Perm. Ct. Arb.), www.italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf.

180. CETA, *supra* note 6, art. 8.31; TTIP, *supra* note 6, art. 13.

certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.¹⁸¹

For greater certainty, [. . .], 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.¹⁸²

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.¹⁸³

However, EU law and investment law cannot be free from mutual exposure. For example, the Commission's Proposal limits the jurisdiction of the Investment Court to exclusively determine if a given action has violated the substantive rules on investor protection enshrined in the Agreement, independently of whether or not that action is in conformity with EU law.¹⁸⁴ This, it is said, allows for the creation of an investor-state dispute settlement mechanism outside the intervention of the CJEU.¹⁸⁵ But there are situations where the Investment Court may in fact need to rule whether host state measures are legal under domestic law. For

181. CETA, *supra* note 6, art. 8.31.

182. TTIP, *supra* note 6, art. 13(3).

183. *Id.*, art. 13(4).

184. *Id.*, art. 13.

185. Schill, *supra* note 173, at 387.

instance, under the new EU approach to commercial and investment policy key concepts such as “fair and equal treatment” or “indirect expropriation” have been defined in relation to the state’s right to regulate.¹⁸⁶ The Investment Court might thus need to determine whether a contract was lawfully terminated or whether regulatory changes were lawfully made under domestic law, to be able to rule whether any rights susceptible of expropriation persist. At some point, then, the Investment Court would have to discuss the legality of a measure under EU law, potentially increasing the risk of overlapping interpretations. This may be the reason why CETA and the EU’s TTIP draft include an additional safeguard to the autonomy and primacy of EU law so that any interpretation of domestic law is to be treated as merely incidental to a principal finding of breach of substantive investor’s rights under the Agreement.¹⁸⁷ In other words, the Tribunal shall be barred from issuing a principal finding that the respondent breached domestic law. But potential overlapping interpretations of EU law, if only as incidental, would still be possible.

To further limit the effect of overlapping interpretations both the CETA and EU’s TTIP draft texts make clear that the ICS’s interpretations of domestic law shall not be binding upon the courts or the authorities of either Party and will be considered as a matter of fact.¹⁸⁸ This position appears to follow the Permanent Court of International Justice’s view that, “[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal

186. *The European Court of Justice Renders Its Opinion on the EU-Singapore Free Trade Agreement*, *supra* note 127.

187. CETA, *supra* note 6, art. 8.31 (providing that the Tribunal shall not have jurisdiction to determine the legality of a measure under the domestic law of a Party); TTIP, *supra* note 6, art. 13 (establishing that the domestic law of the Parties shall not be part of the applicable law used by the Tribunal in making a determination).

188. CETA, *supra* note 6, art. 8.31 (“[I]n determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact.”); TTIP, *supra* note 6, art. 13(3) (“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.”).

decisions or administrative measures.”¹⁸⁹ And even domestic procedural rules usually consider foreign domestic laws as a question of fact.¹⁹⁰ But one may wonder if this attempt made by the Commission to isolate domestic law, including EU law, from investment law stressing that “for greater certainty” domestic law shall be treated as a matter of fact, would have real consequences in practice. The normal way in which courts adjudicate is by applying the law to underlying facts; it is not totally logical to apply facts to facts. Investment tribunals (and other international courts and tribunals) have often interpreted and applied domestic law when necessary, and except for the duty or not to apply it *ex officio* it is not clear that treating domestic law as fact has made or would make much difference to the Investment Court’s reasoning process.¹⁹¹ In other words, despite its treatment as a matter of fact, the Investment Tribunal’s interpretation and application of domestic law, including EU law, would influence the final decision, and if reiterated, could develop into a sort of *de facto* overlapping precedent.

The aforementioned circumstance is aggravated by the fact that although the ICS would be required to follow the prevailing interpretation of domestic law made by the courts or authorities of that Party, they would not be directly bound to request nor would be able to request the CJEU for a preliminary ruling on interpretation. This certainly poses doubt as to the compatibility of ISDS/ICS with EU law, inasmuch neither of the two mechanisms can guarantee a preliminary and prevailing intervention of the CJEU in the interpretation of EU law,¹⁹² as

189. Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J (ser. A) No. 7, at 19 (May 25, 1926).

190. Traditional common law procedure and practice is to treat foreign law as if it were a fact. See *Sussex Peerage Case* [1844] 11 Cl. & Fin. 85, 8 Eng. Rep. (HL) 1047. In countries like Germany, however, it is a generally accepted rule that foreign law is treated as law, and not as fact. The relevant provision on proof of foreign law in Article 293 of the German Civil Procedure Code ZPO. See Rainer Hausmann, *Pleading and Proof of Foreign Law—A Comparative Analysis*, 1 EUR. LEGAL F. 1, 2 (2008).

191. Jarrod Hepburn, *CETA’s New Domestic Law Clause*, EJIL: TALK! (Mar. 17, 2016), www.ejiltalk.org/cetas-new-domestic-law-clause.

192. See Consolidated Version of the Treaty on European Union, art. 19, Feb. 7, 1992, 2012 O.J. (C 326) 27 [hereinafter TEU] (providing that the Court of Justice of the EU shall give preliminary rulings on the interpretation of EU law); Nikos Lavranos, *How*

demanded by the CJEU in the Opinion 2/2013, referring to the ECtHR.¹⁹³ Clearly speaking, the consideration of domestic legality as a question of fact and not law, may avoid the constitutional obstacle of need for a preliminary intervention of the CJEU, but in practice, it does not eliminate the risk of overlapping interpretations of EU law. As expressed by the *SPP v. Egypt* tribunal,¹⁹⁴ the contention that “[. . .] municipal law should be treated as a “fact” is not helpful. [When disputing] parties are in fundamental disagreement as to what [a provision of domestic law] means [. . .] the Tribunal therefore must interpret [that provision] and determine its legal effect”.¹⁹⁵

B. Competence to hear actions for damages

The obligation to pay damages for breach of the substantive rules on investor protection under post-Lisbon TFAs may bring additional legal pitfalls in the way of ISDS/ICS. According to article 268 TFEU, the CJEU holds the exclusive competence to hear actions for damages brought under article 340 TFEU.¹⁹⁶ In other words, if you want to sue the EU for damages, the CJEU is the only court with jurisdiction to do so. In this way, it could be argued that, for instance, art. 28.1 of EU’s TTIP draft and article 8.39 CETA undermine the exclusive competence of the CJEU in relation to damage claims by granting a judicial alternative to foreign investors.

Under EU law, actions for damages constitute an autonomous remedy but the CJEU has limited its use. For example, it excludes

the European Commission and the EU Member States Are Reasserting Their Control over Their Investment Treaties and ISDS Rules, in REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 309, 330 (Andreas Kulick ed., 2017) (opining that according to the CJEU’s past reasoning, there is no room within the legal system of the EU for any foreign tribunal operating outside the preliminary ruling system, which puts the Commission’s proposal in question).

193. See Case C-2/13, Reports of Cases Opinion 2/13 of the Court, 2014 EUR-Lex CELEX ¶¶ 236–48 (finding that the CJEU holds exclusive competence over preliminary rulings on the interpretation of EU law).

194. S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award on the Merits, at 328 (May 20, 1992).

195. Rephrased in Hepburn, *supra* note 191.

196. TFEU, *supra* note 1, art. 28(1).

disguised actions for annulment or actions for failure to act.¹⁹⁷ Moreover, according to the case law of the CJEU it is also very difficult, if not impossible, to claim damages for lawful acts.¹⁹⁸ Indeed, the CJEU has tried to avoid the potential of a “regulatory chill” if it were to accept damages claims too easily. In the Court’s own words,

the strict approach taken towards the liability of the Community in the exercise of its legislative activities is attributable to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.¹⁹⁹

This approach is in contrast with ISDS claims where very high amounts of damages may be requested for domestic measures which were lawfully adopted. The ISDS case initiated by the pharmaceutical company Eli Lilly against Canada²⁰⁰ following the invalidation of two of its patents by Canadian Federal Courts, the ISDS case launched by Philip Morris against Australia²⁰¹ subsequent to the adoption by the latter of the Plain

197. Ankersmit, *supra* note 16.

198. Joined Cases C-120/06 & 121/06 P, *Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) v. Council*, 2008 ECR I-6513, ¶¶ 164–69 (holding that when there has not been an unlawful action, liability cannot be imputed without meeting several conditions to claim damages); Ankersmit, *supra* note 16, at 2.

199. FIAMM, ECR I-6513, at ¶ 174.

200. *Eli Lilly & Co. v. Can.*, ICSID Case No. UNCT/14/2, Final Award, ¶ 5 (2017); *see also* Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven at 12–13, *Eli Lilly & Co. v. Can.*, ICSID Case No. UNCT/14/2 (Nov. 7, 2012) (explaining the patent, which is the object of the notice, as well as one other that has been invalidated).

201. PCA Press Release, Permanent Court of Arbitration, Tribunal Publishes

Packaging Tobacco legislation in order to protect public health, or the claim brought by the Swedish company Vattenfall against Germany based on the Energy Charter Treaty are illustrative of this problem.²⁰² It is not difficult to anticipate the problem that may be caused by the admission of damage claims in courts other than the European Court of Justice, courts that are less wary of granting compensation for EU financial liability arising out of the exercise of regulatory activity. In addition to being a clear advantage for foreign investors, it could cause a perverse competitive pressure on the CJEU regarding damage claims.²⁰³ In this regard, there would be no difference between ISDS and ICS, unless the latter aligned its decisions with the CJEU case law in the application of article 268 of the TFEU. The reaction of the CJEU to this challenge, is yet uncertain.

1. Monetary damages for breach and the internal market

Usually, arbitral tribunals may only award monetary damages for breach to the exclusion of other remedies.²⁰⁴ Moreover, article 54(1) of the ICSID Convention only obliges Contracting States to enforce the “pecuniary obligations” imposed by ICSID awards as if they were final judgments of a court in that State.²⁰⁵ Under the ICS proposed by the EU Commission, too, monetary damages are the primary remedy for breach of a FTA, as provided in art. 28.1 of EU’s TTIP draft or art. 8.39 CETA.²⁰⁶ Being so, the EU legally adopted measures which infringe a FTA that could be continuously applied against the payment of damages, like in WTO law, thereby avoiding impacts on EU law and distortions in the internal market. But there may be cases where the payment of monetary damages would be economically equivalent to a specific performance and undermine the

Redacted Version of Award on Jurisdiction and Admissibility, PCA 168165 (May 16, 2016).

202. *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* ICSID Case No. ARB/09/6, Request for Arbitration, ¶ 11–13 (2009).

203. Ankersmit, *supra* note 16.

204. *E.g.*, CETA, *supra* note 6, art. 8.39; TTIP, *supra* note 7, art. 28(1).

205. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 28, art. 54.

206. TTIP, *supra* note 6, art. 28(1); CETA, *supra* note 6, art. 8.39.

functioning of the internal market, for example, the repayment of a grant awarded in breach of EU law. In fact, this allegation was given by Romania and the European Commission, acting as *amicus curiae* in the *Micula* case.²⁰⁷ The case concerned the repeal of incentives under the Bilateral Investment Treaty (BIT) between Sweden and Romania following Romania's EU accession in 2007.²⁰⁸ Basically, in its submission the Commission underlined that any payment of the award based on the breach of the BIT would constitute illegal state aid, because Micula would after all receive compensation equal to the benefits, which the Commission considered to be in violation of EU state aid rules under art. 107 TFEU.²⁰⁹ After the final award was rendered in December 2013, and claimants successfully applied for the enforcement of the award in Romania, the Commission issued an injunction to suspend any action leading to the execution or implementation of the award until the Commission made a final decision on the compatibility of such payment with the internal market.²¹⁰ Subsequently, the Commission initiated formal state aid proceedings against Romania which concluded in May 2015 with a final Decision where the Commission deemed such payment as state aid.²¹¹ In the Commission's opinion the enforcement of the arbitral award would grant foreign investors a monetary amount equivalent to the economic benefits provided for under the repealed program prior to Romania's accession to the European Union.²¹² Such advantages, which they would not

207. See Brief for Amicus Curiae the Commission of the European Union in Support of Defendant-Appellant, at 8–10, *Micula v. Rom.*, No. 15-3109-CV (2d Cir. Feb. 4, 2016) (arguing that payment by Romania in compliance with the award of the Court would undermine the Commission's decision that Romania is prohibited from repaying any claimant because such payment is contrary to EU law).

208. See *Micula v. Rom.*, ICSID Case No. ARB/05/20, Award, at 9 (Dec. 11, 2013).

209. See Brief for Amicus Curiae the Commission of the European Union in Support of Defendant-Appellant, *supra* note 207 (arguing the Commission's position that payment of any award would constitute a violation of Article 107 of the TFEU as it would be unlawful state aid).

210. Commission Decision 2015/1470, ¶ 1–2, 6, 2015 O.J. (L 232) 43, 43–44, (EU).

211. European Commission Press Release IP/15/4725, State Aid: Commission Orders Romania to Recover Incompatible State Aid Granted in Compensation for Abolished Investment Aid Scheme (Mar. 30, 2015).

212. Commission Decision 2015/1470, ¶ 95, 2015 O.J. (L 232) 43, 58 (EU).

have in normal market conditions, would constitute an indirect grant of State aid, found to be illegal and incompatible with the internal market. For the European Commission, it was irrelevant that Romania was obliged to pay those amounts by an international treaty, since a treaty concluded between two member states of the European Union cannot be applied to prevent the application of the EU law in the field of State aid.²¹³

The Commission's Decision from May 2015 is under review at the General Court by means of an action for annulment lodged by some investors on November 28, 2015.²¹⁴ But even if the Court decides in favor of the European Commission, it would have limited effects in the field of ISDS. Firstly, arbitral awards can be enforced outside the territory of the European Union by courts that not are obliged to respect EU law in matters of State aid.²¹⁵ In fact, when Micula sought to have the award enforced in the U.S., Romania objected that it could not pay out the damages under the award because the Commission had forbidden it from doing so.²¹⁶ This argument was, however, rejected by the Court because "(. . .) there can be no substantive review of an ICSID award in this court. . . [t]o do otherwise would undermine the ICSID Convention's expansive spirit on which many American investors rely when they seek to confirm awards in the national courts of the Convention's other member states."²¹⁷ Secondly, even if the Court decides in favor of the European Commission, the obligation imposed on a Member State to abolish aid deemed incompatible with the internal market is designed to re-establish the previously existing situation, a goal that is achieved when the investor reimburses the amounts granted as illegal aid. However, to put the Commission's order into practice would be unattainable, as there is no mechanism to recover from claimants,

213. Commission Decision 2015/1470, ¶ 104-015, 2015 O.J. (L 232) 43, 60 (EU).

214. Case T-624/15, *European Food and Others/Commission* ¶ 34, 2016 O.J. (C 16) 45 (EU).

215. U.N. Conference on Int'l Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. 3, U.N. Doc. E/CONF.26/8 (June 8, 1958).

216. *Micula v. Gov't of Romania*, No. 15 Misc. 107, 2015 WL 4643180, at *4 (S.D.N.Y. Aug. 5, 2015).

217. *Id.* at *4, *7.

amounts lawfully and successfully paid by Romania under international law.

The situation is not different when the above consideration is applied to FTAs concluded by the EU. Indeed, in post-Lisbon agreements monetary damages are still the primary remedy against infringements of substantive investor rights.²¹⁸ Payments that, as shown, cannot avoid potential interferences in the functioning of the internal market.

C. Compatibility of ISDS/ICS and the principles of direct effect and non-discrimination based on nationality

According to CETA,

1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.

2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.²¹⁹

Traditionally, provisions included in international trade agreements concluded by the EU have been denied direct effect.²²⁰ Although the direct effect has not been totally ruled out, the Court of Justice has reiterated in this respect that, in principle, GATT or WTO law cannot be relied on to review the legality of acts of

218. CETA, *supra* note 6, art. 8.39; TTIP, *supra* note 6, art. 28(1); Angelos Dimopoulos, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities*, 51 C.M.L.R. 1671, 1699 (Dec. 2014) (discussing the legal framework for the involvement of the EU and its Member States in Investor-State Dispute Settlement and whether the Financial Responsibility Regulation is a sufficient instrument to address the issue).

219. CETA, *supra* note 6, art. 30.6.

220. See Gerhard Bebr, *Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 C.M.L.R. 35, 71 (1983) (observing that despite the guarantee of application of the direct effect principle under Article 177 of the EEC Treaty, such a guarantee is missing under the various free-trade agreements concluded by the Community).

the European Union, because they are too flexible and imprecise.²²¹ CETA has gone a step further and includes a general direct effect exclusion provision, aimed at avoiding the incorporation of its provisions in domestic law.²²² Accordingly, neither domestic courts nor the CJEU will be able to apply CETA rules in domestic proceedings and individuals will be also barred from invoking CETA provisions in the domestic court systems. Any impact of CETA on EU law is circumvented. The EU's TTIP draft is expected to include a similar provision in the future,²²³ as in other recently concluded EU Free Trade Agreements.²²⁴ Accordingly, both CETA and TTIP would receive the same treatment as given by the Court of Justice to WTO law, which does not have direct effect, even in situations where the WTO Appellate Body confirms that EU legislation is incompatible with WTO rules.²²⁵

221. *E.g.*, Joined Cases 21 & 24/72, *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1272 (describing a flexible provision in GATT and how it does not have direct effect in the community system); Case C-280/93, *Ger. v. Council*, 1994 E.C.R. I-4973, ¶¶ 104, 106, 112; Case C-149/96, *Portuguese Republic v. Council of the Eur. Union*, 1999 E.C.R. I-8425, ¶ 47; Stefan Griller, *Judicial Enforceability of WTO Law in the European Union*, *Annotation to Case C-149/96, Port. v. Council*, J. INT'L ECON. L. 441 (2000); Gerstetter et al., *Legal Implications of the EU-U.S. Trade and Investment Partnership (TTIP) for the Acquis Communautaire in ENVI Relevant Sectors That Could Be Addressed During Negotiations* (Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, Environment, Public Health and Food Safety IP/A/ENVI/ST/2013-09, Oct. 2013), at 13.

222. CETA, *supra* note 6, art. 30.6.

223. *See* Gerstetter et al., *supra* note 221, at 13, 15 (describing the narrow circumstances where TTIP may have a direct effect on EU law, but how it generally will not).

224. *See* EUSFTA, *supra* note 78, art. 17.15, for an example of a recently concluded agreement containing such a provision; *see also* Aliko Semertzi, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, 51 C.M.L.R. 1125, 1125–27 (2014) (discussing several post-2008 EU free trade agreements which all contain direct effect provisions).

225. *See, e.g.*, Pieter Jan Kuijper & Marco Bronckers, *WTO Law in the European Court of Justice*, 42 C.M.L.R. 1313, 1317, 1335 (2005) (pointing out that neither the U.S. nor the E.U. recognizes direct effect and noting that decisions of the WTO Appellate Body can never influence whether a treaty, such as the WTO, has direct effect or not); Luca Barani, *Relationship of the EU Legal Order with WTO Law: Studying Judicial Activism* 14 (GARNET, Working Paper No. 70, 2009) (stating that even when the WTO Appellate Body finds that Community laws are incompatible with WTO rules, private parties do not have the right to challenge Community legislation in the light of WTO rules); Daniel

The lack of reciprocity is generally mentioned as a general argument in favor of excluding the direct effect of CETA or TTIP, since the United States or Canada do not permit their courts to entertain private claims that are directly based on bilateral trade agreements.²²⁶ As an opposing argument, it is stressed that even if there is no reciprocity in the U.S.' and Canada's treatment of TTIP and CETA, each Member State has the basic constitutional freedom to choose the system it prefers of giving effect to public international law, as ruled by the Court of Justice in *Kupferberg*,²²⁷ so the lack of reciprocity would not be a problem.²²⁸ In this regard, it is underlined that the possibility of invoking CETA or TTIP provisions in domestic proceedings would not only serve U.S. or Canadian interests, but also the EU's own nationals, as domestic courts would be able to review EU measures against the good governance principles of TTIP, CETA and other similar agreements.²²⁹

Whatever the ultimate reason may be, the exclusion of the direct effect of CETA or TTIP does reinforce the existence of an external and parallel mechanism of dispute settlement entirely outside the institutional and judicial framework of the European Union. This circumstance has been otherwise criticized by the

Thym, *The Missing Link: Direct Effect, CETA/TTIP and Investor-State Dispute Settlement*, EU L. ANALYSIS (Jan. 7, 2015, 1:05 P.M.), <http://eulawanalysis.blogspot.co.uk/2015/01/the-missing-link-direct-effect-cetattip.html> (contending that CETA and TTIP would not have direct effect in the EU legal order, similar to the WTO, which also does not have direct effect, even when the WTO Appellate Body rules that an EU law does not fit within WTO standards).

226. Bronckers, *supra* note 161, at 668–69. As stated by EU Trade Spokesman John Clancy on December 20, 2013 regarding the inclusion of ISDS mechanisms in TTIP:

“The reason ISDS is needed in TTIP is that the U.S. system does not allow companies to use international agreements like TTIP as a legal basis in national courts. So European companies—

and especially SMEs—will only be able to enforce the agreement through an international arbitration system like ISDS.”

Investment Protection Does Not Give Multinationals Unlimited Rights to Challenge Any Legislation, EUR. COMM'N (Dec. 20, 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1008>.

227. Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, 1982 E.C.R. 3641, 3663, para. 18.

228. Bronckers, *supra* note 161, at 669.

229. *Id.*

European Commission regarding ISDS. For instance, in the *amicus curiae* submission in *Euram v. Slovakia*, the Commission argued that

[t]he arbitral tribunal is not a court or tribunal of an EU Member State but a parallel dispute settlement mechanism entirely outside the institutional and judicial framework of the European Union. Such mechanism deprives courts of the Member States of their powers in relation to the interpretation and application of EU rules imposing obligations on EU Member States.²³⁰

So paradoxically, by excluding the right to invoke TTIP and CETA provisions in domestic courts, the EU will be strengthening the external and special treatment that is given to foreign investors in the traditional ISDS mechanisms and which is strongly criticized by important sectors of the European public opinion. Some have already called the proposed Investment Court System as “ISDS in disguise,”²³¹ whereas associations such as the *Deutscher Richterbund* in Germany²³² or the Spanish *Asociación de Jueces para la Democracia*,²³³ claim that it is inadmissible that the legal protection of foreign investors in Europe is undertaken by a tribunal outside of the European court system. That amounts to the usurpation of domestic judicial functions, it is said, characterized by its independence and impartiality, to confer them to a body linked to the big economic corporations and most powerful Governments.²³⁴

In any case, barring individuals from invoking CETA or TTIP

230. Letter Submitted by the European Commission to the Tribunal Concerning *Eur. Am. Inv. Bank AG (EURAM) v. Slovak Republic*, (2011 No. 2010-17), [EU Commission’s Observations].

231. *Investment Court System: ISDS in Disguise*, *supra* note 160.

232. Peter Schneiderhan, *Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP-Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015*, 4/15 DEUTSCHER RICHTERBUND (Feb. 2016), www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitionsgericht.pdf.

233. *JpD Sobre el TTIP y la Creación de un Tribunal Especial*, JUECES PARA LA DEMOCRACIA (May 23, 2016), www.juecesparalademocracia.blogspot.com.es/2016/05/jpd-sobre-el-ttip-y-la-creacion-de-un.html.

234. Schneiderhan, *supra* note 232; *JpD Sobre el TTIP y la Creación de un Tribunal Especial*, *supra* note 233.

provisions in domestic courts not only throws doubt as to its compatibility with the European court system but it also seems to directly collide with the principle of non-discrimination based on nationality. Certainly, ISDS and ICS give foreign investors special rights of judicial protection which domestic investors lack, reinforced by the fact that these dispute settlement mechanisms can be reached by foreign investors without prior recourse to local remedies.²³⁵

Pursuant to art. 218.11 TFEU, all FTAs concluded by the EU must comply with the primary law of the Union, including the EU Charter of Fundamental Rights.²³⁶ Only empowering foreign investors to trigger a parallel and external Court system does not seem to fit well within article 20 EU Charter of Fundamental Rights which prescribes that “[e]veryone is equal before the law” or article 21 of the EU Charter of Fundamental Rights, which contains a clear prohibition of discrimination based on nationality.²³⁷

Some favor the idea of allowing domestic courts in the EU to

235. See Ana M. López-Rodríguez & Pilar Navarro, *Investment Arbitration and EU Law in the Aftermath of Renewable Energy Cuts in Spain*, 25 EUR. ENERGY & ENVTL. L. REV. 2, 2, 6 (2016) (noting that thousands of national investors are confined to having their claims entertained by domestic courts, whereas foreign investors may resort to ISDS to claim damages against the Kingdom of Spain).

236. See TFEU, *supra* note 1, art. 218.11 (providing that any contemplated agreements that are considered adverse to EU Treaties may not enter into force, thus they must comply with the primary law of the Union); Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1; *Primary Law*, EUR-LEX, http://eur-lex.europa.eu/legal_content/EN/TXT/HTML/?uri=LEGISSUM:114530&from=EN (last updated Aug. 12, 2010) (describing what EU Primary Law is and detailing the treaties that are considered Primary Law, such as the Treaty of Lisbon); *EU Charter of Fundamental Rights*, EUR. COMM’N, [http://ec.europa.eu/justice/fundamental-rights/charter/index_en](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm).

htm (last visited Aug. 29, 2017) (explaining what the EU Charter of Fundamental Rights is and how it is enforced through the Treaty of Lisbon).

237. Charter of Fundamental Rights of the European Union, *supra* note 236, arts. 20–21; *but see*, Dominik Hanf, ‘Reverse Discrimination’ in *EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, 18 MAASTRICHT J. EUR. & COMP. L. 29, 30, 32 (2011) (addressing some aspects of so-called “reverse discrimination,” where a Member State treats its own citizen less favorably than any other Union citizen, the CJEU has ruled that it is an unavoidable, normal consequence of the division of competences between the Union and its Member States as established by the Treaties).

handle private treaty-based claims.²³⁸ This should allow foreign and national investors to be treated alike. In this particular, it has been suggested to include national courts as a mandatory first instance to settle investor-state disputes so that the Investment Tribunal would be a sort of an international appeals facility to ensure that the first-instance court correctly applied the legal standards laid down to protect foreign investors under international law.²³⁹ Yet, this model would require that the United States or Canada also allow their courts to entertain private claims directly based on bilateral trade agreements.²⁴⁰ Certainly, the lack of reciprocity is not a problem from a constitutional point of view but still, an asymmetrical application of TTIP or CETA by European courts would not be desirable. However, it could lead to the EU becoming more demanding and aggressive towards the other parties in the context of dispute settlement, in order to uphold the balance of rights and duties originating from the agreements.²⁴¹ That is not the best scenario for a durable and fruitful partnership.

Another way of granting foreign and national investors equal treatment would be to allow equal access to an investment court. In that case, EU investors would have to be allowed to bring not only claims against third countries, but also treaty-based claims

238. Ernst-Ulrich Petersmann, *Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*, 18 J. INT'L ECON. L. 579, 583 & n.6, 599 (2015).

239. Stephan Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, ASIL INSIGHTS (Apr. 22, 2016), <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>; Bronckers, *supra* note 161, at 675.

240. *But see* Jan Kleinheisterkamp, *Is There a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?* 4 (Feb. 14, 2014) (unpublished manuscript) (on file with the London School of Economics, Department of Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188 (arguing that private claims based on a U.S. statute implementing TTIP may already be permitted by the United States because other international treaties already allow private claims via statute through Congress).

241. Hélène Ruiz Fabri argues such is the case in WTO law. *See* Hélène Ruiz Fabri, *Is There a Case—Legally and Politically—for Direct Effect of WTO Obligations?*, 25 EUR. J. INT'L L. 151, 172 (2014).

about EU or national measures.²⁴² Yet, this option is hardly realistic, as it would clash with the hard line drawn by the CJEU on the competence of international courts to rule on matters falling under the EU's jurisdiction.²⁴³

It is beyond the aim of this article to assess the opportunity of granting private enforcement of international agreements in domestic courts.²⁴⁴ Nevertheless, it may be concluded that if the equal protection of investors becomes central in the European Union, either by application of arts. 20 and 21 of the EU Charter of Fundamental Rights or due to public opinion's pressure, the proposed ICS would require further thoughts and adjustments on this particular issue. As it stands today, the Commission's model, is as selective and exclusive as traditional ISDS mechanisms.

In May 2017, the CJEU has finally defined the competence of the EU to sign and ratify FTAs.²⁴⁵ Notwithstanding Opinion 2/2015 we will have to wait for a request on an independent opinion regarding the compatibility between ISDS/ICS with EU law. This is likely to happen following the "Statement by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA."²⁴⁶ Indeed, Belgium will ask the Court of Justice of the European Union to rule on the compatibility of the ICS with EU law, pursuant to Article 218(11) TFEU, essential to get the Walloon government to drop its veto against CETA.²⁴⁷ In that

242. See Bronckers, *supra* note 161, at 672 (contending that, in order to grant foreign and national investors equal treatment via equal access to an international court, EU investors must also be permitted to bring treaty-based claims regarding EU or national measures before this court).

243. *Id.* at 673.

244. For an analysis of the merits of granting private enforcement of international agreements in domestic courts, see Petersmann, *supra* note 238, at 579–605.

245. Nikos Lavranos, *The CJEU's Opinion on EU-SING FTA: More Confusion than Clarity*, KLUWER ARB. BLOG (May 30, 2017), <http://kluwerarbitrationblog.com/2017/05/30/cjeus-opinion-eu-sing-fta-confusion-clarity/>.

246. See Statements to Be Entered in the Council Minutes, at 37, Jan. 14, 2017, 2017 O.J. (L 11) 21.

247. Laurens Ankersmit, *Investment Court System in CETA to Be Judged by the ECJ*, EUR. L. BLOG: NEWS AND COMMENTS ON EU LAW (Oct. 31, 2016), <http://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj/>.

case, there are significant issues that question the legality of ISDS/ICS under EU Law. And there is no reason to believe that the CJEU will look any more favorably upon ISDS/ICS than the ECtHR or other international courts or tribunals.

VI. CONCLUSIONS

The aim of the present work has been to analyze investor-State dispute settlement from an EU law perspective. The overall conclusion is that ISDS is navigating the turbulent waters of political opposition and legal uncertainty.

The inclusion of ISDS clauses in post-Lisbon FTAs has raised a number of political issues and met significant hostilities in European civil society and amongst prominent politicians in the Member States.²⁴⁸ The main reasons for these hostilities are the belief that ISDS is a tool for big corporations to make governments pay when they regulate; that it grants foreign investors greater rights than are enshrined in national constitutions; and that it is not judicially independent, but has a built-in pro investor bias.

In response to this opposition, EU institutions have reacted in various ways. The European Commission, for instance, has backed away from supporting ISDS and has introduced a new approach based on the creation of a Permanent International Investment Tribunal or Investment Court System (ICS) to replace traditional ISDS mechanisms. The CJEU, for its part, has declared in Opinion 2/15 that there is a mixed competence to approve treaties containing ISDS clauses and has thereby given the last word to the Member States, which now have official *de facto* veto powers on the issue.²⁴⁹

At the legal level, it is now well defined by the CJEU that FTAs containing provisions relating to portfolio investment and

248. See August Reinisch, *The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court*, (CIGI, Investor-State Arbitration Series, Paper No. 2, 2016), https://www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf (explaining that investor-state arbitration has received broad opposition when in reference to TTIP).

249. Opinion 2/15 (EU-Singapore Free Trade Agreement), *supra* note 15, at ¶¶ 19, Conclusion.

dispute settlement between investors and the State require the consent of the Member States.²⁵⁰ However, the immediate drawback is that the negotiations of post-Lisbon FTAs with third States and the ratification process will be lengthier and more intense. This is likely to complicate the treaty-making activities of the EU and its role as an international actor. The solution to this hindrance seems to be the elimination of ISDS clauses from its FTAs altogether and make them the subject of a side agreement subject to Member State consent. Here, the CJEU's mixity approach to ISDS seems to converge with the European Commission's idea of a Multilateral Investment Court as a medium-term objective. In the meantime, the conclusion of FTAs without ISDS/ICS clauses may lead to distortions under art. 59.1 Vienna Convention, as existing ISDS provisions in FTAs between Member States and third countries would remain in force.

Moreover, the creation of an investment court poses several legal issues regarding its compatibility with EU Law, which largely coincide with those relating to ISDS. Here, we are in such an uncertain area at the moment as the CJEU has not yet ruled on the issue of the material compatibility of ISDS/ICS with EU Treaties. The present article has, nonetheless, made an attempt to analyze core legal issues that may stand in the way in that regard.

Prominent among the various issues which have been analyzed is the need to preserve the autonomy of the European Union legal order. Both CETA and the November 2015 TTIP Proposal try to sort out this challenge by articulating mechanisms to keep EU law and investment law totally separated. These mechanisms include:

- a) to limit the competence of the Investment Court to the settlement of claims on possible violations of investor rights under the Agreement, with the exclusion of any violation of EU law; b) to regard any interpretation of domestic law as an incidental question and not as a principal finding; c) to

250. CJEU Press Release No 52/17, *The Free Trade Agreement with Singapore Cannot, in its Current Form, Be Concluded by the EU Alone* (May 16, 2017), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf>.

consider any interpretation of domestic law as matter of fact; and d) the declaration that any meaning given to domestic law by the Tribunal shall not be binding upon domestic courts.

These articulated mechanisms, however, cannot maintain EU law free from external exposure. As seen, the consideration of domestic legality as an incidental question of fact cannot avoid the risk of overlapping interpretations of EU law and the duty to pay damages as a remedy for breach in investment claims may hinder the effectiveness of the Commission's enforcement powers and ultimately, distort the proper functioning of the internal market. In addition, the obligation to pay damages for breach of the substantive rules on investor protection may stand in the way of the exclusive competence of the CJEU ex article 268 to hear actions for damages brought under article 340 TFEU.

Most dramatically, CETA and, expectedly, TTIP, expressly exclude private rights of action so neither domestic courts nor the CJEU will be able to apply FTAs in domestic proceedings. Individuals will also be barred from invoking FTAs' provisions in domestic courts. Whatever the ultimate reason may be, the exclusion of the direct effect in FTAs does reinforce the existence of an external and parallel mechanism of dispute settlement entirely outside the institutional and judicial framework of the European Union. By doing so the EU will be strengthening the external and special treatment that is given to foreign investors in the traditional ISDS mechanisms and which is strongly criticized by important sectors of the European public opinion.²⁵¹

251. There are also high-profile opponents of ISDS mechanisms in the United States. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.9203255f79fd; Recently, a letter signed by 200 professors of law and economics has urged members of Congress to reject the Trans-Pacific Partnership (TPP) as long as ISDS is included. See 220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals That Include Investor-State Dispute Settlement (ISDS), PUB. CITIZEN (Sept. 7, 2016), <http://www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf>; Rob Howse, *Could the Critics of ISDS Save TPP? An Opportunity for Hillary Clinton to Strike a New National Bargain on Trade*, INT'L ECON. L. & POLICY BLOG (Sept. 11, 2016, 8:43 AM), <http://www.worldtradelaw.typepad.com/ielpblog/2016/09/could-the-critics-of>

Furthermore, it may even collide with the principle of non-discrimination on grounds of nationality, as enshrined in articles 20 and 21 the EU Charter of Fundamental Rights.

It is clear that the new approach on investor-State dispute settlement proposed by the European Commission needs further thoughts and adjustments. There must be no doubt as to the proposed model's conformity with EU Law. Moreover, the final model must be consistent and coherent, clearly showing the way forward in the field of investment dispute resolution. If the ultimate idea with the Investment Courts is to protect democratic governance and the public interest, as many sectors of civil society demand, the rights of private actions should not be excluded. But if the purpose is to maintain the special treatment of foreign investors, ISDS' disguised solutions, as proposed by the Commission, weaken the overall credibility of ISDS as a mechanism of investor protection and the enforcement of international law. Instead, the reform efforts should focus in a much clearer and balanced framework for ISDS.

Presumably the issue of the material compatibility of ISDS/ICS with EU Law will be defined following Belgium's future request on an advisory opinion pursuant to Article 218(11) TFEU, essential to get the Walloon government to drop its veto against CETA. However, there is no reason to believe that the CJEU will look any more favorably upon ISDS/ICS than the ECtHR or other international courts or tribunals. Public opinion, at the same time, does not seem to cease its hostilities against investor-State dispute settlement, either.²⁵² Meanwhile, there is the risk that investors, in a scenario without ISDS in EU FTAs, choose to settle in States that have an FTA/ISDS provision in force. Unless, of course, one argues that investor rights do not bring the economic benefits claimed for them.²⁵³

[isds-save-tpp-an-opportunity-for-hillary-clinton-to-strike-a-new-national-barga.html](#).

252. Commission Decision (EU) 2017/1254 of 4 July 2017 on the Proposed Citizens' Initiative Entitled 'Stop TTIP', 2017 O.J. (L 179) 16, 17. On May 10, 2017, the General Court annulled the Commission Decision C (2014) 6501 final (Sept. 10, 2014), rejecting the request for registration of the proposed European citizens' initiative titled 'Stop TTIP.' Subsequently, the Commission has been forced to register it.

253. Lauge N. Skovgaard Poulsen et al., *Costs and Benefits of an EU-USA Investment Protection Treaty*, LSE ENTERPRISE 44 (April 2013),

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In this uncertain context, there is a clear need to build bridges over the turbulent seas of investor-State dispute settlement in Europe.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf.