STUDY

Requested by the INTA committee

European Parliament

EU investment protection after the ECJ opinion on Singapore:

Questions of competence and coherence

Policy Department for External Relations
Directorate General for External Policies of the Union
PE 603.476 - March 2019

EN

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT

European Parliament

WORKSHOP REPORT

EU investment protection after the ECJ opinion on Singapore:

Questions of competence and coherence

ABSTRACT

Investment protection continues to be a controversial issue, as shown in particular during the negotiations on the EU-US Transatlantic Trade and Investment Partnership (TTIP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). To address stakeholder concerns, the EU has moved from traditional investor-state dispute settlement arrangements towards introducing bilateral investment court systems in new agreements and pursuing the goal of establishing a permanent multilateral investment court. At the same time, the European Court of Justice defined the limits of the Union's exclusive competence in its opinion of 16 May 2017 with regard to the EU-Singapore Free Trade Agreement (FTA), which has led to the splitting of new FTAs into two parts, treating investment protection separately. Adding to the complex picture, a plethora of EU Member States' bilateral investment treaties also remain in place. The workshop held by the Committee on International Trade took stock of existing EU investment protection provisions and analysed the options for a coherent and predictable dispute settlement system in line with the EU Treaties.

EP/EXPO/B/INTA/CEI/2018/02 and EP/EXPO/B/INTA/2018/13
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The workshop recording is available at

http://www.europarl.europa.eu/ep-live/en/committees/video?event=20190220-1400-COMMITTEE-INTA

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POLICY DEPARTMENT, DG EXPO
FOR THE COMMITTEE ON INTERNATIONAL TRADE (INTA)

European Parliament

Wednesday, 20.02.2019 – **14:00-15:30**
ALTIERO SPINELLI BUILDING – ROOM **A1G2**

CONTACT AND REGISTRATION: **poldep-expo@ep.europa.eu**

Workshop programme

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES

POLICY DEPARTMENT

European Parliament

For the Committee on International Trade (INTA)

WORKSHOP

EU investment protection after the ECJ Opinion on Singapore:

Questions of competence and coherence

Wednesday, 20 February 2019, 14.00-15.30

Brussels, Altiero Spinelli building (ASP), **room A1G-2**

PROGRAMME

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- **Mr Helmut SCHOLZ**, Member of the Committee on International Trade

14.10 **Stocktaking of investment protection provisions in EU agreements and Member States' bilateral investment treaties and their impact on the coherence of EU policy**

- **Prof. Steffen HINDELANG**, Professor of Law, University of Southern Denmark, Odense

14.25 **From Investor-State Dispute Settlement to a Multilateral Investment Court?**

- **Prof. Stephan SCHILL**, Professor of International and Economic Law and Governance, Amsterdam Center for International Law, University of Amsterdam

14.40 **Exchange of views**

- **Colin BROWN**, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, DG TRADE, European Commission
- Discussion with participation of MEPs and stakeholders

15.25 **Concluding remarks by the Chair**

Biographies

Steffen HINDELANG is currently professor (wsr) at the Department of Law of the University of Southern Denmark in Odense. He teaches and researches in the areas of international economic law, esp. international investment law, EU law and German public law. He is also adjunct faculty at Humboldt University and Technical University, both in Berlin.

Previously he was guest professor at the Faculty of Law of the University of Uppsala as a Riksbankens Jubileumsfond – Alexander von Humboldt Stiftung Swedish Prize Laureate (2018), senior research associate and senior lecturer at Humboldt-Universität zu Berlin (2010-2011) and research associate and lecturer at the University of Tübingen (2004-2009), both in Germany.

He is also senior fellow at the Walter Hallstein Institute of European Constitutional Law at Humboldt-Universität zu Berlin and academic advisor to the International Investment Law Centre Cologne (IILCC). He was guest professor, among others, at Nagoya University, Bocconi University Milan, the University of Lausanne, the Charles University Prague, the International Law School of the Moscow State Institute of International Relations (MGIMO), and the Turkish-German University Istanbul.

Furthermore, he advised, inter alia, European governments in international investment disputes and international organisations, such as UNCTAD, on matters of reform of the current international investment law regime. He was repeatedly invited by the European Parliament's INTA Committee to prepare studies on the evolvement of the EU Common Commercial Policy in the area of investment.

Stephan W. SCHILL is Professor of International and Economic Law and Governance at the University of Amsterdam and Principal Investigator of the European Research Council-funded project on 'Transnational Public-Private Arbitration as Global Regulatory Governance'. He is admitted to the bar in Germany and New York, is a Member of the ICSID List of Conciliators, and acts as arbitrator in investment treaty proceedings. He also advises governments and international organizations on international investment law and investor-state dispute settlement, including as expert in contentious proceedings. He is Co-Editor-in-Chief of the Journal of World Investment and Trade, one of the leading international journals on international economic law, and Member on the Editorial Board of the Journal of International Arbitration. Stephan Schill has published widely on international investment law and investor-state dispute settlement, including the monograph *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) and the edited volumes *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015 – with David Caron, Abby Cohen Smutny and Epaminontas Triantafilou), and *International Investment Law and the Global Financial Architecture* (Elgar Publishing, 2017 – with Christian Tams and Rainer Hofmann).

PART I

Stocktaking of investment protection provisions in EU agreements and Member States' bilateral investment treaties and their impact on the coherence of EU policy

Prof. Dr. Steffen HINDELANG, LL.M., and Dr. Jurgita BAUR

ABSTRACT

This short paper provides a general overview of existing investment protection provisions in selected EU agreements with third countries. It assesses to what extent there is coherence between the different regimes and, as a consequence of the CJEU's Opinion 2/15, how the splitting between FTAs and investment protection agreements impacts policy coherence. It also looks at selected existing bilateral investment treaties of EU Member States and assesses them from the point of view of consistency with EU policy and highlights certain challenges for the EU linked with the existence of the different investment protection provisions as of today.

1 Executive Summary

For almost ten years, the EU has been shaping its investment protection policy. To better understand the EU's progress made in developing a coherent policy[1], this paper examines and assesses selected provisions of investment protection in a comparative perspective.

Those provisions are found in three EU agreements, in two Member States bilateral investment agreements (BITs) which entered into force before the *Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries* (Grandfathering Regulation) was adopted, as well as in the Dutch Draft Model BIT 2018 that was finalized after the said Grandfathering Regulation. The main purpose that motivates this shortish paper is to assess to what extent there is coherence between the different investment protection regimes and to expound the development of the EU's investment policy after the Court of Justice of the European Union (CJEU)'s Opinion on the Singapore free trade agreement (Opinion 2/15).

Opinion 2/15 affected the EU's investment protection policy yet again. The CJEU's Opinion led to the political choice to separate the provisions on investment protection from those on trade (including establishment)[2]. Consequently, the EU (draft) agreement with Singapore and the one with Vietnam, originally covering trade and investment relations comprehensively, were both split into two separate agreements: a free trade agreement (FTA) and an investment protection agreement (IPA) respectively. So far, the Comprehensive Economic and Trade Agreement (CETA)[3] which combines trade and investment protection in one agreement, has been unaffected.

CETA, the EU-Singapore IPA[4], and the EU-Vietnam IPA[5] (together also referred to as the EU agreements) thus differ from each other in structure and design. However, with regards to fair and equitable treatment (FET) and expropriation, probably the two most important substantive standards of investment protection and covered by this shortish paper, they are contained in all aforesaid agreements and the content of these provisions is largely alike. In other words, they embody a similar understanding of how property protection should be balanced with other public interests, such as security, health, and environmental protection.

When it comes to dispute settlement, the EU agreements all contain the reformed investor-State dispute settlement system termed 'Investment Court System' (ICS) and display, in this respect, a large degree of coherence among each other.

Moreover, key substantive investment protection provisions in the Dutch Draft Model BIT 2018 resemble, in terms of content, the respective provisions found in the EU agreements. However, in terms of dispute settlement, the Dutch Draft Model BIT 2018 follows more closely the 'traditional' model of investor-State dispute settlement (ISDS) as found, for example, in the 2001 Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal

[1] European Commission, *Towards a comprehensive European international investment policy*, COM(2010)343, 2010, available here (visited 1 February 2019), p. 2.
[2] See M. Cremona, Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore, in: European Constitutional Law Review, 14: 231-259, 2018, p. 237, available here (visited 6 January 2019).
[3] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, available here (visited 4 January 2019).
[4] EU-Singapore Free Trade Agreement and Investment Protection Agreement as of April 2018, available here (visited 4 January 2019). The EP gave its consent on 13 February 2019, cf. European Parliament, Parliament gives green light to EU-Singapore trade and investment protection deals, Press Release, available here (visited 17 February 2019).
[5] EU-Vietnam Free Trade Agreement and Investment Protection Agreement as of September 2018, available here (visited 4 January 2019).

Protection of Investment (2001 USA-Lithuania BIT)[6] and the 2010 Agreement between the Federal Republic of Germany and the Hashemite Kingdom of Jordan concerning the Encouragement and Reciprocal Protection of Investments (2010 Germany-Jordan BIT)[7], which serve as case in point for 'old' Member State BITs with third countries.

The Dutch Draft Model BIT 2018 could in fact evidence an emerging tendency towards more coherence of the EU`s and Member States' approaches towards investment protection policy when it comes to substantive protection clauses. Currently, most Member States BITs display a regulatory approach prevalent *before* the EU embarked on a reform of international investment law.

All EU agreements compared establish FET as a standard independent of customary international law. Furthermore, the FET standard applies to the operation of the investment only; not to the establishment phase. While the FET standards in the 2001 USA-Lithuania BIT and the 2010 Germany-Jordan BIT are drafted as a blanket clause leaving it to an arbitral tribunal to determine its content, all EU agreements, as well as the Dutch Draft Model BIT 2018, contain a closed list of state actions and behaviour which constitute a breach of the FET standard. Furthermore, all EU agreements compared, as well as the Dutch Draft Model BIT 2018, do not treat the disappointment of legitimate expectations of the investor in itself as amounting to a breach of the FET standard. While, again, the 2001 USA-Lithuania BIT and the 2010 Germany-Jordan BIT essentially leave it to the interpretation of an arbitral tribunal, the EU agreements and the Dutch Draft Model BIT 2018 emphasize the State's 'right to regulate'.

The EU agreements and the Dutch Draft Model BIT 2018 provide protection in case of direct and indirect expropriation. Considerable effort is devoted to further define in particular the concept of indirect expropriation. All EU agreements include a non-exhaustive list of factors to be considered when determining whether a measure or series of measures by a host State constitutes indirect expropriation. Furthermore, the EU agreements specify legitimate public policy objectives which, if pursued by the host State, carry the rebuttable presumption of not amounting to indirect expropriation. The Dutch Draft Model BIT 2018 contains such clarifications as well. This is a relatively new regulatory approach, broadening again the 'regulatory autonomy' of the host State. In contrast, the 2001 USA-Lithuania BIT and the 2010 Germany-Jordan BIT leave it completely to an arbitral tribunal to specify the concept of indirect expropriation.

The thus far globally predominant concept of resolving disputes between investors and host States is still the 'traditional' model of ISDS[8].The 2010 Germany-Jordan and the 2001 USA-Lithuania BIT are typical examples. The Dutch Draft Model BIT 2018 seems to follow this 'tradition' to a larger degree.

At its core, ISDS includes some form of international arbitration. Arbitration is a dispute settlement mechanism based on a contract between the disputing parties. In the case of ISDS, this contract is, thus, concluded between the investor and the host State. Among other distinct features, ISDS includes the use of ad-hoc tribunals, a suspicion towards domestic courts, a rather opaque selection process for arbitrators, and no appeals mechanism[9].

[6] USA-Lithuania BIT signed 14 January 1998, entered into force 11 November 2001, amended 1 May 2004, available here (visited 5 January 2019); note also the 2004 Additional Protocol between the Government of the United States of America and the Government of the Republic of Lithuania to the Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, Senate Treaty, Treaty Document 108-21, available here (visited 5 January 2019).
[7] Germany-Jordan BIT signed 13 November 2007, entered into force 28 August 2010, available here (visited 5 January 2019).
[8] Kuijper and others, *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements (Volume 2 - Studies)* (2014), 22-3, available here (visited 17 February 2019).
[9] Hindelang and Sassenrath, *The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective*, 108, available here.

Not least due to the aforementioned features, the 'traditional' ISDS has been subject to growing critique from civil society, academia, and even business organisations particularly for not producing consistent and predictable outputs[10]. In reaction to such critique, the European Commission has embarked on a mission to (radically[11]) reform ISDS and to do away with its most 'undesirable' features[12].

The reformed system envisaged by the European Commission is the Investment Court System[13]. It has been implemented in all EU agreements[14]. 'With the view to increase legitimacy and to advance procedural integrity, the EU agreements deviate from the 'traditional' way of appointing arbitrators. Now governments preselect a roster of arbitrators who serve for a predetermined time. From the said roster typically three arbitrators are randomly allocated to a claim[15]'. Furthermore, an appeals mechanism has been introduced, qualifying (relatively) speedy resolution of a dispute for the sake of reaching at a 'more correct' outcome.

In sum, the approach taken in the EU agreements and in the Dutch Draft Model BIT 2018 could, on the one hand, contribute towards more legal certainty in the application of *substantive* investment protection standards. They display a high degree of policy coherence. An instrument available to secure coherence between EU agreements and renegotiated or newly concluded EU Member State BITs is the Commission's authorisation decision on the basis of the Grandfathering Regulation which can require the EU Member States to "include or remove from such negotiations and prospective bilateral investment agreement any clauses where necessary to ensure consistency with the Union's investment policy" (Art. 9(2)). On the other, the substantive standards as set out in the aforesaid agreements will possibly lead to a reduced level of investment protection if compared to the 2001 USA-Lithuania BIT and the 2010 Germany-Jordan BIT predating the Grandfathering Regulation. The two latter agreements, to a very large degree, leave it to an arbitral tribunal to define the balance between the protection of private property and public interests. This balance can be in line with the one struck in the EU agreements and the Dutch Draft Model BIT 2018, but it does not have to be so. The risk of a lack of policy coherence is palpable. The search for more precise language and, thus, greater predictability in interpreting the EU agreements is nonetheless a welcome development which, however, now needs to be tested in practice.

When it comes to dispute settlement, the Dutch Draft Model BIT 2018 seems to stick to 'traditional' thinking. It displays a larger degree of coherence with the 2001 USA-Lithuania BIT and the 2010 Germany-Jordan BIT than with the EU agreements. While one may debate whether each Member State BIT requires or justifies, e.g., the establishment of an appeals facility as found in the EU agreements, much care is to be exercised, however, if one does not want to lose the fruits of the ISDS reform by 'uncoordinated' treaty-making which may invite for 'treaty shopping'.

[10] Kuijper and others, *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements (Volume 2 - Studies)*, 56 with further references; European Parliamentary Research Service, *From arbitration to the investment court system (ICS)* (2017), PE 607.251, 9-11, available here (visited 17 February 2019).

[11] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJ L 11, 14 January 2017, p. 5.

[12] Cf. European Commission, *Concept Paper: Investment in TTIP and beyond - the path for reform* (2014), available here (visited 24 November 2017); European Commission, *Roadmap on the 'Establishment of a Multilateral Investment Court for investment dispute resolution'* (2017), 2, available here (visited 17 February 2019).

[13] See, for example, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade for All - Towards a more responsible trade and investment policy* (2015), COM(2015) 497 final, 15, available here (visited 17 February 2019); see extensively on the subject European Parliamentary Research Service, *From arbitration to the investment court system (ICS)*.

[14] European Commission, *Roadmap on the 'Establishment of a Multilateral Investment Court for investment dispute resolution'*, 2.

[15] Hindelang and Hagemeyer, *In Pursuit of an International Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, 199, available here (visited 17 February 2019).

2 Introduction

Since the entry into force of the Lisbon Treaty[16], the European Union (EU) has been seeking to position itself as a global player in international investment protection policy. In 2009, the Common Commercial Policy (CCP) has been expanded to include foreign direct investment. Consequently, the EU enjoys the exclusive competence in this area[17]. The amended competence has brought many new opportunities to (re-)shape investment policy, of which the EU made use widely.

Within the last ten years, the EU negotiated with, among others, Canada, the USA, Vietnam, Singapore, New Zealand, Australia, Japan, Mercosur, and Mexico. Some agreements, such as CETA, have been successfully concluded. Since 21 September 2017, the agreement has (partly) provisionally been applied[18]. It will enter into force when all EU Member States have ratified the Agreement[19].

Following the CJEU's Opinion 2/15[20] on the allocation of competencies between the EU and the EU Member States for concluding the (comprehensive) EU-Singapore Free Trade Agreement (EUSFTA), issued on 16 May 2017, the said agreement as well as the EU-Vietnam agreement were readjusted before ratification process was started. In each case, a comprehensive agreement covering all trade and investment relations was split into two standalone agreements: a free trade agreement[21] and an investment protection agreement.

In Opinion 2/15[22], the CJEU held that the EUSFTA's scope extended to areas, which are subject to 'shared competences'[23]. These areas relate to

(i) portfolio foreign investment,

(ii) investor-state dispute settlement (ISDS), and

(iii) state-to-state dispute settlement relating to provisions regarding portfolio investment[24].

This Opinion is important not only for the EUSFTA itself but also for ongoing and future negotiations and conclusions of the EU trade and investment agreements. It will also have an impact on the interaction and cooperation of the EU with the Member States as well as on the coherence of the EU policy in the field.

In this context policy coherence relates to 'positive connections' or 'the construction of a united whole'[25]. Art. 207 (1) TFEU requires the CCP to be based on uniform principles and be conducted in the context of

[16] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.
[17] Cf. Art. 3 (1) lit. e Treaty on the Functioning of the European Union (TFEU).
[18] European Commission - Press release, *EU-Canada trade agreement enters into force,* 20. September 2017, available here (visited 6 January 2019).
[19] Note that Belgium asked the Court for clarification on the legality of the new Investor Court System in CETA (Opinion 1/17). The request by Belgium before the CJEU is still pending. The AG BOT has opined in favour of legality, cf. CJEU, Opinion 1/17, ECLI:EU:C:2019:72 – AG Bot, available here (visited 12 February 2019).
[20] Opinion 2/15 of the Court of 16. May 2017, available here (visited 4 January 2019).
[21] The FTA still covers 'establishment' which essentially means market access by means of direct investment.
[22] See para. 225-256, 285-293, 294-304 of the Opinion 2/15 of the Court of 16 May 2017, available here (visited 4 January 2019).
[23] In the Opinion 2/15 the CJEU held that provisions on portfolio investments, 'cannot be approved by the European Union alone' (see para. 244). This may indicate a different understanding of 'shared competence' as defined in Art. 2 TFEU. See D. Thym, *Mixity after Opinion 2/15: Judicial Confusion over Shared Competences*, VerfBlog, 2017/5/31, available here (visited 6 January 2019).
[24] See para. 225-256, 285-293, 294-304 of the Opinion 2/15 of the Court of 16. May 2017, available here (visited 4 January 2019); M. Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore,* in: European Constitutional Law Review, 14: 231-259, 2018, p. 236, available here (visited 6 January 2019).
[25] See C. Hillion, *Tous pour un, un pour tous! Coherence in the External Relations of the European Union*, in: Marise Cremona (ed), Developments in EU External Relations Law (OUP 2008), p. 10-36 (14), available here (visited 9 January 2019); H. Lenk, *Challenging*

the principles and objectives of the Union's external action as defined in Art. 21 TEU[26]. Coherence, furthermore, does not only extend to all EU-policy fields, but it also spreads vertically, i.e. in an EU-Member State relationship[27].

In its *Proposal for a Council's Decision on the signing, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part* of 18 April 2018[28] the Commission stated that 'from the date of its entry into force, the EU-Singapore IPA will replace and supersede the bilateral investment treaties between the Republic of Singapore and EU Member States that are listed in Annex 5 (Agreements Referred to in Article 4.12) to the IPA'[29].

It is this replacement mechanism which forms part of a formal coordination between the EU and the Member State policies under the Grandfathering Regulation[30] (cf. Art 3) seeking consistency. The possibility to maintain 'old' Member State BITs with third countries[31] (cf. Art. 3) and to authorise Member States to update and even conclude new BITs (cf. Art. 7 et sq.) is another element of this policy coordination.

The Commission, in its 2010 Communication entitled *Towards a Comprehensive European International investment policy*[32], formulated standards for investment protection and dispute settlement it perceives desirable in its agreements. In this way it seeks to provide coherence among its own agreements.

With a view to assist the European Parliament and other stakeholders in evaluating the progress made in terms of coherence of the CCP post-Lisbon in respect of investment protection, this shortish paper provides a concise comparative perspective on selected investment protection provisions – i.e. the fair and equitable treatment standard and expropriation – and dispute settlement provisions of the following agreements: the investment chapter in CETA, the EU-Vietnam IPA, The EU-Singapore IPA, 2001 USA-Lithuania BIT, 2010 Germany-Jordan BIT as well as the Dutch Draft Model BIT 2018[33].

The three EU agreements were selected as they represent different stages in the evolution of the EU investment protection policy:

CETA constitutes a comprehensive free trade agreement with integrated investment protection chapter. Other examples within this group relate to the Transatlantic Trade and Investment Partnership (TTIP) (currently on hold), and the EU-Mexico Trade Agreement which is, despite Opinion 2/15, currently still

the Notion of Coherence in EU Foreign Investment Policy, in: European Journal of Legal Studies, Vol. 8 No.2, p. 6-20 (8), available here (visited 9 January 2019).

[26] See C. Hillion, *Tous pour un, un pour tous! Coherence in the External Relations of the European Union*, in: Marise Cremona (ed), Developments in EU External Relations Law (OUP 2008), p. 10-36 (17), available here (visited 9 January 2019)

[27] See H. Lenk, *Challenging the Notion of Coherence in EU Foreign Investment Policy*, in: European Journal of Legal Studies, Vol. 8 No.2, p. 6-20 (8), available here (visited 9 January 2019); P. Gauttier, *Horizontal Coherence and the External Competences of the European Union,* in: European Law Journal, Vol. 10, No. 1, January 2004, pp. 23–41 (25).

[28] European Commission, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the *Republic of Singapore of the other part,* 18. April 2018, COM (2018) 195 final, available here (visited 11 January 2019).

[29] Ibid., p. 2.

[30] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJL 351, 20.12.2012, p. 40–46, available here (visited 17 January 2019).

[31] Notices from Member States, List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ 2017/C 147/01, available here (visited 11 January 2019).

[32] COM(2010)343 final, p. 8 et sq.

[33] Netherlands draft model BIT 2018, available here (visited 5 January 2019).

structured as an integrated agreement. The negotiations are aimed at modernising the 2000 EU-Mexico Global Agreement, which does not address some of the important trade and investment issues of today[34].

As already mentioned, the EU-Singapore IPA and the EU-Vietnam IPA emerged both from drafts of comprehensive FTAs with integrated investment protection chapters. As a consequence of the CJEU's holdings in Opinion 2/15, investment protection was separated[35].

Although not part of this shortish paper, the EU-Japan free trade agreement is nonetheless worth mentioning. It resamples a comprehensive FTA without investment protection chapter, combined with a 'political option' to seek agreement on investment protection at a later stage. Moreover, there are ongoing negotiations between the EU and China on investment protection. This project reflects another category, i.e. a stand-alone investment agreement without simultaneous negotiations on a free trade agreement.

The 2001 USA-Lithuania BIT, 2010 Germany-Jordan BIT, and the Dutch Draft Model BIT 2018 represent examples of investment protection policy approaches of the Member States. The first two BITs entered into force before the Grandfathering Regulation was adopted and reflect 'old' BIT-making tradition, characterized by blanket investment protection clauses and investor-State dispute settlement by means of arbitration, heavily relying of commercial arbitral instruments. Although, since 2009, foreign direct investment (FDI) falls within the exclusive competence of the EU, the Grandfathering Regulation permits the Member States to maintain and, with authorisation by the Commission, to renegotiate or conclude BITs with third countries. On 27 April 2018, the Commission published a list with over 1300 Member States BITs with third countries[36]. From 2015 until mid-2018, the Commission has adopted 29 Implementing Decisions authorizing the Member States to open formal negotiations or to sign and conclude bilateral investment agreements with third countries[37]. Only one Member State BIT was concluded in 2018 and four were concluded in 2017[38].

The Dutch Draft Model BIT 2018 displays the evolvement of a Member State's investment policy approach. It is intended to replace the 2004 model and to be used for renegotiating the 79 existing Dutch BITs with non-EU countries and for negotiating new agreements[39]. Its substantive provisions are similar to the EU agreements. Its dispute settlement provisions seem to be placed in between the EU agreements and the 2001 USA-Lithuania and 2010 Germany-Jordan BITs.

Due to a very broad mandate but rather restricted overall length, in this shortish paper, stocktaking and evaluation must be limited to selected provisions and the aforesaid agreements. On dispute settlement, this paper is – again due to its limited scope – restricted to a broad overview. Overall, only certain developments, issues, and challenges in terms of coherence of EU investment protection policy can be highlighted and some generalization is unavoidable.

[34] European Commission, *Management Plan 2017*, DG Trade, available here (visited 6 January 2019).
[35] See para. 225-256, 285-293, 294-304 of the Opinion 2/15 of the Court of 16 May 2017, available here (visited 4 January 2019).
[36] See Notices from Member States, List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investments agreements between Member States and third countries, OJ 2018/C 149/01, available here (visited 1 February 2019).
[37] See List of authorisation to negotiate and sign BITs requested by Member States and granted by Commission, available here (visited 1 February 2019).
[38] Lithuania-Turkey BIT in 2018, Hungary-Tajikistan BIT, Hungary-Islamic Republic of Iran BIT, Islamic Republic of Iran-Luxembourg BIT, Czech Republic-Islamic Republic of Iran BIT in 2017. See UNCTAD, Investment Policy Hub, available here (visited 1 February 2019).
[39] B.-J. Verbeek/ R. Knottnerus, *The 2018 Draft Dutch Model BIT: A critical assessment,* July 2018, available here (visited 18 January 2019); N. Sheehan et. al., *New Draft Dutch Model Bilateral Investment Treaty: Significant Changes Ahead For Investors,* July 2018, available at here (visited 18 January 2019).

3 EU agreements with third countries

3.1 Introduction

This section briefly examines the fair and equitable treatment standard (below 3.2.1) and the expropriation clause (below 3.2.2) contained in the investment chapter in CETA, the EU-Vietnam IPA, and the EU-Singapore IPA.

3.2 Comparison of the selected investment protection provisions

3.2.1 Fair and equitable treatment standards

The fair and equitable treatment (FET) standard is one of the most important protection standards for investors. It has also been the most frequently used standard in investment arbitration[40]. With regard to the FET standard, older investment protection agreements have in common that they do not define the standard in the agreements themselves. Arbitration tribunals often refer to decisions of other arbitral tribunals to interpret the respective FET clause[41]. When looking at arbitral practice a distinction is typically made between different categories of the FET standard. The FET standard includes the following obligations: (1) to honour legitimate expectations of the investor, (2) to allow for access to justice, and (3) to guarantee due process[42].

CETA, the EU-Singapore and the EU-Vietnam Investment Agreements all contain a FET clause. All these agreements appear to establish FET as a standard independent of customary international law[43] which applies to the operation of investment only, not to the establishment phase.

Comprehensive Economic and Trade Agreement (CETA)

In CETA, the fair and equitable treatment (FET) standard is defined in Article 8.10 (1). CETA aims at setting out the FET standard rather precisely. Art. 8.10 (2) CETA contains a *closed* list of state actions and behaviour which amount to a breach of the obligation of fair and equitable treatment.

In that respect CETA refers to 'denial of justice', 'fundamental breach of due process', 'manifest arbitrariness', 'targeted discrimination on manifestly wrongful grounds', and 'abusive treatment'. However, the agreement does not specify what is meant by these terms. This may arguably give rise to uncertainty in respect to the protective scope until a sufficient number of awards, interpreting these terms, have been rendered on the basis of CETA[44]. The closed list in CETA seeks to define the standard rather narrowly. However, according to Art. 8.10 (3) CETA the closed lists could potentially be amended by the treaty parties acting through a treaty committee[45].

[40] See S. Hindelang/ C.P. Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective,* Study for the European Parliament, September 2015, p. 136, available here (visited 11 January 2019).
[41] This practice is highly problematic, see S. Hindelang, *Study on Investor-State Dispute Settlement ("ISDS") and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available here (visited 16 January 2019), pp. 66 et seqq.
[42] See S. Hindelang/ C.P. Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective,* Study for the European Parliament, September 2015, p. 137, available here (visited 11 January 2019).
[43] See D. Gallo/ F.G. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication,* in: Fordham International Law Journal, Vol. 39, Issue 5, 2016, p. 1079-1152 (1116), available here (visited 11 January 2016); M.C. Porterfield, *A Distinction without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, in: IISD, 22. March 2013, available here (visited 11 January 2019).
[44] See S. Hindelang/ C.P. Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective,* Study for the European Parliament, September 2015, p. 141, available here (visited 11 January 2019).
[45] Ibid.

Legitimate expectations are *not* listed in Article 8.10 (2) CETA as a separate category amounting to a breach of the FET standard. Thus, the disappointment of legitimate expectations alone does not constitute a breach of the FET standard[46]. A reference to legitimate expectations is though included in Art. 8.10 (4) CETA. Legitimate expectations may be taken into account in the context of the categories mentioned in Art. 8.10 (2) CETA[47]. The wording 'may take into account' has been criticized as not providing sufficient guidance for interpreters[48].

EU-Singapore Investment Protection Agreement

Art. 2.4 (2) EU-Singapore IPA contains, like CETA (above 3.2.1.1), a closed list of state actions and behaviour which constitute a breach of the fair and equitable treatment standard.

In terms of a notable difference, the EU-Singapore IPA refers to 'similar bad faith conduct' in connection with harassment, coercion, and abuse of power whilst CETA uses the generic term 'abusive treatment'. Whether these differences in wording will lead to different interpretations remains to be seen[49].

Although not identical in wording with CETA, but possibly similar in result, the EU-Singapore IPA refers to legitimate expectations in Art. 2.4 (3) also only as an additional consideration in determining whether one of the obligations mentioned in 2.4 (2) EU-Singapore IPA were breached. In terms of expectations that can be taken into account, both the EU-Singapore IPA and CETA refer to legitimate expectations stemming from certain representations. The EU-Singapore IPA seems to be somewhat narrower in that it requires that a representation has to be '*reasonably* relied upon by the investor'[50].

Except for this, the statements made in respect of CETA (above 3.2.1.1) apply mutatis mutandis here as well.

EU-Vietnam Investment Protection Agreement

Overall, the Article on fair and equitable treatment in the EU-Vietnam Agreement is very similar to that in CETA in its structure and content. Art. 2.5 (2) EU-Vietnam Agreement contains a closed list of state actions and behaviour which constitute a breach of fair and equitable treatment. The statements made in respect of CETA (above 3.2.1.1) apply mutatis mutandis here as well.

3.2.2 Expropriation provisions

Investment protection agreements regularly contain provisions on requirements of and protection against direct and indirect expropriation. Investment treaties do not prohibit expropriating investments; they typically establish several conditions for a lawful expropriation, including the payment of compensation to the investor[51].

As a rule, investment treaties distinguish between direct and indirect expropriation. Direct expropriation occurs when an investment is nationalised or otherwise directly taken through formal transfer of title or outright seizure of property by the State. Indirect expropriation occurs if a measure or a series of measures

[46] Ibid.
[47] G. Van Harten, The European Union's Emerging Approach to ISDS: a Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA, in: Bologna Law Review, p. 138-165 (157); S. Hindelang/ C.P. Sassenrath, The investment chapters of the EU's international trade and investment agreements in a comparative perspective, Study for the European Parliament, September 2015, p. 141, available here (visited 11 January 2019).
[48] Ernst, „Fair and equitable treatment" im CETA – Innovation im Spannungsverhältnis zwischen Investor und *Staat*, KritV 2015, S. 406 (422).
[49] See S. Hindelang/ C.P. Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective,* Study for the European Parliament, September 2015, p. 141, available here (visited 11 January 2019).
[50] [Emphasis added]; Ibid., p. 142.
[51] Ibid., p. 153; J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available here (visited 18 January 2019), p. 153.

of a host State has an effect equivalent to direct expropriation, even though the investor formally remains the legal owner without formal transfer of title or outright seizure.

Previously, investment protection agreements, like the 2010 Germany-Jordan BIT or the 2001 USA-Lithuania BIT, did not provide much guidance on what constitutes expropriation, in particular indirect expropriation. Typically, the interpretation of indirect expropriations was left to arbitral tribunals. CETA, the EU-Singapore IPA, and the EU-Vietnam IPA are exploring other avenues by attempting to more clearly define indirect expropriation in Annex 8-A, Annex 1 and Annex 4 respectively.

Comprehensive Economic and Trade Agreement (CETA)

Expropriation is regulated in Art. 8.12 CETA. Art. 8.12 (1) covers direct and indirect expropriation. For further guidance on interpreting the provision, Art. 8.12 (1) refers to Annex 8-A CETA.

Art. 8.12 (1) contains a general prohibition of direct and indirect expropriation, which is followed by a test determining requirements for a lawful expropriation: State measures effecting expropriation must be for a public purpose, conducted under due process of law, on a non-discriminatory basis, and against the payment of compensation[52]. Art. 8.12 (4) CETA guarantees the right of a prompt (domestic) judicial review of a measure and of the valuation of the investment. Compensation must be 'prompt, adequate, and effective'. The compensation shall amount to the fair market value (Art. 8.12 (2) CETA).

CETA contains, in Annex 8-A (1) (a) and (b), a definition of direct and indirect expropriation respectively. Annex 8-A (1) (b) defines indirect expropriation as follows: It occurs if a measure or series of measures of the host State has an effect equivalent to direct expropriation. The determination of whether a measure or series of measures by the host State, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors, elements already known from arbitral practice including, inter alia, the economic impact, the duration or character of the measure. The list of factors in Annex 8-A (2) is non-exhaustive [53].

Annex 8-A (3) CETA includes a specific provision that aims at preserving the regulatory autonomy of the host State. Measures taken to protect health, safety or the environment carry a rebuttable presumption of not constituting indirect expropriation. Only measures which are manifestly excessive in light of their objective might amount to indirect expropriation[54]. This establishes some kind of proportionality test. As only 'manifestly excessive' measures constitute indirect expropriation, CETA allows for a considerable policy space on part of the government. The consequences of this 'new' approach are yet unknown. The approach could, if applied faithfully by arbitral tribunals, possibly lead to a decreased level of investment protection[55]. CETA gives high priority to the legitimate purpose of a measure and, thus to the 'right to regulate' of the host State. While such an approach might be appropriate with regard to highly developed legal systems which bear less the risk of exploiting such autonomy, it should carefully be evaluated whether this regulatory approach can serve as a blueprint for all of the EU's actual or potential treaty partners[56].

[52] See S. Hindelang/ C.P. Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective,* Study for the European Parliament, September 2015, p. 155, available here (visited 11 January 2019).
[53] Ibid., p. 155-156.
[54] European Commission, *Investment provisions in the EU-Canada free trade agreement (CETA),* February 2016, available here (visited 19 January 2019).
[55] See S. Hindelang/ C.P. Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective,* Study for the European Parliament, September 2015, p. 155-156, available here (visited 11 January 2019).
[56] Ibid.

EU-Singapore Investment Protection Agreement

Expropriation is addressed in Art. 2.6 EU-Singapore IPA. Art. 2.6 (1) covers direct and indirect expropriations. Art. 2.6 in EU-Singapore IPA does not explicitly refer to Annex 1 for the purpose of interpreting the terms direct and indirect expropriation. While this may be seen as unfortunate from an editorial point of view, it does not change the fact that the aforementioned terms are clarified in the said Annex 1.

The EU-Singapore IPA follows in Art. 2.6 (1), with slight variation in language, the model employed in CETA (above 3.2.2.1.). The same holds true for Annex 1 of EU-Singapore IPA.

EU-Vietnam Investment Protection Agreement

Art. 2.7 EU-Vietnam IPA also contains a provision on direct and indirect expropriation. For interpretation of these terms, Art. 2.7 (6) refers to Annex 4 of the Agreement. Art. 2.7 and Annex 4 follow the pattern in CETA (above 3.2.2.1.) and the EU-Singapore IPA (above 3.2.2.2). Unlike CETA and the EU-Singapore IPA, the EU-Vietnam IPA does not provide a non-exhaustive list of 'legitimate public policy objectives' which are rebuttably presumed not constituting indirect expropriation. This lack is however not expected to have a significant impact on the level of protection of investments if compared to the other two EU agreements.

3.3 Dispute Settlement

A reformed model of the 'traditional' investor-State dispute settlement system has been termed 'Investment Court System'[57] and implemented in all EU agreements[58].

In particular, five areas of development – if contrasted with the 2001 USA-Lithuania BIT and the 2010 Germany-Jordan BIT – should be highlighted in the EU agreements.

These areas concern the provisions regulating the consultation mechanism prior to the actual arbitration, the relationship of the ICS and domestic remedies, the appointment and conduct of arbitrators, the provisions addressing cost allocation in investment arbitration, and the rules addressing transparency and public access to ICS proceedings.

First, the EU agreements aim at making consultations as a means of amicable settlement of an investment dispute more effective by 'proceduralizing' them. The agreements provide for a clear definition of formal steps and requirements, also with a view to pre-defining the dispute subsequently to be arbitrated.

Secondly, the EU agreements flash out in some more detail the (still problematic) relationship of the ICS and domestic legal systems. They require the investor to 'waive' domestic claims if he wants to proceed to arbitration. None of the regulatory approaches in these agreements explicitly encourage the use of domestic remedies; not even such which do function rather well. In fact, the EU agreements provide explicitly for an instrument to circumvent the primacy of primary legal protection – i.e. the revocation or amendment of an administrative act or a law – enshrined in advanced legal systems. This may defeat the purpose of judicial review, i.e. signalling illegality and forcing the respective government authority to remedy the illegal measure. In the end, it might promote an 'endure and cash in' attitude.

Thirdly, all EU agreements provide for a pre-established roster of arbitrators (called 'members') – designated by the State parties – from which the arbitrator or arbitrators are chosen randomly for individual disputes. The EU agreements take steps to regulate more closely the conduct of arbitrators by State parties themselves instead of leaving this task to professional associations as well as formal and

[57] See, for example, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade for All - Towards a more responsible trade and investment policy* (2015), COM(2015) 497 final, 15, available here (visited 19 January 2019); see extensively on the subject European Parliamentary Research Service, *From arbitration to the investment court system (ICS)*.
[58] European Commission, *Roadmap on the 'Establishment of a Multilateral Investment Court for investment dispute resolution'*, 2.

informal working groups of arbitration institutions, in which interests of the common good or specific EU regional interests might not always be satisfactorily represented.

Fourth, the EU agreements explicitly tackle the issue of cost allocation in an investment arbitration.

Fifth, the EU agreements make tremendous progress on transparency of and public access to ICS proceedings.

Having identified these five areas of development, overall there are still gaps to fill and loose ends to connect. That involves especially the coordination of well-functioning domestic legal systems with the ICS.

As of now, in essence, all EU agreements are (still) formally committed to the 'traditional' model of ISDS, modifying it to a large extent though. To name some continuities, all of the EU agreements base dispute settlement on a contractual basis between investor and host-State (i.e. arbitration, in essence), continue to use some kind of ad hoc tribunals, and all of them are suspicious towards domestic courts[59].

Yet, it should be noted that for the European Commission the ICS is only an interim solution. The final goal is to establish a Multilateral Investment Court (MIC), i.e. one (permanent) institution that is competent to decide on numerous (or ideally all) investment agreements' disputes[60]. The details of such an MIC are in the making; since the MIC is also facing various legal and practical obstacles, its realization appears feasible only in the long run[61].

Thus, for now, the EU implements the ICS in its agreements and leaves open a 'back door' for a possible future MIC.

4 EU-Member State BITs with third countries

4.1 Comparison of selected investment protection provisions dating back before the adoption of the Grandfathering Regulation

This section briefly examines the selected investment protection provisions, i.e. the ones on fair and equitable treatment (below 4.1.1) and expropriation (below 4.1.2), in the EU Member States BITs with third countries *before* the adoption of the Grandfathering Regulation. The 2010 Germany-Jordan BIT and the 2001 USA-Lithuania BIT serve as a case in point.

4.1.1 Fair and equitable treatment standard

The 2010 Germany-Jordan and the 2001 USA-Lithuania BIT appear to establish FET as a standard independent of customary international law and appear to apply to the 'operation' of an investment only, just like the EU agreements.

Beyond that, the 2010 Germany-Jordan and the 2001 USA-Lithuania BIT do not provide any further guidance on the content of the FET standard. The regulatory approach to further define the FET standard in the EU agreements aims at creating more legal certainty, if the categories listed are faithfully applied. However, such faithful application could possibly lead to reduced protection for investors if compared to the open-ended wording in the 2010 Germany-Jordan and the 2001 USA-Lithuania BIT[62].

[59] Hindelang and Hagemeyer, *In Pursuit of an International Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, 237, available here (visited 17 February 2019).
[60] European Commission, *Concept Paper: Investment in TTIP and beyond - the path for reform*,11-2; European Commission, *A future multilateral investment court* (2016), MEMO/16/4350, available here (visited 19 January 2019).
[61] Hindelang and Hagemeyer, *In Pursuit of an International Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, 244-6, available here (visited 17 February 2019).
[62] See S. Hindelang/ C.P. Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective*, Study for the European Parliament, September 2015, p. 142, available here (visited 11 January 2019).

4.1.2 Expropriation provision

Art. III (1) 2001 USA-Lithuania BIT contains an expropriation clause covering direct and indirect expropriation. Preconditions for a lawful expropriation are similar to the provisions of the above-mentioned EU agreements (3.2.2.). Only the 2010 Germany-Jordan BIT somewhat deviates from this norm, not referring to 'due process' and restricting the non-discrimination requirement to most-favored-nation treatment[63]. Both the 2001 USA-Lithuania and the 2010 Germany-Jordan BIT guarantee the right of a prompt (domestic) judicial review of the respective State measure as well as of the valuation of the expropriated investment. According to Art. 4 (2) 2010 Germany-Jordan BIT, the compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable, which means nothing other than that the compensation has to be 'prompt, adequate, and effective' (Art. III (1) 2001 USA-Lithuania BIT). The amount is usually fixed to the fair market value, except for the 2010 Germany-Jordan BIT which does not specify this point[64].

Neither the 2001 USA-Lithuania BIT nor the 2010 Germany-Jordan BIT contains provisions which further specify the term indirect expropriation or provide for a non-exhaustive list of factors to be considered when determining whether a measure constitutes an indirect expropriation, as it is the case in the EU-agreements (above 3.2.2.). Both Member State agreements also do not provide for provisions specifically tailored at granting the host State more regulatory autonomy (above 3.2.2.). Conversely, this arguably results in a more comprehensive investment protection.

4.1.3 Dispute Settlement

The 'traditional' and thus far globally predominant concept of resolving disputes between investors and host States has come to be known as investor-State dispute settlement[65]. The 2010 Germany-Jordan and the 2001 USA-Lithuania BIT are typical examples.

At its core, ISDS includes some form of international arbitration. Arbitration is a dispute settlement mechanism based on a contract between the disputing party. In the case of ISDS this contract is, thus, concluded between the investor and the host State. Among other distinct features, ISDS includes the use of ad-hoc tribunals, a suspicion towards domestic courts, a rather opaque selection process for arbitrators, and no appeals mechanism[66].

Not least due to the aforementioned features has 'traditional' ISDS been subject to growing critique from civil society, academia, and even business organisations particularly for not producing consistent and predictable outputs[67]. In reaction to such critique, the European Commission has embarked on a mission to (radically[68]) reform ISDS and to do away with its most 'undesirable' features[69].

[63] Ibid., p. 155.
[64] Ibid.
[65] Kuijper and others, *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements (Volume 2 - Studies)* (2014), 22-3, available here (visited 24 November 2017).
[66] Hindelang and Sassenrath, *The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective*, 108, available here.
[67] Kuijper and others, *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements (Volume 2 - Studies)*, 56 with further references; European Parliamentary Research Service, *From arbitration to the investment court system (ICS)* (2017), PE 607.251, 9-11, available here (visited 24 November 2017).
[68] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJ L 11, 14 January 2017, p. 5.
[69] Cf. European Commission, *Concept Paper: Investment in TTIP and beyond - the path for reform* (2014), available here (visited 24 November 2017); European Commission, *Roadmap on the 'Establishment of a Multilateral Investment Court for investment dispute resolution'* (2017), 2, available here (visited 24 November 2017).

4.2 Comparison of selected investment protection provisions dating after the adoption of the Grandfathering Regulation

This section briefly examines the provisions on fair and equitable treatment (below 4.2.1) and expropriation (below 4.2.2) in the Dutch Draft Model BIT 2018. The provisions on fair and equitable treatment and expropriation largely follow the EU agreements[70].

4.2.1 Fair and equitable treatment standard

FET standard in Art. 9 of the Dutch Draft Model BIT 2018, in its structure and content, seems to follow the model contained in the EU agreements. While the EU agreements speak of 'targeted discrimination', the Dutch Draft Model BIT 2018 employs the language of direct or targeted indirect discrimination. Whether the different wording results also in a difference in scope is questionable. Furthermore, the list of examples provided which further specify measures which constitute direct or targeted indirect discrimination on wrongful grounds is more comprehensive than the lists in the EU agreements.

An instrument available to secure such coherence between EU agreements and renegotiated or newly concluded EU Member State BITs is the Commission's authorisation decision on the basis of the Grandfathering Regulation which can require the EU Member States to "include or remove from such negotiations and prospective bilateral investment agreement any clauses where necessary to ensure consistency with the Union's investment policy" (Art. 9(2)).

4.2.2 Expropriation provision

The provision on expropriation in the Dutch Draft Model BIT 2018 is overall comparable to the EU agreements (above 3.2.2).

Like all other agreements compared (above 3.2.2 and above 4.1.2), Art. 12 (1) Dutch Draft Model BIT contains a general prohibition of direct and indirect expropriation, which is followed by a test determining requirements for a lawful expropriation. Art. 12 (7) Dutch Draft Model BIT 2018 also guarantees the right of a prompt judicial review under domestic law. Compensation must be 'prompt, adequate, and effective' (Art. 12 (1) (d) Dutch Draft Model BIT 2018). The compensation shall amount to the fair market value (Art. 12 (5) Dutch Draft Model BIT 2018).

As opposed to the 2010 German-Jordan and the 2001 USA Lithuania BITs and in line with the EU agreements, the Dutch Draft Model BIT 2018 includes in Art. 12 (3) a definition of indirect expropriation and in Art. 12 (8) a specific provision that emphasizes the host State's regulatory autonomy by providing for a non-exhaustive list of legitimate public interests which may be pursued with a reputable presumption of not constituting indirect expropriation.

4.2.3 Dispute Settlement

The Dutch Draft Model BIT 2018 essentially provides investors with a dispute settlement option which is close to the 'traditional' one found in the 2010 Germany-Jordan and the 2001 USA-Lithuania BITs. It makes though provision for the establishment of a MIC sometime in the future when the dispute settlement provisions in the Dutch Draft Model BIT 2018 will cease to apply.

Notably, the Dutch Draft Model BIT 2018 departs from the approaches in the 2010 Germany-Jordan and the 2001 USA-Lithuania BIT by providing for the three members of an arbitral tribunal to be appointed by an appointing authority, i.e. the ICSID Secretary-General for ICSID arbitrations or the PCA Secretary-General

[70] B.-J. Verbeek/ R. Knottnerus, *The 2018 Draft Dutch Model BIT: A critical assessment,* July 2018, available here (visited 18 January 2019).

for UNCITRAL arbitrations. The UNCITRAL Transparency Rules are incorporated in Art. 20 (11) Dutch Draft Model BIT 2018.

Notably, to the degree discussed and coordinated with the Commission within the context of the authorisation mechanism contained in the Grandfathering Regulation, one may wonder why the Commission has not taken issue with the regulatory approach found in the Dutch Draft Model BIT 2018. This approach is largely inconsistent with the Union's policy on dispute settlement which emerged as a reaction to the deficits[71] identified in respect of the 'traditional' mode of dispute settlement, the latter of which now again featuring in the Dutch Draft Model BIT 2018. It can be assumed that the provision (Art. 15) on the replacement of the 'traditional' mode of dispute settlement by a MIC also originates from the Commission. However, the replacement of the 'traditional' mode of dispute settlement by a MIC requires accession of *both* State parties to a yet to be negotiated MIC which is not a given.

5 Summarizing and concluding observations

5.1 Implications of the CJEU's Opinion 2/15 on the Common Commercial Policy

On 16 May 2017, the CJEU delivered Opinion 2/15 in response to a request by the Commission pursuant to Art. 218 (11) TFEU, as to whether the EUSFTA is compatible with the order of competences enshrined in the EU Treaties. The Commission asked if the Union has the 'competence to sign and conclude alone the Free Trade Agreement with Singapore?'[72] The CJEU[73] held that the EUSFTA's scope extended to areas which fall outside the CCP and are currently a matter of 'shared competence'. These areas include (i) foreign portfolio investment, (ii) investor-state dispute settlement (ISDS), and (iii) state-to-state dispute settlement relating to provisions regarding portfolio investment[74].

The Opinion has had a significant impact on the exercise of the CCP. The CJEU interpreted the scope of the CCP, an area of exclusive EU competence, broadly. This reading reduces the instances in which so-called mixed agreements are employed. Mixed agreements cover subject areas in which the EU does not enjoy exclusive competence and, thus, may require or want the Member States to become party to an international agreement alongside the EU[75].

A broad reading of the CCP and, consequently, less room for mixed agreements may in turn affect the EU's status as an actor in international trade policy: Future negotiations with third countries may be less lengthy and burdensome as the EU Member States' 'veto powers' inherent in mixed agreements were effectively reduced.

Furthermore, Opinion 2/15 may also affect the Commission's general approach in regard to the content and structure of its trade- and investment-related agreements[76]. The CJEU's Opinion gave the Commission

[71] Cf. Hindelang, Steffen, Study on Investor-State Dispute Settlement ("ISDS") and Alternatives of Dispute Resolution in International Investment Law, Study for the European Parliament, September 2014, available here (visited 16 January 2019).
[72] Opinion 2/15 of the Court of 16. May 2017, available here (visited 4 January 2019), para. 1.
[73] See para. 225-256, 285-293, 294-304 of the Opinion 2/15 of the Court of 16 May 2017, available here (visited 4 January 2019).
[74] Ibid.; M. Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore,* in: European Constitutional Law Review, 14: 231-259, 2018, p. 236, available here (visited 6 January 2019).
[75] See M. Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore*, in: European Constitutional Law Review, 14: 231-259, 2018, p. 236, 257, available here; D. Kleimann/ G. Kübek, *The Singapore Opinion or the End of Mixity as We Know It, VerfBlog,* 2017/5/23, available here (visited 26 January 2019).
[76] See E. Roussou/H. F. Willan, *Free Trade Agreement between the EU and the Republic of Singapore – Analysis*, Study for the European Parliament, March 2018, p. 74, available here (visited 25 January 2019).

an incentive to remove provisions on investment protection from comprehensive free trade and investment agreements and to place them into separate agreements[77]. Consequently, following the CJEU's Opinion 2/15, the EU-Singapore and the EU-Vietnam draft agreements, originally covering trade and investment relations comprehensively, were both split into two standalone agreements: a free trade agreement concluded as an EU-only agreement and an investment protection agreement concluded as a mixed agreement respectively. Contrariwise, if the Commission would like to continue with its previous approach of negotiating comprehensive trade and investment agreements with an investment protection chapter, as exemplified by CETA, it will have to conclude the whole agreements as mixed agreements together with the Member States[78].

5.2 Splitting investment and trade – pros and cons

Comprehensive trade and investment agreements offer advantages but also may bring certain challenges. To begin with, trade and investment are economically just two sides of the same coin and are closely linked to each other. This calls for addressing them in one agreement.

In negotiations, more comprehensive agreements allow for more far-reaching 'package deals', i.e. 'do ut des'-compromises across more subject areas. Thus, more comprehensive agreements may actually increase the chances of a successful 'deal'.

On the potential downside, binding many subject areas – or issues – together, may bring political groups from across a larger spectrum closer together in their common opposition against a certain agreement. Thus, a more comprehensive agreement may actually unite opposition and 'create' a blocking majority[79].

From an EU competence perspective, concluding trade agreements without an investment protection chapter may result in faster negotiation and ratification processes as the EU can act without the Member States. In particular, Member State parliaments do not need to be closely involved in ratification processes[80]. Also other negative legal consequences of mixity could be avoided. Furthermore, investment protection could actually be designed 'stronger' as investment protection may perhaps not be compromised for trade concessions.

However, there are also some potential disadvantages when concluding separate agreements on trade and investment protection. Among others, there could be a risk that the EU investment protection agreement may not materialise, as in the case of Japan[81], which would also delay the replacement of existing Member States BITs.

[77] See M. Cremona, Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017:, ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore, in: European Constitutional Law Review, 14: 231-259, 2018, p. 237, available here (visited 6 January 2019).
[78] See S. Gáspár-Szilágyi, *CJEU Opinion 2/15 and its Implications for Applying More Legitimate Investment Courts,* available here (visited 25 January 2019).
[79] See S. Gáspár-Szilágyi, *Opinion 2/15: Maybe it is time for the EU to conclude separate trade and investment agreements,* available here (visited 25 January 2019).
[80] See E. Roussou/H. F. Willan, *Free Trade Agreement between the EU and the Republic of Singapore – Analysis*, Study for the European Parliament, March 2018, p. 75, available here (visited 25 January 2019).
[81] See S. Gáspár-Szilágyi, *Opinion 2/15: Maybe it is time for the EU to conclude separate trade and investment agreements,* available here (visited 25 January 2019).

5.3 Coherence of the EU investment policy – State of play and perspectives

The EU agreements with Singapore and Vietnam evidence that, in the future, the EU will regularly split agreements into two separate ones, one on trade and another one on investment protection.

This split, however, seems not to have led to significant differences between the EU-Singapore IPA and the EU-Vietnam IPA in terms of substance. In fact, they show a considerable degree of coherence among each other in respect of the two protection standards compared. There is, moreover, also a large degree of coherence with regard to the investment chapter in CETA. The latter of which is a comprehensive trade and investment agreement. The same holds true for the dispute settlement part.

The avenue taken by the EU agreements can be sketched as 'more comprehensive regulation' of investment protection[82]. The 2001 USA-Lithuania BIT and the 2010 Germany-Jordan BIT, in contrast, follow a 'traditional' approach which may be termed 'light touch regulation' of investment protection. It is difficult to describe these two approaches as coherent. They invite for 'treaty shopping' by strategically restructuring investments and, thus, circumvent the EU's investment protection policy.

In terms of improving coherence between the EU agreements and those of the Member States, the Dutch Draft Model BIT 2018 *partly* appears to lead the path, also for other Member States. To the extent analyzed, the Dutch Draft Model BIT 2018's approach, in respect of substantive protection standards, is largely in line with the one found in the EU agreements. What concerns the dispute settlement provisions, the Dutch Draft Model BIT 2018 is closer to the ISDS model found in the 'old' Member State BITs, such the 2001 USA-Lithuania and the 2010 Germany-Jordan BITs.

To secure coherence between EU agreements and renegotiated or newly concluded EU Member State BITs, the Commission's authorisation decision on the basis of the Grandfathering Regulation can require the EU Member States to "include or remove from such negotiations and prospective bilateral investment agreement any clauses where necessary to ensure consistency with the Union's investment policy" (Art. 9(2)). In this context, to the best of the authors' knowledge, it is surprising that the Commission has not taken issue with the regulatory approach found in the Dutch Draft Model BIT 2018. This approach is largely inconsistent with the Union's policy on dispute settlement which emerged as a reaction to the deficits identified in respect of the 'traditional' mode of dispute settlement, the latter of which now again featuring in the Dutch Draft Model BIT 2018. It can be assumed that the provision in the Dutch Draft Model BIT 2018 on the replacement of the 'traditional' mode of dispute settlement by a MIC also originates from the Commission. However, the replacement of the 'traditional' mode of dispute settlement by a MIC requires accession of both State parties to a yet to be negotiated MIC which is not a given.

Since, for the time being, the EU and the Member States seem to be bound together in mixity in the area of investment protection anyway – which is in particular due to the political choice of *not* wanting to include a local remedies rule in an EU IPA – and the negotiation and large-scale ratification of a MIC might still take some time, this could also open up a new window of opportunity: The EU and the Member States may attempt to draft and adopt a model investment protection agreement containing core provisions and principles – *a Joint EU-EU Member States Core Principles Model IPA (Core Principles Model IPA)*. Such Core Principles Model IPA may serve both the EU and the Member States for negotiating new investment protection agreements and replacing 'old' ones. It will not only make the Commission's authorization 'policy' on the basis of the Grandfathering Regulation transparent and publicly accountable, but it may improve coherence in particular in the field of dispute settlement.

[82] Hindelang, Steffen and Sassenrath, Carl-Philipp, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective, Study for the European Parliament*, September 2015, p. 165, available here (visited 11 January 2019).

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ANNEX: Workshop presentation slides

CELIS SDU

Presentation

Stocktaking of Investment Protection Provisions in EU Agreements and Member States' Bilateral Investment Treaties and Their Impact on the Coherence of EU Policy

European Parliament
'EU Investment Protection After the ECJ Opinion on Singapore: Questions of Competence and Coherence'
20.02.2019

https://www.europeaninvestmentlaw.eu/

CELIS SDU

Introduction

- Overall aim: To assess to what extent there is coherence between the different investment protection regimes and to expound the development of the EU`s investment policy after the CJEU`s Opinion on Singapore (Opinion 2/15)
- Comparison of EU-Agreements:
  - CETA
  - EU-Singapore IPA
  - EU-Vietnam IPA
- Comparison of Member States' agreements:
  - Entry into force before Grandfathering Regulation
    - USA-Lithuania BIT
    - Germany-Jordan BIT
  - After the Grandfathering Regulation
    - Dutch Model BIT 2018

https://www.europeaninvestmentlaw.eu/

CELIS SDU

Key findings I

Overall regulatory approach

Thin Regulation

- USA-Lithuania BIT
- Germany-Jordan BIT

More comprehensive regulation

- CETA
- EU-Singapore IPA
- EU-Vietnam IPA

Blanket Clauses — *More specific clauses*

"Just in between"

- Dutch Draft Model BIT 2018

https://www.europeaninvestmentlaw.eu/

CELIS SDU

Key findings II

Substantive Standards

Member States BITs

Fair and equitable treatment

- Blanket clause
- Broader investment protection

Expropriation

- Blanket clause
- Broader investment protection

EU Agreements, Dutch Draft Model BIT 2018

Fair and equitable treatment

- Contain a list of state actions and behaviors which constitute a breach of the fair and equitable treatment standard
- Do not protect legitimate expectations of investors as an own category within the FET standard

Expropriation

- Contain a definition on indirect expropriation
- A non-exhaustive list of factors concerning whether a measure or series of measures by a Party constitutes indirect expropriation

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CELIS SDU

Key findings III

Procedural Standards

Member States BITs,
(Dutch Draft Model BIT 2018, With some modifications)

Investor-State Dispute Settlement

- Ad hoc
- Rather opaque selection process for arbitrators
- No appeals mechanisms

EU Agreements

Investment Court System (ICS)

- State parties nominate member of a tribunal; random selection
- Appeals mechanism
- Transparency

https://www.europeaninvestmentlaw.eu/

CELIS SDU

Conclusions

1. The Opinion 2/15 and the split of formally comprehensive agreements into FTAs and IPAs seem, so far, not to affect the coherence of the EU`s investment protection policy
2. CETA, EU-Singapore IPA, and EU-Vietnam IPA **largely coherent among each other**
3. 'Old' Member State BITs **not coherent** in terms of substantive protection and dispute settlement clauses with the EU agreements
4. The Dutch Draft Model BIT 2018 is **coherent** with the EU agreements in respect of the substantive protection clauses compared and closer to the 'old' Member States BITs in terms of dispute settlement, hence, **incoherent** with the EU agreements
5. Thus, the EU investment protection policy faces challenges for coherence from 'old' and 'new' Member State BITs
6. → **JOINT EU-MEMBER STATES CORE PRINCIPLES MODEL IPA**

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PART II

From investor-state dispute settlement to a multilateral investment court?

Evaluating options from an EU law perspective

Prof. Dr. Stephan SCHILL, LL.M.

ABSTRACT

This short study analyzes the different options for including provisions on the settlement of investment disputes in the EU's free trade and investment agreements. It does so from the perspective of the constitutional values and principles governing EU external relations and the common commercial policy. Against this background, the study assesses the need for special recourses for investors under international law as opposed to recourses under domestic law, addresses the legal aspects raised by the introduction of 'investment court systems' in EU free trade agreements, and pays particular attention to the establishment of a permanent multilateral investment court in light of the ongoing process addressing investor-state dispute settlement reform under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).

1 Background and objective of the study

The debates on the future of investor-state dispute settlement (ISDS) are at a historic juncture. In November 2018, after more than a decade of debates in academic circles and civil society[1], Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) agreed by consensus that reforming the current system of investor-state arbitration was 'desirable' to address concerns relating to: (1) consistency, coherence, predictability, and correctness of arbitral rulings; (2) independence, impartiality, and diversity of decision-makers; and (3) costs and duration of proceedings[2]. Work at UNCITRAL will now move to the final stage of the Working Group's mandate: to 'develop any relevant solutions'[3].

On 18 January 2019, the European Commission, speaking for the European Union (EU) and its Member States, made a submission to UNCITRAL, in which it proposed a 'standing mechanism for the settlement of investment disputes' (hereinafter also referred to as 'multilateral investment court' – MIC)[4]. It builds on ideas developed as part of the 'investment court system' (ICS) the EU originally proposed for the EU-United States Transatlantic Trade and Investment Partnership (TTIP)[5] and integrated in the trade and investment agreements with Canada (the Comprehensive Economic and Trade Agreement – CETA), Mexico, Singapore and Vietnam[6]. The MIC would replace investor-state arbitration, which is used in most international investment agreements (IIAs) so far.

The proposed MIC is to consist of a two-tiered, permanent body with a first instance and an appellate tribunal; it is to be staffed with a diverse and qualified body of full-time adjudicators who are subject to strict ethical rules and are appointed so as to ensure their independence, impartiality and neutrality; the MIC's procedures are to be transparent, its awards subject to effective enforcement mechanisms; jurisdiction would be structured to allow ISDS proceedings under existing IIAs to come under the umbrella

[1] See, for example, Gus Van Harten, Investment Treaty Arbitration and Public Law (OUP 2007); Michael Waibel et al (eds). The Backlash Against Investment Arbitration: Perceptions and Reality (Wolters Kluwer 2010); Stephan W Schill (ed), International Investment Law and Comparative Public Law (OUP 2010); Pia Eberhardt and Cecilia Olivet, Profiting from Injustice – How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom (Corporate Europe Observatory and Transnational Institute 2012); M Sornarajah, Resistance and Change in the International Law on Foreign Investment (CUP 2015); Jean E Kalicki and Anna Joubin-Bret (eds), Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century (Brill 2015); Steffen Hindelang and Markus Krajewski (eds), Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified (OUP 2016); Andreas Kulick (ed), Reassertion of Control over the Investment Treaty Regime (CUP 2016); Karl P Sauvant, The Evolving International Investment Law and Policy Regime: Ways Forward. E15 Task Force on Investment Policy – Policy Options Paper (International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016).

[2] See United Nations Commission on International Trade Law (UNCITRAL), 'Draft Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session' UN Doc No A/CN.9/964 (6 November 2018) paras 40, 53, 63, 83, 90, 98, 108, 123, 127, 133.

[3] For the scope of the mandate, see United Nations, 'Report of the United Nations Commission on International Trade Law of its Fiftieth Session (3-21 July 2017)' Official Records of the General Assembly, Seventy-second Session, Supplement No 17, UN Doc No A/72/17 (2017) para 264.

[4] European Commission, 'Submission of the European Union and its Member States to UNCITRAL Working Group III' (18 January 2019) http://trade.ec.europa.eu/doclib/html/157631.htm accessed 5 March 2019 (reproduced in UNCITRAL, UN Doc No A/CN.9/WG.III/WP.159/Add.1 (24 January 2019)). On the mandate of the Commission, see Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (EU Doc No 12981/17 ADD 1) (1 March 2018).

[5] See European Commission, 'Commission Draft Text TTIP: Investment' (2015) http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf accessed 5 March 2019.

[6] The texts of the respective agreements are available on the Commission's website on 'Negotiations and agreements' http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ accessed 5 March 2019.

of the new institution through an opt-in mechanism similar to how the Mauritius Convention extended the UNCITRAL Rules on Transparency to old IIAs[7].

The Commission considers its proposal best suited to address all concerns identified in respect of ISDS in a comprehensive fashion: a standing court ensures greater coherence and consistency and is more independent and cost-effective than any alternative[8]. The Commission further mentions the need to consider creating a mechanism for assisting developing countries in litigating international investment disputes and concedes the need for flexibility so as to allow the participation in the MIC of states that prefer state-to-state dispute settlement or the creation of an appeals facility for investor-state arbitration awards only[9].

It is difficult to imagine, however, that the EU's model for ISDS will be universally accepted. Despite convergence on many procedural features, such as transparency, ensuring independence and impartiality of dispute resolvers, possibilities for early dismissal of unmeritorious claims, ensuring state control and avoiding multiple proceedings, the other main models for ISDS reform diverge starkly in institutional design from the EU proposal[10]. Several states (including the United States and Japan) seem to prefer to reform investor-state arbitration incrementally, as exemplified by the Agreement for Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the treaty succeeding to the Trans-Pacific Partnership (TPP) after US withdrawal[11]. Other states, like India, express a strong preference for domestic courts by suggesting the reintroduction of the exhaustion of local remedies[12]. And again other states, like Brazil, prefer inter-state adjudication[13].

The present study evaluates the different options for reforming investment dispute settlement, focusing specifically on two particularly salient aspects: (1) the question of whether there is a need for investor access to an international dispute settlement mechanism also in light of the lack of comparable mechanisms under international law for enforcing investor obligations and (2) the suitability of the MIC, as the officially endorsed EU position, to address concerns relating to ISDS. The study assesses reform options as to how well they fit with the EU's constitutional framework governing its external relations and the common commercial policy, of which ISDS forms part, as laid down in Arts 3(5) and 21 TEU and referenced in Art 207(1) TFEU[14]. The text of these provisions is reproduced in the following box.

[7] See Commission (n 4) paras 11-37. See further on the opt-in mechanism Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap* (CIDS-Geneva Center for International Dispute Settlement 2016).

[8] See Commission (n 4) paras 40-56.

[9] See Commission (n 4) paras 38-39.

[10] See further Stephan W Schill and Geraldo Vidigal, *Cutting the Gordian Knot: Investment Dispute Settlement à la Carte*. RTA Exchange (International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB) 2018); Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 American Journal of International Law 410.

[11] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, entered into force 30 December 2018). The CPTPP incorporates the text of the Trans-Pacific Partnership (TPP), which was signed 4 February 2016.

[12] See the Model Text for the Indian Bilateral Investment Treaty (January 2016) http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560 accessed 5 March 2019.

[13] Geraldo Vidigal and Beatriz Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2018) 19 Journal of World Investment & Trade 475.

[14] See also European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (2015) 7, 22 ff. On the need to assess ISDS against constitutional law and values, see also Stephan W Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 Journal of International Economic Law 649.

Relevant provisions of EU primary law

Article 207(1) TFEU

[...] The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

Article 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3(5) TEU

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 21 TEU

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

   The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

   (a) safeguard its values, fundamental interests, security, independence and integrity;

   (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

   (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

   (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

   (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

   (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

   (g) assist populations, countries and regions confronting natural or man-made disasters; and

   (h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

   The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Part 2 of this study addresses the need for access of foreign investors to international recourses against host states and considers whether providing such recourses for investors only creates an unbalance in relation to enforcing investor duties. Part 3 summarizes the constitutional constraints under EU law for including ISDS mechanisms in EU IIAs. Part 4 evaluates the MIC model proposed by the Commission against the values and principles governing EU external action and discusses the model's most important structural challenges. Part 5 concludes by summarizing the study's findings and recommendations.

2 Reasons for investor access under international law

When considering policy options for settling international investment disputes, one central question is why such disputes should be settled in an international forum to which investors have access rather than principally in domestic courts, as suggested by India's preferred model, or in an inter-state dispute settlement system as enshrined in Brazil's recent practice. In particular in trade and investment negotiations with countries with well-developed legal systems, such as Canada or the United States, the argument is often heard that domestic courts in those states, just as the courts in the EU, offer adequate mechanisms for investment protection and dispute settlement[15]. Yet, a number of reasons, as detailed in this section, militate for the creation of international dispute settlement mechanisms to which foreign investors have access. These reasons are also backed up by EU values and principles governing EU external action.

2.1 Protection against political risk in host countries

The reason why the EU is seeking to include ISDS mechanisms in its IIAs is not primarily the promotion and protection of inward investment into the EU. Rather, the principal concern lies in offering effective protection for European investors against expropriation, arbitrary, discriminatory treatment, and other unlawful acts in the respective host country and to provide investors with dispute settlement options outside the host state's judiciary. This is important as the judiciary in foreign countries may be, or may be perceived to be, insufficiently independent, impartial, or neutral, or may not offer effective dispute settlement mechanisms, for example due to clogged dockets and excessively lengthy procedures, or because of access limitations to judicial review[16]. This is an obstacle that can result in insufficient protection of EU investors abroad, possibly dis-incentivizing outward foreign investment.

Providing EU investors with the possibility for recourse in an international forum through ISDS is therefore one form of protecting EU investors abroad and of providing them with access to justice against unlawful conduct by the respective host state. This is a central concern for the idea of the rule of law and reflects EU values and principles. Art 3(5) TEU requires the EU to 'contribute to the protection of its citizens.' Access to justice is part of the principle of the rule of law (mentioned both in Arts 21(1) and 2 TEU) and is enshrined in Art 47 of the Charter of Fundamental Rights of the European Union (CFR), Art 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[17], and numerous constitutions of

[15] See Deutscher Richterbund, Stellungnahme No. 04/16 (February 2016) p 3 https://www.bmwi.de/Redaktion/DE/Downloads/S-T/stellungnahme-deutscher-richterbund-zur-errichtung-eines-investitionsgerichts-fuer-ttip.pdf accessed 5 March 2019.

[16] On this justification see Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 European Journal of International Law 1147, 1160-1163. For critical discussion see also Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2(1) Trade, Law and Development 19, 33-35.

[17] See *Golder v United Kingdom*, Judgment (21 February 1975) ECHR Series A No 18, paras 28–36; Christoph Grabenwarter and Katharina Pabel, in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG-Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2nd edn, Mohr Siebeck 2013) vol 1, ch 14, paras 73 ff.

Member States[18]. By providing an internationalized form of judicial review that compensates for rule-of-law deficits in domestic courts, ISDS mechanisms thus reflect the principle of the rule of law.

It should also be noted that the need to grant access to justice to EU investors is not necessarily limited to countries with weak governance structures. Also in relation to countries that are considered to have well-functioning judiciaries, structural deficits may exist in respect of effective access to justice before domestic courts. The review of executive acts may be limited or excluded, for example under doctrines, such as the 'political questions'-doctrine that US courts use in order to exempt certain executive measures from judicial review, including in cases relating to foreign trade or public procurement[19]. It also bears noting that foreign judgments, even from judicial systems that are widely respected for their independence and impartiality, are not automatically recognized and enforced in the EU, because certain practices – such as the award of punitive damages – may be viewed as contravening the *ordre public* in EU Member States[20]. Similarly, there is a concern that the host state's courts, even when they are independent and impartial, show bias in favor of their own state and to the detriment of the foreign party[21]. Finally, even legal systems with well-functioning domestic judiciaries may change over time, thereby bringing to the fore new aspects of political risk that did not exist in the past.

It is for reasons of reciprocity that the EU must offer the same protections and dispute settlement mechanism at home that it seeks for its own investors abroad. Offering reciprocity is also demanded by the principles governing EU external action. Art 21(1) TEU requires the EU to respect the 'principle[] of [sovereign] equality' as well as the 'principles of the United Nations Charter', which, in turn, enshrines the principle of sovereign equality in its Art 2(1).

2.2 Effective enforcement mechanism for international law

A further aspect militating in favor of providing EU investors with international recourses to settle investor-state disputes relates to applicable law. What EU investors vindicate under an ISDS mechanism are regularly not rights granted under domestic law. Instead, their claims concern alleged breaches of the international agreement in question. Domestic courts, however, do not necessarily apply that international agreement within the internal legal order and do not necessarily give it primacy over conflicting national law[22]. EU agreements, such as CETA, even expressly provide that claims for breach of the agreement cannot be brought in domestic courts[23]. This speaks in favour of creating an international remedy to which foreign investors have access.

[18] Article 24 of the Italian Constitution; Article 24(1) of the Spanish Constitution; Art 20(1) of the Greek Constitution; Art 19(4) of the German Constitution. Siehe further Carsten Nowak, 'Recht auf effektiven Rechtsschutz' in Sebastian Heselhaus and Carsten Nowak (eds), *Handbuch der Europäischen Grundrechte* (CH Beck 2006) § 51 paras 23, 24 (with further references to Member States constitutions).

[19] See Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' Congressional Research Service Report No R43834 (2014) 10-12, 15-19 https://fas.org/sgp/crs/misc/R43834.pdf accessed 5 March 2019.

[20] See, for example, German Federal Court of Justice, BGHZ 118, 312 (334 ff.).

[21] Cf Barbara Bucholtz, 'Sawing Off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing Duty Assessments under Free Trade Agreements' (1995) 19 Maryland Journal of International Law 175, 177-178 and accompanying footnotes (addressing the justification for binational panels instead of review by domestic courts in the 1988 free trade agreement between Canada and the United States).

[22] For examples, see *LaGrand Case, Federal Republic of Germany and LaGrand (Walter) v. United States and Governor of Arizona*, United States Supreme Court, 526 US 111 (1999); *Medellín v. Texas*, United States Supreme Court, 552 US 491 (2008); CJEU, Case C-61/94, *Commission./.Germany*, ECR 1996, I-3989 ff.

[23] See Art 30.6 CETA. For critical accounts of this provision see Ernst-Ulrich Petersmann, 'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) 18 Journal of International Economic Law 579, 592-594; Marco Bronckers, 'Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts?: An EU View on Bilateral Trade Agreements' (2015) 18 Journal of International Economic Law 655, 663 f.

By contrast, inter-governmental or inter-state mechanisms, such as diplomatic protection, or formal inter-state dispute settlement, do not provide an adequate substitute for an ISDS mechanism. Affected investors regularly do not have a right vis-à-vis their government to have their claim espoused against a foreign sovereign, thus making investors dependent on the goodwill of their home country and likely prejudicing smaller in favor of larger investors[24]. Giving investors access to an international forum therefore is the most effective means to enforce the substantive rights granted under those treaties.

2.3 Actively shaping global governance

A third reason that militates for settling investment disputes through ISDS mechanisms and developing such mechanisms in a multilateral forum, such as UNCITRAL, consists in the contribution this can make to international cooperation and global governance. In an inter-state system, exercising diplomatic protection could burden the political climate between the EU and its foreign partners, which may be counterproductive to solving other problems for which international cooperation is necessary, be it environmental protection or international security[25]. Granting investors access to ISDS thus creates space for the EU to cooperate internationally more effectively in other fields. This yields the EU's constitutional commitment expressed in Arts 3(5) and 21 TEU to contribute to shaping international relations in line with the values that inspired its own creation.

More specifically, developing ISDS mechanisms in a multilateral setting, for example in the current UNCITRAL process, also reflects the EU's constitutional commitment to 'promote multilateral solutions to common problems' (Art 21(1) TEU) and to 'promote an international system based on stronger multilateral cooperation and good global governance' (Art 21(2)(h) TEU). An active support of the current ISDS reform process at UNCITRAL allows the EU to use its external relations powers to shape globalization according to the EU's constitutional mandate to promote and protect democracy, the rule of law, human rights, and sustainable development, and to support multilateralism.

That the solutions to be developed for ISDS preferably are of a multilateral nature, and do not depend on the concrete bilateral relations in question, also becomes clear when considering that investment flows are not of a strictly bilateral nature, but can be structured so as to fall within the scope of almost any IIA. Even if, for example, CETA had not provided for access to ISDS, Canadian companies could structure their investment into the EU through a company protected by an EU agreement with a third country that contains an ISDS mechanism[26]. The same would apply vice versa for EU investors who invest in Canada. For this reason, it is difficult to limit ISDS to specific bilateral relations. The issue is one of principle: either ISDS is not sought at all, or it is structured so as to be acceptable, in principle, for any foreign investor.

2.4 Asymmetry problem: investor obligations and enforcement

One important concern that results from the creation of international dispute settlement mechanisms to which foreign investors have access lies in its asymmetric set-up: investors have access to an international forum, but an international forum is not available to enforce investor obligations and to sanction investor

[24] See comprehensively Juliane Hagelberg, Die *völkerrechtliche Verfügungsbefugnis des Staates über Rechtsansprüche von Privatpersonen* (Nomos 2006).
[25] This phenomenon is also referred to as 'de-politicization'. See Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA (1986) 1 ICSID Review-Foreign Investment Law Journal 1; Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 ICSID Review-Foreign Investment Law Journal 14.
[26] See Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 221 ff.

misconduct[27]. This is a significant concern as the very justification for granting investors access to ISDS, namely deficits in domestic governance and domestic courts, would support granting those affected by investor misconduct access to an international forum as well. At the same time, the concern for asymmetry should not be resolved by opposing investor access to an international dispute settlement forum or by not supporting the present UNCITRAL reform process for ISDS.

First, in this context, it is important to distinguish between questions of substantive law and procedure. Investor obligations are first and foremost matters of substantive law and are principally addressed by domestic law; only gradually, they appear in international instruments, mostly in the form of soft law, such as the OECD Guidelines for Multinational Enterprises[28], and are starting to be included or referenced in IIAs[29]. ISDS, however, is principally about allowing the effective enforcement of international law. Similarly, the present UNCITRAL process relates, at least at present, principally to questions of procedure and may therefore not be the right forum for addressing what are to a considerable extent questions of substantive law.

Second, international dispute settlement mechanisms are in many situations not strictly necessary to enforce investor obligations. Instead, investor misconduct can, in many circumstances, be addressed through the means of administrative law and the enforcement mechanisms it provides at the domestic level. In addition, ISDS mechanisms, already at present, can be used to enforce certain investor duties. Depending on the applicable IIA, breaches of domestic law can bar an investor's access to ISDS[30]. Similarly, counterclaims by states against investors are increasingly accepted as a means to sanction investor misconduct[31].

Finally, asymmetries arising out of establishing ISDS mechanisms without corresponding international mechanisms for enforcing investor duties can be mitigated by strengthening enforcement and dispute settlement in host and home countries, including through domestic law reform programs and technical assistance for host countries. This could equally address imbalances resulting from investors' asymmetric access to justice.

All in all, trying to address the entire spectrum of investor obligations as part of the current UNCITRAL process, which relates so far principally to questions of procedure, may prove overly ambitious. This notwithstanding, a slightly less ambitious, but still meaningful approach, would be to keep any adjudicatory mechanism that results from the current UNCITRAL process sufficiently open, so that its

[27] The concern for investor obligations has also been expressed repeatedly by the European Parliament. See European Parliament, 'European International Investment Policy' Resolution 2010/2203(INI) (6 April 2011) para 37; European Parliament, 'Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' Resolution 2014/2228(INI) (8 July 2015) para 2(d)(xiii); European Parliament, 'A Forward-Looking and Innovative Future Strategy for Trade and Investment' Resolution 2015/2105(INI) (5 July 2016) paras 18 and 68.

[28] Organisation for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011).

[29] See Kathryn Gordon et al, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' OECD Working Papers on International Investment 2014/01 (2014) http://dx.doi.org/10.1787/5jz0xvgx1zlt-en accessed 5 March 2019.

[30] For critical discussion of the case law see Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29 ICSID Review-Foreign Investment Law Journal 155; Stephan W Schill, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 Law and Practice of International Courts and Tribunals 281.

[31] See *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 1110–1221. See further Arnaud de Nanteuil, 'Counterclaims in Investment Arbitration: Old Questions, New Answers?' (2018) 17 Law and Practice of International Courts and Tribunals 374.

jurisdiction can cover, if disputing parties so choose, also claims against foreign investors; this could potentially constitute an important step in addressing gaps in investor accountability[32].

3 Constitutional constraints under EU law

Crucial for evaluating any future ISDS mechanism are the constitutional constraints EU primary law establishes. Currently, the question whether the ICS mechanism in CETA is in line with EU law is pending before the Court of Justice of the European Union (CJEU) in *Opinion 1/17*[33]. On 29 January 2019, Advocate General (AG) Bot handed down his opinion on the EU constitutionality[34]. The CJEU is expected to decide in the next months. This decision will not only determine the EU constitutionality of CETA's ISDS mechanism, but by implication also that included in other EU IIAs. In addition, *Opinion 1/17* will have repercussions on the Commission's approach to establish an MIC and determine how much constitutional leeway the EU treaties grant for the achievement of such a project.

Three issues are before the CJEU in *Opinion 1/17*: 1) whether the ICS mechanism conforms to the principle of autonomy of EU law and respects the Court's monopoly to interpret EU law authoritatively; 2) whether the grant of access to foreign but not domestic investors to the ICS is in line with the principle of equal treatment and non-discrimination under Art 21 CFR; and 3) whether the ICS constitutes an independent and impartial tribunal in the sense of Art 47 CFR.

In his opinion, AG Bot concluded that no breach of the respective principles of EU law occurred. Whether the CJEU will adopt the same position is, however, entirely open. In the past, the Court has repeatedly prevented the creation of, or participation by the EU and/or its Member States in, international dispute settlement mechanisms[35]. Most recently[36], it blocked accession of the EU to the ECHR because it found a violation of the principle of autonomy of EU law[37]. In *Achmea*, the CJEU invoked the concept of autonomy of EU law to find that the provisions in IIAs between Member States for investor-state arbitration were incompatible with EU law[38].

Certainly, the relationship between the ECHR and EU law is different from the relationship between EU law and any other international treaty, not least because the ECHR plays a special role for determining general principles of EU law[39] and in interpreting the CFR[40]. Likewise, the *Achmea* ruling may be specific to the intra-EU context and therefore unrelated to EU participation in ISDS[41]. Still, there is a tangible danger that the CJEU's jurisprudence on the autonomy of EU law could prevent the EU from agreeing to ISDS, whether in the form of an ICS or an MIC.

[32] This could be combined with the proposal for the establishment of an international court dealing with trans-border mass torts, which often have their origin in foreign investment projects. See Maya Steinitz, *The Case for an International Court of Civil Justice* (CUP 2019).
[33] See 'Request for an Opinion Submitted by the Kingdom of Belgium Pursuant to Article 218(11) TFEU (Opinion 1/17)' [2017] OJ C 369/2.
[34] Opinion of Advocate General Bot, *Opinion 1/17* (29 January 2019).
[35] For a detailed overview over the CJEU's past jurisprudence, see Szilárd Gáspár-Szilágyi, 'A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union' (2016) 17 Journal of World Investment & Trade 701; Steffen Hindelang, 'Repellent Forces: The CJEU and Investor-State Dispute Settlement' (2015) 53 Archiv des Völkerrechts 68.
[36] See CJEU, Opinion 1/91, *European Economic Area I* [1991] ECR I-6079 paras 30-35; Opinion 1/09, *European and Community Patents Courts* [2011] ECR I-1137, paras 78, 80 and 89.
[37] CJEU, Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (18 December 2014) paras 178-214, 236-48.
[38] CJEU, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158.
[39] See CJEU, Case C-94/00, Roquette Frères SA v Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes (Commission of The European Communities, Third party) [2002] ECR I-9011, para 23; Joined Cases C-46/87 and 227/88, Hoechst AG, ECR 1989, 2859, para 13 (with further references).
[40] See Art 53 CFR.
[41] Cf *Achmea* (n 38) para 57.

A decision preventing the EU from agreeing to the respective ISDS mechanisms, or significantly limiting its participation in them, would, however, be little attractive from the perspective of the constitutional principles and values mentioned in Art 21 TEU, as it could effectively end the EU's involvement in reforming international investment law and ISDS according to its own constitutional values and mandate. Instead, other powerful actors could then shape the content and institutional infrastructure of international investment law and ISDS in ways that are potentially less in line with EU constitutional values.

In any event, monitoring the developments in the pending CJEU proceedings in *Opinion 1/17* will be crucial in determining the EU's policy space in shaping ISDS reform.

4 The Multilateral Investment Court: benefits and challenges

Because of the reasons that militate for providing ISDS mechanisms at the international level, a general state-to-state model (as contained in Brazil's recent IIA practice) or a model requiring the exhaustion of local remedies (as championed by India), are little attractive from an EU perspective. Among the other options for ISDS reform, the EU and its Member States have expressed a clear preference. Rather than reforming investor-state arbitration (the approach taken inter alia under the CPTPP), they subscribe to further institutionalization, either, as included in recent EU free trade agreements, through the ICS mechanism on a bilateral basis, or, as now proposed at UNCITRAL, in the form of a single MIC.

The European Parliament has already expressed its agreement with the establishment of the court-like ICS when considering the TTIP negotiations[42]; and also welcomed multilateral approaches to ISDS reform when considering the Commission's position on the EU's common commercial policy[43]. The core question that therefore arises at present is to which extent the European Parliament should also support the Commission's proposal to create an MIC. For this purpose, this section addresses the benefits of the MIC, as compared to alternative ISDS mechanisms at the international level, in particular the ICS mechanism, but also discusses the challenges connected to such a project. Rather than zooming in on the technical details, the section concentrates on structural questions of institutional design[44].

4.1 Benefits of the Multilateral Investment Court

The MIC as laid out in the Commission's submission to UNCITRAL will be able to address all the concerns identified by the UNCITRAL Working Group[45]. It would make ISDS more consistent, coherent and predictable and allow for possibilities to correct incorrect rulings through its appellate tribunal. A permanent court would also ensure greater independence and impartiality of decision-makers and allow for a representative and diverse body of adjudicators. The MIC would also result in cheaper and shorter proceedings for the parties as no time and money will be spent on the appointment of arbitrators and because points of law will not be re-litigated over and over again once the MIC has established a consistent jurisprudence.

The MIC proposal is arguably also better in line with the values mentioned in Arts 3(5) and 21 TEU, in particular as far as the promotion of the rule of law and democracy are concerned, as compared to both reformed investor-state arbitration or a bilateral system of multiple ICS mechanisms. From an EU perspective, the MIC, with adjudicators that are appointed by public institutions and are subject to

[42] European Parliament, 'Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' Resolution 2014/2228(INI) (8 July 2015) para 2(d)(xv).
[43] European Parliament, 'A Forward-Looking and Innovative Future Strategy for Trade and Investment' Resolution 2015/2105(INI) (5 July 2016) para 68.
[44] For an in-depth study of the MIC, see also Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (European Yearbook of International Economic Law Special Issue, Springer Nature Switzerland 2018).
[45] See European Commission, *UNCITRAL Submission* (n 4) paras 40 ff.

continuous democratic control, would have a higher level of democratic legitimacy than a mechanism of investor-state arbitration where at least one private actor, the investor, is involved in the appointment of adjudicators. In addition, the higher level of consistency an MIC is likely to attain, as compared to reformed investor-state arbitration or a bilateral system of ICS mechanisms, is more in line with the concept of the rule of law.

The MIC proposal also addresses many of the concerns the European Parliament has expressed in past resolutions. Thus, the Commission proposal stresses the importance of transparency and third-party participation in ISDS[46]; it mentions the need for the MIC to be affordable for small and medium enterprises and for least developed and developing countries[47]. The Commission proposal also stresses the importance of effective enforcement mechanisms for MIC rulings, either through existing enforcement mechanisms under the New York and ICSID Conventions, or through the creation of a new enforcement regime[48]. Similarly, the Commission proposal mentions the need for control mechanisms that respond effectively to keep in place both the powers of interpretation by contracting parties to IIAs as well as those of the contracting parties to the MIC[49]. This would ensure that the MIC remains subject to mechanisms of democratic control that could create a counterweight to correct its jurisprudence should states disagree with how it develops.

All of this would contribute to making the MIC into a mechanism that ensures that the future ISDS architecture conforms to EU principles to further the rule of law, democracy, and international cooperation at a multilateral level, as enshrined in Arts 3(5) and 21 TEU. It should be noted, however, that alternative approaches to reforming ISDS, including reformed investor-state arbitration, or using the MIC only as an appeals body for investor-state arbitral awards, would not be incompatible with EU values and principles as such. They would, however, likely not achieve the same level of consistency and democratic control as the establishment of an MIC.

4.2 Continuous challenges

Its benefits notwithstanding, the establishment of an MIC also comes with a number of challenges that need to be weighed, to the extent they cannot be addressed, in relation to its advantages.

4.2.1 Consistency and lack of substantive rules

A frequently raised concern against the establishment of an MIC that hears disputes under a great number of bilateral, regional or sectoral IIAs is that consistency will not be achieved without a multilateral agreement on the substantive rules governing investor-state relations. This concern questions whether the current UNCITRAL approach to work on procedure before substance is sensible in light of the objective to create greater consistency and predictability[50].

There is little doubt that agreeing on uniform substantive rules governing investor-state relations would further increase consistency, coherence, and predictability. Yet, it is doubtful whether aiming to negotiate

[46] Ibid paras 28-29. For this concern, see also European Parliament, 'European International Investment Policy' Resolution 2010/2203(INI) (6 April 2011) para 31.
[47] European Commission, *UNCITRAL Submission* (n 4) paras 33 and 38. For these concerns, see European Parliament, 'European International Investment Policy' Resolution 2010/2203(INI) (6 April 2011) paras 22 and 34 (concerning SMEs); and European Parliament, 'European International Investment Policy' Resolution 2010/2203(INI) (6 April 2011) para 21; European Parliament, 'A Forward-Looking and Innovative Future Strategy for Trade and Investment' Resolution 2015/2105(INI) (5 July 2016) para 15 (concerning developing countries).
[48] European Commission, *UNCITRAL Submission* (n 4) paras 30-32.
[49] Ibid para 26.
[50] For discussion of this concern see also Bungenberg and Reinisch (n 44) 115-119.

such rules is politically feasible. Various multilateral projects have failed in the last 20 years, including under the auspices of the Organisation for Economic Co-operation and Development (OECD) as well as in the World Trade Organization (WTO)[51]. Procedural reform, by contrast, seems more promising, not least because of the consensus already reached at UNCITRAL. Also, a successful conclusion of ISDS reform could be the precursor to further discussions on the multilateralization of substantive law.

What is more, even with the continuous existence of a multitude of bilateral, regional and sectoral IIAs, a single dispute settlement forum, such as the MIC, could contribute to avoiding unjustified inconsistencies. After all, many of the most notorious inconsistencies in the present ISDS system were not due to differences in the underlying IIAs, but concerned differences in the application of customary law, the interpretation and application of generic treaty provisions, such as most-favored-nation or umbrella clauses, and the handling of arbitral procedure or questions of admissibility and jurisdiction. An MIC would overcome the problem of such unjustified inconsistencies even without the multilateralization of substantive investment treaty standards.

4.2.2 Right to regulate; protection of labor rights, environment, sustainable development

A further concern raised against a project, such as the MIC, that focuses solely on dispute settlement is whether this will sufficiently protect host states' right to regulate as well as competing concerns, such as labor rights, the environment and sustainable development[52]. However, here again, the right to regulate, as well as the protection of competing concerns, is first and foremost an issue that concerns the substantive law governing investor-state relations. It would likely overburden the present UNCITRAL process to include multilateral discussions on such matters at this moment beyond generic references to the need to safeguard the right to regulate[53].

What should be ensured, however, is that the jurisdiction of any new institution that emerges from the present process is not *ab initio* limited to claims by foreign investors, but could encompass the possibility for claims by other parties that relate to foreign investment projects[54]. This could involve claims by affected populations or public interest organizations against investors and/or states for failure to respect and protect the rights of affected populations.

4.2.3 Enforcement of MIC rulings and relationship to existing structures

Another important practical issue concerns the enforcement of MIC rulings and its relationship to existing structures addressing international investment law and international dispute settlement[55]. For present-day investor-state arbitration, or a reformed future version of it, the recognition and enforcement of arbitral awards in ensured through the operation of the New York Convention[56] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Conventions)[57]. These instruments ensure that foreign arbitral awards, respectively ICSID awards, will be

[51] For in-depth discussion of past efforts to agree to multilateral rules on foreign investment, see Schill (n 26) 23-64.
[52] See Steffen Hindelang, 'Study on Investor-State Dispute Settlement ('ISDS') and Alternatives of Dispute Resolution in International Investment Law' in European Parliament (ed), *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements* (EXPO/B/INTA/2014/08-09-10) (September 2014) 39, 72 ff.
[53] Suggesting the inclusion of such a reference in a future MIC statute, Bungenberg and Reinisch (n 44) 5.
[54] See the discussion supra Section 2.4.
[55] See further Bungenberg and Reinisch (n 44) 147 ff.
[56] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.
[57] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

recognized and enforced in all signatory states of the respective convention. Whether the MIC, from a legal perspective, can be constructed so as to interlink with these conventions is still an open question[58]. This concern should therefore be monitored closely to see how the UNCITRAL process further unfolds.

4.2.4 Relationship to and role of domestic courts

A further concern with the establishment of an MIC is its relation to domestic courts. The fact that ISDS is only open to foreign investors risks allowing claimants either to bypass domestic courts entirely or gives them an additional remedy that domestic investors do not have. This risks creating a parallel justice system and could further reduce the power of domestic courts to control government conduct in pursuit of the rule of law[59].

Yet, rather than seeing ISDS at the domestic and the international level as mutually incompatible, or only permitting international ISDS after the exhaustion of local remedies, there is unexplored room for smarter ways of integrating domestic adjudication and ISDS[60]. A possible solution could be to require a more focused recourse at the domestic level, which is subject to a limited period of time before ISDS proceedings can be initiated at the international level. Such prior recourse could take place in a domestic court with specific expertise in resolving foreign investment disputes.

Special chambers in appeals courts or international commercial courts that are developed in several jurisdictions as of recent may be an option for such prior domestic recourse. This would ensure that domestic judicial institutions with judges who possess immediate democratic legitimacy get a first opportunity to control the host state's government conduct before a case proceeds to the international level. It would allow the domestic judiciary to control government conduct and enhance domestic rule-of-law culture, without taking away rule-of-law control by international adjudicators.

4.2.5 Strengthening domestic governance

Independently of procedural reforms to ISDS itself, it is also important to realize that many problems attributed to ISDS have their origin elsewhere, including in deficits in implementing substantive IIAs disciplines[61]. Hence, work on strengthening domestic governance and domestic institutions in order to reduce, if not avoid, the liability risk under the treaties and to increase compliance of host states with their treaty obligations would also reduce concerns vis-à-vis ISDS. This is all the more true as the greatest source of breaches of IIAs stems from the executive branch of government, not the legislator or domestic courts.

Measures that would help to address some root causes of ISDS procedures could include technical assistance to strengthen compliance of host states with investment treaty obligations, for example through the inclusion of investment treaty impact assessment procedures, capacity-building and training of domestic decision-makers on investment treaty compliance and dispute prevention, the implementation of better conflict management strategies for host states that face ISDS proceedings, or

[58] Compare N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 Journal of World Investment & Trade 585 with August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 Journal of International Economic Law 761.

[59] See, for example, Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 International Review of Law and Economics 107, 118-122. For a critical evaluation of this claim see Susan D Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2006) 19 McGeorge Global Business & Development Law Journal 337, 365-372.

[60] See Schill (n 14) 664-665.

[61] See for an in-depth study on the relationship between IIAs and domestic governance Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018).

even the creation of *Conseil d'Etat*-type competences to advise governments on the implementation of IIAs or on the IIA-compatibility of host state measures.

4.2.6 Continued democratic control

Another challenge consists in how to ensure continuous democratic control and legitimation of ISDS mechanisms once they are established and in operation. After all, such mechanisms are living instruments. They do not only mechanically apply the law to the facts of a specific case, but through their jurisprudential activity they also contribute to the further development of the law governing investor-state relations[62]. They exercise, in other words, international public authority[63]. This has been true in respect of the present system of investor-state arbitration, and it will be no different for any future ISDS mechanism, including the MIC. A challenge arising in regard of ISDS mechanisms is therefore how to ensure continuous democratic oversight and control by the contracting parties and to provide for legislative counterweights, for example in the form of treaty bodies that can issue binding interpretations and correct or counterbalance decisions of the MIC that the contracting parties disagree with.

The Commission's proposal mentions control mechanisms to be established as part of the applicable IIA and possibly at the level of the future MIC as well[64]. For the European Parliament, it will be important, in this context, to ensure its own continued involvement with these mechanisms for democratic control and not to cede control fully to the other branches of the EU or the Member States. Instead, the European Parliament should consider seeking internal mechanisms that allow it to have continuous influence over the dynamic development of MIC jurisprudence. Whether the 'Framework Agreement on Relations between the European Parliament and the European Commission'[65] is sufficient for these purposes, would need to be assessed in more depth.

4.2.7 Trust by the disputing parties

Democratic control of ISDS mechanisms is one important aspect for the legitimacy of the system; trust by the disputing parties another. So far, investor-state arbitration has had the great advantage of having been trusted by the disputing parties, including foreign investors and states. In particular, the possibility of participating in the appointment of arbitrators has fostered that trust and created a sense of ownership of the dispute settlement process by the disputing parties[66]. A permanent institution, such as an MIC, by contrast, would do away with party appointment.

The appointment process for members of the MIC would therefore need to be structured so as to ensure that the parties vest trust in such a new investment dispute settlement institution. To achieve this, it is important that the appointment mechanism is cast in a way that its members not only possess the necessary professional and ethical qualifications, but also are seen as truly neutral and not leaning one-sidedly in favour of states. If this cannot be achieved, it is likely that investors will not make use of the new institution and instead try to channel their disputes back to arbitration, for example, by increasingly resorting to contractual arrangements to this effect with host states.

[62] See Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (ICCA Congress Series No 14, Wolters Kluwer 2009) 5.

[63] Ingo Venzke, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication' (2016) 17 Journal of World Investment & Trade 374. See more generally Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2016).

[64] European Commission, *UNCITRAL Submission* (n 4) paras 26 and 27.

[65] Framework Agreement on Relations between the European Parliament and the European Commission, *Official Journal* L 304/47 (20 November 2010).

[66] Cf Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded' (2013) 23 Arbitration International 7.

4.2.8 Political feasibility and need for flexibility in institutional design

A final and highly important problem with the proposal to establish an MIC concerns the political feasibility of such a project. This hinges to a great extent on whether the MIC will be acceptable to actors outside the EU. Indeed, it is difficult to imagine that proponents of proposals as divergent as the MIC, state-to-state dispute settlement, reformed investor-state arbitration, or preferring investment dispute settlement in domestic courts, will be able to agree on a uniform institutional design. Yet, institutional fragmentation could further exacerbate the problems with ISDS and entrench inconsistencies, incoherence, and unpredictability, rather than remedy them successfully.

One solution to this concern is to keep the architecture of a future MIC open, even if an MIC would, from the perspective of the EU, best address the concerns with present-day ISDS[67]. Flexibility in dispute settlement design would help garner political support from other states that are unwilling to fully endorse and submit to the jurisdiction of an MIC. In fact, the Commission's MIC proposal to UNCITRAL acknowledges the need for flexibility and builds on the idea of 'open architecture'[68], considering that a standing mechanism could not only settle investor-state disputes, but also operate in inter-state cases in order to permit the participation of states like Brazil who limit investment dispute settlement under international law to the inter-state context. Similarly, the Commission in its proposal to UNCITRAL signals openness to allow members to use the MIC as an appeals body only[69].

The key question in this context will be the degree of flexibility in dispute settlement design that the idea of open architecture will ultimately permit. Indeed, an institutional model that seeks to combine the different dispute settlement options currently floated under one common institutional structure would be best suited to result in a multilateral consensus that is broadly supported. Following the example of the United Nations Convention on the Law of the Sea (UNCLOS)[70], one could thus imagine a Multilateral Investment Dispute Settlement Institution (MIDSI), which gives states parties a choice among different dispute settlement options[71]. One pillar of this institution could operate as a fully-fledged two-tier MIC, allowing the EU and its Member States to put their ideas for investment dispute settlement reform into practice. Another pillar could administer inter-state arbitrations, allowing Brazil and its followers to participate in the creation of MIDSI, and yet another pillar could administer (reformed) investor-state arbitrations, with or without using the MIC as an appeals body, thus allowing those states that reject the idea of a standing court to participate in a truly multilateral framework. The institution could also be set up so as to allow states flexibility in respect of the need to have focused recourse to domestic remedies first.

Furthermore, even for states that would not want to opt into using the MIC for purposes of settling investment disputes, the MIC could carry out certain procedural tasks, such as deciding on arbitrator challenges or addressing requests for provisional measures before an arbitral tribunal is constituted. The MIC could also perform other 'systemic' functions, such as issuing advisory opinions or responding to requests for preliminary rulings from arbitral tribunals, following the model of the CJEU[72]. This could provide clarity on specific points of interpretation of the law governing international investor relations and

[67] On the need for flexibility, see also Roberts (n 10) 431-432; Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361, 409.
[68] European Commission, *UNCITRAL Submission* (n 4) para 39.
[69] Ibid.
[70] UNCLOS, Part XV (which provides for dispute settlement in permanent courts and through arbitration). See further Alan E Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 International and Comparative Law Quarterly 37.
[71] For more detail on this and the following see Schill and Vidigal (n 10) 17-20.
[72] See Christoph Schreuer, 'Preliminary Rulings in Investment Arbitration' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 207; Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill 2017).

contribute to consistency and coherence even though the MIC would in such cases not settle the entire dispute in law and in fact.

The organisation (MIDSI) itself could also be structured as a forum for negotiations of future investment rules, including on substantive standards of protection and investor obligations. Such an organisation, with a dispute settlement arm and an inter-governmental assembly would help address further fragmentation by creating a multilateral frame that could be used to shape the future of international investment governance.

5 Findings and recommendations

There are good reasons for establishing recourses for foreign investors against host states in an international forum which can assess the states' conduct under international law. The need to protect EU investors abroad against political risk, to establish enforcement mechanisms for EU agreements with foreign states, and to create institutions and mechanisms that depoliticize investment disputes and contribute to a rules-based international system for the governance of international investment relations all support the creation and reform of ISDS mechanisms under international law. The European Parliament should support such recourses, their effective functioning, and compliance with resulting decisions. At the same time, concerns that have come to the fore in the current system of treaty-based investor-state arbitration must be addressed. These concerns are by now widely shared by states worldwide and form part of the consensus reached in the ongoing UNCITRAL process.

Both the EU's current approach to include 'investment court systems' into its international trade and investment agreements and the Commission's approach to seek the establishment of an MIC address the concerns raised in respect of treaty-based investor-state arbitration. In comparison to the ICS, the MIC would be, from an EU perspective, the superior option in addressing those concerns. It would correspond better with EU values and principles, in particular its constitutional commitment to multilateralism. The European Parliament should therefore support the Commission's approach at UNCITRAL.

Still, the current MIC approach is not a panacea. It raises its own challenges, including the challenge of creating democratically legitimate mechanisms to control the future performance of an MIC, tackling the asymmetries resulting from providing investors with international recourses, but not those affected by investor misconduct, ensuring effective access to justice for SMEs and less developed countries, and ensuring support of the MIC by all involved stakeholders, including investors, host states, and public interest organizations. None of these challenges should, however, be seen as fundamental obstacles to an MIC as currently envisioned by the Commission.

The European Parliament should therefore support initiatives that seek to embed the MIC in more comprehensive and holistic approaches to investment governance and that help ensure broad stakeholder acceptance. These could consist in complementing the MIC, as also suggested by the Commission, with an advisory mechanism for developing countries[73] and other means for technical assistance in respect of dispute avoidance, dispute management, and domestic governance more generally, as well as investment mediation and conciliation facilities. Also, the European Parliament should support efforts to keep the institutional design of any future investment dispute settlement mechanism open for the possibility to deal with claims against foreign investors for investor misconduct brought either by host states, affected populations, or public interest organizations. All of this would contribute to a more comprehensive system of international investment governance that is in line with EU values and policies.

[73] Such an advisory mechanism could draw on similar experiences in the context of WTO law. See Robert Schwieder, 'Legal Aid and Investment Treaty Disputes: Lessons Learned from the Advisory Centre on WTO Law and Investment Experiences' (2018) 19 Journal of World Investment & Trade 628.

Of key importance is also generating sufficient political support for new investment dispute settlement structure outside the EU. To achieve that objective, the European Parliament should support efforts to keep investment dispute settlement options sufficiently flexible and to consider whether the MIC should not be conceived as simply one form for the settlement of investor-state disputes as part of a broader menu of dispute settlement options. This could encompass, depending on the preference of other states, the possibility to continue to use (reformed) investor-state arbitration, to use the MIC as an appeals mechanism against arbitral awards, to limit investment dispute settlement to state-to-state procedures, or to require the prior and focused use of domestic courts.

The European Parliament should support flexibility in the future architecture of investment dispute settlement in order to integrate as many states as possible within one multilateral framework for investment dispute settlement. One such solution is the creation of a MIDSI sketched out above. Such an institution could also provide a platform for negotiations to close gaps in international investment governance, addressing inter alia investor obligations, the scope of the right to regulate and the relationship with non-investment concerns and public interests. Such an institution could foster a system for international investment governance that reflects and promotes EU values and principles.

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ANNEX: Workshop presentation slides

EU investment protection after the ECJ Opinion on Singapore:
Questions of competence and coherence
European Parliament, Committee on International Trade (INTA)
20 February 2019

From Investor-State Dispute Settlement to a Multilateral Investment Court?
Evaluating Options from an EU Law Perspective

Stephan Schill

Overview

- ISDS Reform at UNCITRAL
- Four Models for Investment Dispute Settlement
- Benchmark for Evaluation
- Need for International System with Investor Access
- Advantages and Challenges of the Multilateral Investment Court
- Proposing a Multilateral Investment Dispute Settlement Institution
- Findings and Recommendations

2

UNCITRAL Consensus

United Nations
UNCITRAL

Reform is "desirable" to address concerns of

(1) consistency, coherence, predictability, and correctness of arbitral rulings;

(2) independence, impartiality, and diversity of decision-makers; and

(3) costs and duration of proceedings

3

Main Actors in ISDS Reform

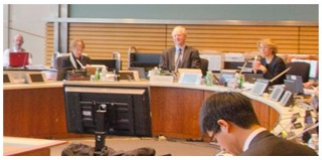


1. Selective Judicialisation: Carve-Outs and Special Regimes
2. Dispute Prevention and Mediation
3. Joint Interpretations
4. Dispute Resolver Qualifications and Ethical Obligations
5. Transparency and *Amicus* Participation
6. Temporal Limitations for Claims
7. Early Dismissal of Frivolous Claims
8. Preventing Parallel, Overlapping, Subsequent Proceedings

4

Main Actors in ISDS Reform

(Reformed) Arbitration



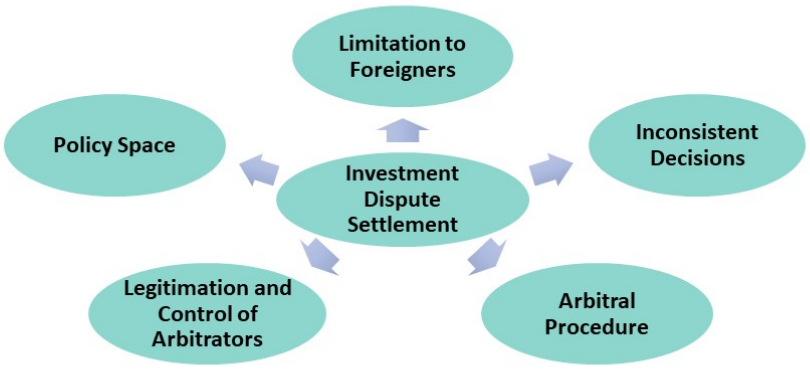
Investment Court System/
Multilateral Investment Court

Domestic Courts First

Inter-State Arbitration

5

Challenges



1. Rule of Law Accountability in ISDS
2. Democratic Accountability in ISDS

6

Benchmark for Evaluation: EU Constitutional Law

- Autonomy of EU law
- Non-discrimination (Art 21 CFR)
- Access to Justice (Art 47 CFR)
  - ➢ *Opinion 1/17 (CJEU, AG Bot – 29 January 2019)*

7

Benchmark for Evaluation: EU Constitutional Law

- EU principles and values shaping the CCP
- Arts 3(5) and 21 TEU
- Rule of law, democracy, sustainable development, multilateralism

8

Need for an International System with Investor Access

- External Economic Policy Perspective (Art 207 TFEU)
- Political Risk – Weak Domestic Governance (Art 3(5) TEU)
- Enforcement of International Obligations (Art 21 TEU)
- Shaping Global Investment Governance (Art 21 TEU)

9

Asymmetry Problem: Investor Obligations and Enforcement

- Substantive Law v Procedure
- Domestic Law v International Law
- Administrative Law Analogy
- Political Feasibility
- Broadening ISDS?

10

Multilateral Investment Court - Benefits

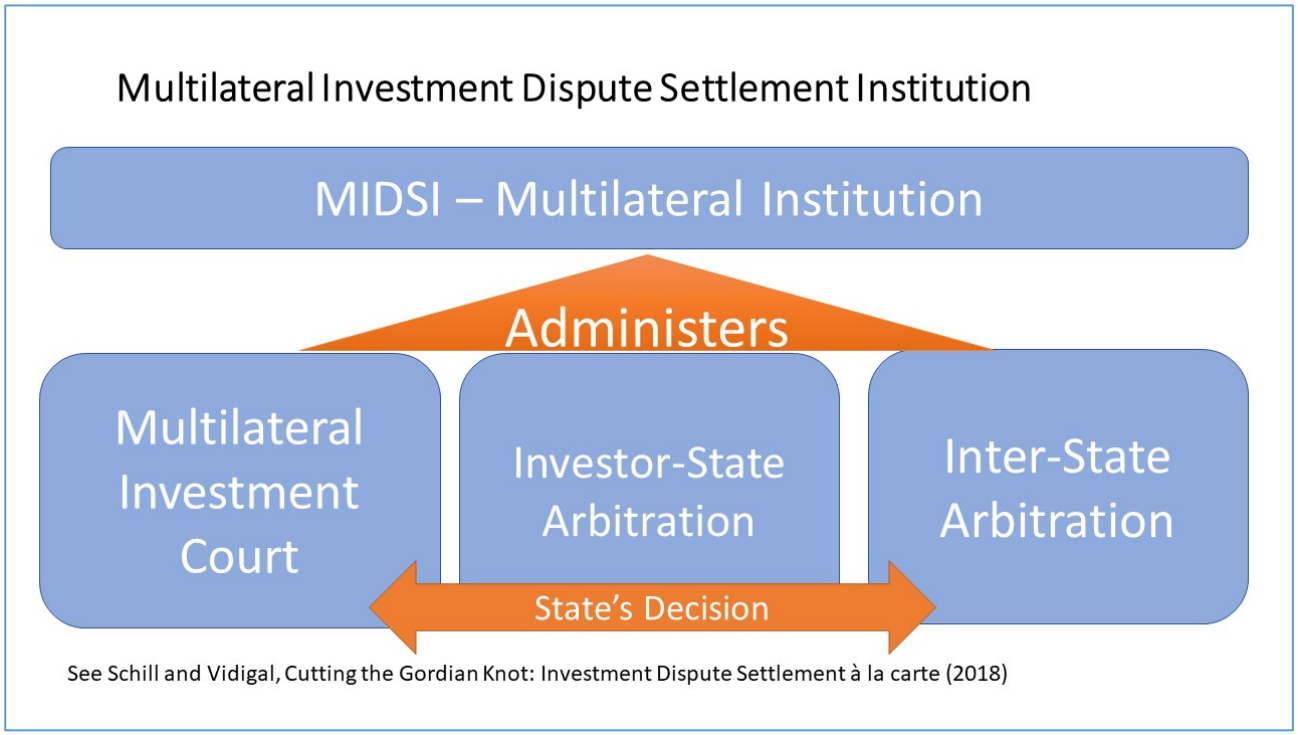
- Addresses UNCITRAL criteria
- Translates EU values and principles into practice
- Advantages over 'investment court system' and investor-state arbitration

11

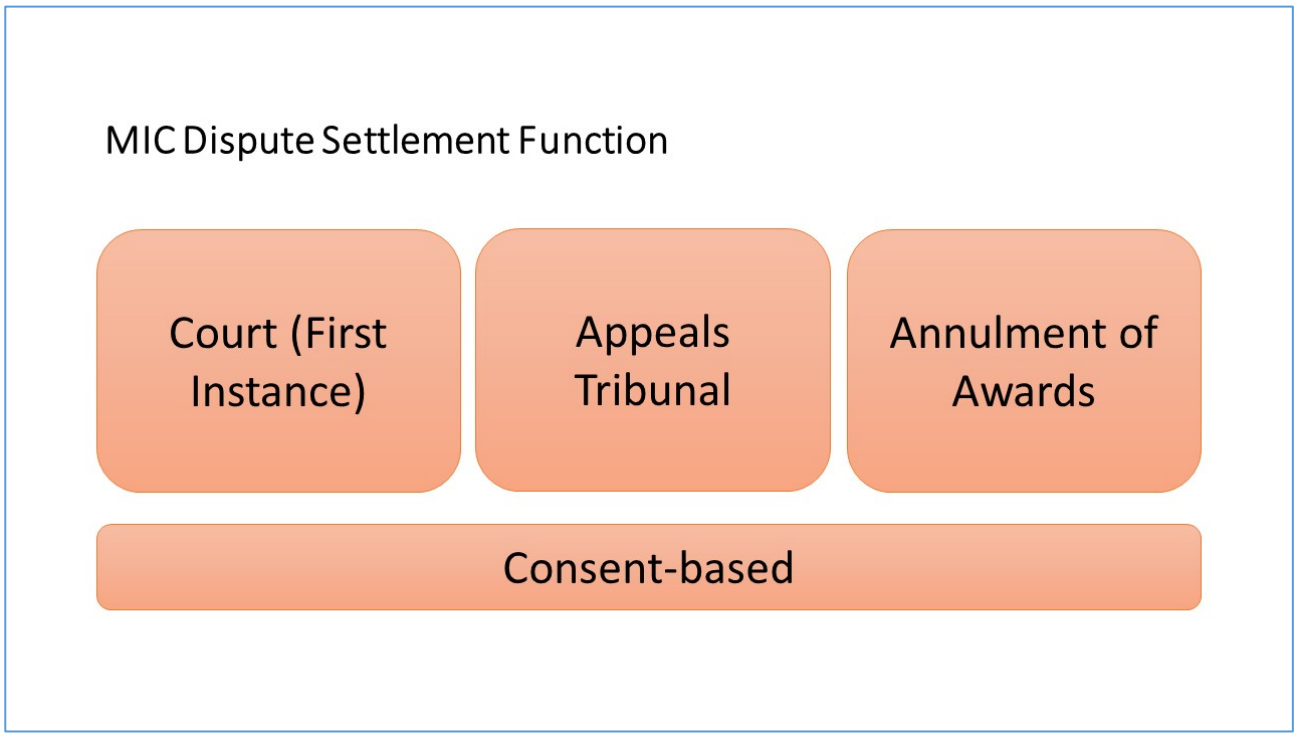
Multilateral Investment Court - Challenges

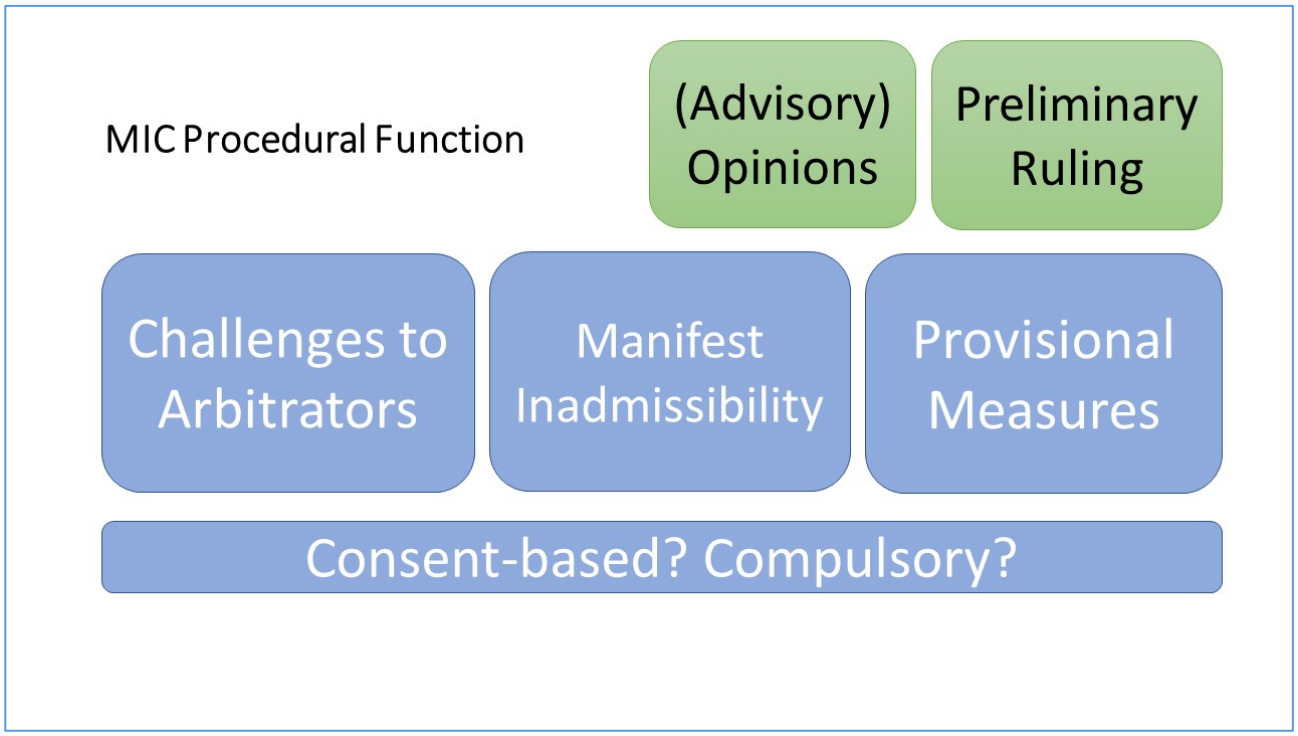
- Lack of substantive rules (standards of treatment, public interests, investor obligations)
- Enforcement of MIC rulings
- Relationship with domestic courts
- Strengthening domestic governance
- Continued democratic control
- Investor trust
- Political feasibility

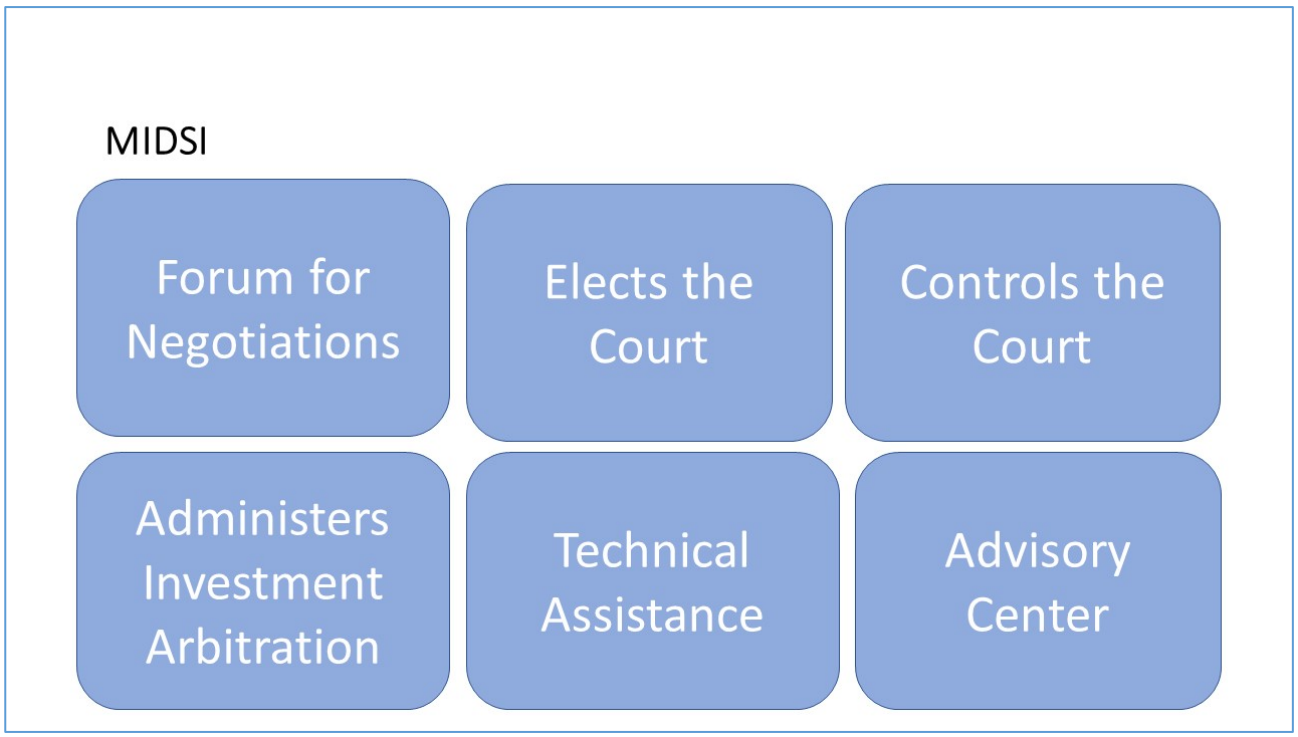
12



See Schill and Vidigal, Cutting the Gordian Knot: Investment Dispute Settlement à la carte (2018)




MIC Procedural Function
(Advisory) Opinions
Preliminary Ruling
Challenges to Arbitrators
Manifest Inadmissibility
Provisional Measures
Consent-based? Compulsory?


MIDSI
Forum for Negotiations
Elects the Court
Controls the Court
Administers Investment Arbitration
Technical Assistance
Advisory Center

Findings and Recommendations

- ISDS mechanisms should be supported
- MIC proposal should be supported
- Support for open architecture
- Explore more comprehensive approaches to investment governance
- Creation of a facility for investment dispute settlement and governance

17

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