

THE EU INVESTMENT COURT SYSTEM

A VIABLE REFORM INITIATIVE?

HANNES LENK

Juridiska institutionens skriftserie

School of Business, Economics and Law at University of Gothenburg

Skrift 032

2019

The EU Investment Court System: A viable reform initiative?

© Hannes Lenk 2019

Cover: with illustration by Laura Haelke

Format and editing with the help of Jeffrey Johns

Print: BrandFactory AB, Kållerød

ISBN 978-91-87869-20-4

To my family
in loving appreciation of their
unwavering patience and support

ACKNOWLEDGEMENTS

Although my name is on the cover of this thesis, it could not have been produced without the help of the hundreds of friends and colleagues. Over the years I have had the pleasure to discuss my thoughts, and learn from, scholars in various disciplines, but also arbitrators, negotiators, government officials, practicing lawyers, and my students. I owe a great debt to all of them, including those that do not appear here explicitly by name. It is you who made this project possible, and who turned the past six years into an unforgettable journey.

My heartfelt gratitude goes to my supervisors Per Cramér, Christophe Hillion, and Andreas Moberg, for seeing this project through. I remember like it was yesterday that I walked in Per's office in 2012, who already then was acting as Dean of the School of Business, Economics and Law at the University of Gothenburg. Over lunch he told me about the research opportunities at the Department of Law and encouraged me to apply for a PhD position in the upcoming year. The welcoming attitude played no insignificant role in my decision to submit an application. For that I am thankful. I met Per a second time during the interview for a PhD position a year later. He asked me where I see myself in 15 years, and I said: "Probably in your chair!" It did not take long for me to realize that I could not fill those shoes even if I tried. For his patience, his advice, his ability to bring my thoughts back on track, and for helping me to make hard choices I am truly grateful. A word should also go to Per's lovely assistant Anna Julin, who always managed to find a spot for me in Per's impenetrable agenda, in spite of my tendency to call for meetings with less than a week's notice.

The journey that led to this book did not, however, start that day in Per's office. It traces back one year earlier. It was Christophe who introduced me to EU external relations law as a field of study during my time as an LLM student in Leiden. My interest and fascination for the EU as a global actor, and, in fact, the EU's competence for foreign direct investment that I developed then still informs my research today. Christophe's commitment and endearing support, even once his role as supervisor formally ended, and the many thoughtful discussions provided an important source of inspiration. From the supervisor of my LLM thesis, Christophe has grown to become a trusted friend.

Andreas, though affiliated with the project as supervisor only during the last two years, has been involved since the very start. With his attention to detail he left no sentence unturned, and never tired of challenging me on fundamental aspects of my work. His contribution did not only improve the quality of my thesis, but made me a better researcher, and teacher. I could not have asked for a better team of supervisors.

I am also grateful to Marise Cremona, Christina Eckes, and Johan Lindholm for taking the time to read my thesis and testifying to its quality with their own reputation. I could not be prouder (though a little intimidated) to have my work examined by such renowned scholars. I am also delighted that Steffen Hindelang agreed to play the devil's advocate for the day. Although I know that we think alike in many respects I am confident that he will not go easy on me. I look forward to an insightful and challenging discussion. I am also much obliged to Panos Koutrakos, and Pernilla Rendahl, who did an incredible job reviewing two earlier drafts of this thesis. Their suggestions and constructive criticism were crucial in finishing the project. Thank you all for your time and dedication!

Amongst those I wish to thank are also Julia Chryssostalis for believing in my academic abilities and for opening my eyes to a career in academia; Joel Dahlquist Cullborg who has not only been a trusted companion but who I have taken advantage of for being a living compendium on investment law; Jonas Hallberg for helping me to appreciate the politics of EU foreign investment law; David Kleimann for inventing the most resourceful twitter group; Gabriela Argüello, Erik Björling, Thomas Erhag, Jakob Heidbrink, Jannice Käll, Erik Lidman, Claes Martinson, Tormod Otter Johansen, David Ryffé, Ann-Sophie Sallander, Anna Wallerman and all my colleagues at the department of law and CERGU for always listening and giving sound advice; Christine Forsell, Jeffrey Johns, Emma Lager, Ulrika Molin, Britt Randvik, and Anna Wahle for helping with all matter administrative and technical; and all those with whom I had the pleasure to discuss my work at one of the countless seminars and conferences: Wolfgang Alschner, Freya Baetens, Daniel Behn, Andrea Bjorklund, Martin Björklund, Birte Böök, Julien Chaisse, Cristina Contarese, Angelos Dimopoulos, Piet Eeckhout, Andrés Delgado Casteleiro, Wybe Douma, Elaine Fahey, Michéle Finck, Szilárd Gáspár-Szilágyi, Matthew Happold, Holger Hestermeyer, Kaj Hobér, Rainer Hofman, Ridhi Kabra, Christine Kaddous, Vivian Kube, Mattias Kumm, Jürgen Kurz, Malcom Langford, Nikos Lavranos, Carl Lewis, Julie Maupin, Dominik Moskvan, Pekka Niemelä, Jed Odermatt, Pietro Ortolani, Allison Östlund, Luca Pantaleo, Martins Paporinskis, Paschalis Paschalidis, Steve Peers, Mona Pinchis-Paulsen, Teresa Quintel, René Repasi, Anthea Roberts, Love Rönnelid, Guri Rosén, Harm Schepel, Julian Scheu, Stephan Schill, Taylor St John, Christian Tams, Anne Thies, Catharine Titi, Takis Tridimas, Todd N. Tucker, Marco Uccelli, Güneş Ünüvar, Maxim Usynin, Giuseppe Matteo Vaccaro Incisa, Nikolas Voulgaris, Lone Wandahl Mouyal, Ramses A. Wessel, and many more.

PREFACE

“It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.”

(Charles Dickens, *A tale of two cities*)

There remains little doubt today that investor-state arbitration, and its institutional framework, has grown to become the central pillar on which the effectiveness of the investment treaty regime rests. Lauded by many as the hallmark of depoliticized conflict resolution in the post-colonial era, others have criticized investor-state dispute settlement for being an instrument in the hands of multinational enterprises to exploit developing countries and suppress their economic and social development. Institutional and procedural characteristics are either seen to be safeguards of due process, i.e. ensuring that the political interests of the respondent state do not dominate the outcome of the dispute, or they are identified as shortcomings that undermine the impartiality of arbitrators, the transparency of proceedings, and inevitably lead to regulatory chill. Investment arbitrators, sometimes depicted as the white knight who uphold justice for investors how have faced oppression and arbitrariness from state officials, are also likened to the devil’s advocate, acting without any sense for justice and driven by nothing more than economic incentives. None of these positions, of course, provide a realistic image of the *status quo* of investor-state dispute settlement. I have met many arbitrators and counsels over the past few years. With few exceptions they are all intelligent, compassionate, highly professional individuals, and genuinely nice persons. The discussion over investor-state dispute settlement has become extremely polarized; it is either the pinnacle of justice, or the abyss of injustice.

Not all of the criticism is substantiated by empirical evidence. Nor is that methodologically possible, or normatively required. But there are clear signs that investor-state arbitration as we know it has passed its prime. Recent reform initiatives, spearheaded by the European Commission's proposal for the establishment of an Investment Court System, no longer focus on incremental adjustments but radical institutional reform. It is an acknowledgement that investor-state arbitration as we know it is no longer sustainable. Even the multilateral talks over the reform of investor-state arbitration in UNCITRAL were referred to as the creation of a Multilateral Investment Court, long before any concrete reform proposal was tabled. It is now clear that multilateral reform will have to take the form of a permanent structure, reminiscent of the EU Investment Court System. This not only because of the dominant position that the EU Commission has assumed in the UNCITRAL negotiations. Only weeks after this manuscript was finished, the Court of Justice of the European Union confirmed with Opinion 1/17 the compatibility of the Investment Court System in the EU-Canada trade and investment agreement with the Treaties. The outcome is not surprising, albeit difficult to reconcile with all of the conclusions drawn in the present study. For if the Court had rejected the Investment Court System, it would have thrown EU external action in trade and investment into despair, and permanently crippled the EU Commission's negotiating position in the UNCITRAL reform process. But the Opinion does not reflect the same sentiment as previous decisions, and it is inconsistent with conclusions drawn by the Court regarding investment agreement concluded between Member States. For these reasons, the Opinion ought to attract criticism, and it is in this light that the present study on the relationship between fundamental principles of EU external relations and the EU external competence over foreign direct investment ought to be read.

More importantly, it remains to be seen whether Opinion 1/17 is as positive a signal for ISDS reform as it is believed to be for the future of EU external action. The Court in its Opinion sets a high bar for the kind of structure that would pass as compatible with the Treaties. Nothing short of the Investment Court System, therefore, could come out of the UNCITRAL discussions if the EU and its Member States are supposed to be a part of it. The EU Commission has effectively drawn up the blueprint for the multilateral reform of investor-state dispute settlement. This is problematic not only because the Investment Court System itself still is a political response to intensifying pressure from civil society over the negotiation of the EU-US Transatlantic Trade and Investment Partnership agreement, but is flawed from a normative perspective. Western normative domination over the global South also presents a contentious approach to reform — judged by historical antecedents of investor-state dispute settlement reform. These are also aspects that the present study engages with and which now must be read in light of the Court's approval of the Investment Court System as an institutional structure that safeguards access to an independent judiciary.

Whether Opinion 1/17 represents hope for a multilateral consensus on investor-state dispute settlement that strengthens belief in international institutions, or whether it signals despair and incredulity; whether scholarship can change the discourse on investor-state dispute settlement that currently occurs in the superlative of comparison only; whether the path of reform lies ahead of us or is already predetermined by history remains to be seen. The present study is not intended to contribute and perpetuate the polarization of the ongoing discourse over the backlash against investor-state arbitration, but to demonstrate how global economic integration, the participation of civil society, the emergence of empirics on investment arbitration, and history are all helpful in paving the way forward.

Hannes Lenk
Falkenberg, 12 June 2019

CONTENTS

ACKNOWLEDGEMENTS.....	V
PREFACE	VII
CONTENTS	XI
ABBREVIATIONS	XVII

1 INTRODUCTION	1
1.1 <i>Aim of this study and delimitation</i>	3
1.2 <i>Research question</i>	7
1.3 <i>The point of departure in theory</i>	7
1.3.1 Constructivism	8
1.3.2 The nature of the Union and its institutions.....	10
1.3.2.1 The role of the Court of Justice	15
1.3.2.2 Hierarchy of norms in the Union legal order.....	16
1.3.3 The investment treaty regime: terminological considerations.....	18
1.3.4 A synthesis	20
1.4 <i>Method and material</i>	21
1.5 <i>Theoretical, scholarly and policy contribution</i>	24
1.6 <i>The argument in a nutshell</i>	26

PART I THE CONTEXT

2 THE ECONOMIC, HISTORICAL AND POLITICAL CONTEXT OF THIS STUDY	31
2.1 <i>The emergence and evolution of the investment treaty regime</i>	32
2.1.1 The multinational enterprise as a driver of foreign direct investment	32
2.1.1.1 Foreign direct investment in the context of global economic integration	33
2.1.1.2 The emergence of the modern multinational enterprise	36
2.1.1.3 Motivations for foreign direct investment	38
2.1.2 Investment law in the context of the legal history of the protection of property in international law	38
2.1.3 The modern investment treaty regime.....	43
2.1.3.1 Multilateralism in international investment law	44
2.1.3.2 Bilateralism in international investment law	46

- 2.2 *The origins of investor-state dispute settlement* 49
 - 2.2.1 The emerging role of arbitration for international property disputes50
 - 2.2.2 The institutionalization of direct standing for investors52
- 2.3 *Investor-state dispute settlement and its ideological criticism* 54
- 2.4 *Interim conclusion* 56

PART II INVESTOR-STATE DISPUTE SETTLEMENT

- 3 INVESTOR-STATE ARBITRATION AND ITS CRITICISM 61
 - 3.1 *Methods of dispute settlement*..... 61
 - 3.2 *Common features of investor-state arbitration*..... 62
 - 3.2.1 Access to arbitration63
 - 3.2.2 Fundamental principles of investment arbitration64
 - 3.2.3 Reviewing and enforcing the award67
 - 3.3 *An overview of the criticism against investor-state arbitration* 68
 - 3.3.1 The neutrality of the arbitrator70
 - 3.3.2 Transparency73
 - 3.3.3 Consistency74
 - 3.3.4 Regulatory chill75
 - 3.3.5 Voice and exit: reactions to the criticism77
 - 3.4 *Interim conclusion* 80

- 4 THE INVESTMENT COURT SYSTEM 81
 - 4.1 *Preliminary remarks: The path to reform*..... 82
 - 4.2 *Institutional features*..... 83
 - 4.2.1 Tribunal and Appeal Tribunal members.....84
 - 4.2.1.1 Members and their affiliation.....84
 - 4.2.1.2 Professional requirements85
 - 4.2.1.3 Ethics.....87
 - 4.2.1.4 Availability and retainer88
 - 4.2.2 Tribunal and Appeal Tribunal divisions: the composition and selection process.....90
 - 4.2.3 Terms of service.....91
 - 4.2.4 Institutional support.....93
 - 4.2.5 The role of bilateral committees.....93
 - 4.2.5.1 Functions of trade committees94
 - 4.2.5.2 Composition and decision-making96
 - 4.3 *Procedural features*.....97
 - 4.3.1 Procedural requirements for the submission of claims97
 - 4.3.1.1 Determining the respondent to disputes97
 - 4.3.1.2 Fork-in-the-road98
 - 4.3.1.3 Waiving the right to challenge the award100
 - 4.3.2 Applicable procedural rules100
 - 4.3.3 Applicable law and rules of interpretation102
 - 4.3.4 The appeal procedure102

4.3.5	Other procedural aspects: costs of proceedings, frivolous claims and transparency	104
4.4	<i>The multilateral reform agenda</i>	104
4.4.1	Multilateralization clauses	105
4.4.2	'Creeping' multilateralization	107
4.4.3	The UNCITRAL reform process.....	109
4.5	<i>Interim conclusion</i>	113
PART III THE CONSTITUTIONAL FRAMEWORK		
5	TREATY-MAKING COMPETENCE	117
5.1	<i>Preliminary remarks on the EU foreign investment policy</i>	118
5.1.1	A brief history of the common commercial policy.....	118
5.1.1.1	Towards an independent policy field	119
5.1.1.2	Towards an integrated policy field	121
5.1.2	A comprehensive Union foreign investment policy?	123
5.1.3	The EUSFTA Opinion	125
5.1.4	Interim conclusion.....	127
5.2	<i>Legal personality, conferral and the appropriate legal basis</i>	128
5.2.1	International legal personality.....	128
5.2.2	The principle of conferred powers	130
5.2.3	The appropriate legal basis.....	131
5.3	<i>The existence of treaty-making competence</i>	132
5.3.1	Express treaty-making competence: the common commercial policy	133
5.3.2	Implied treaty-making competence.....	135
5.3.3	The scope of the Union's treaty-making competence	140
5.3.3.1	Competence over institutional provisions	140
5.3.3.2	Competence over existing Bilateral Investment Treaties between Member States and third countries.....	142
5.3.4	Implications for investor-state dispute settlement provisions.....	143
5.4	<i>The nature of treaty-making competence</i>	144
5.4.1	The Union's exclusive competence over foreign direct investment	145
5.4.2	The Union's shared competence over portfolio investment	146
5.4.3	Implied exclusivity.....	147
5.4.4	Implications for investor-state disputes settlement provisions.....	150
5.5	<i>The concept of foreign direct investment in Union external relations</i> ...	155
5.6	<i>'Mixture' in EU foreign investment policy</i>	160
5.7	<i>Interim conclusion</i>	163
6	THE PRINCIPLE OF AUTONOMY.....	167
6.1	<i>Preliminary remarks: Origins of the principle of autonomy</i>	168
6.2	<i>The relevant case law</i>	170
6.2.1	The European Economic Area Agreements	171
6.2.2	The European Common Aviation Area	172
6.2.3	The European Patents Court	173

6.2.4	The European Court of Human Rights	174
6.2.5	Synthesis	175
6.3	<i>Recent developments: Achmea and the CETA opinion</i>	178
6.3.1	Achmea	179
6.3.1.1	Opinion of Advocate General Wathelet.....	180
6.3.1.2	The decision of the Court	182
6.3.1.3	Relevance of Achmea for investment agreements with third countries	183
6.3.2	The CETA Opinion.....	184
6.4	<i>The relevance of EU law for investment disputes</i>	185
6.4.1	A matter of law	186
6.4.2	A matter of fact.....	187
6.5	<i>The indirect effect of investment awards</i>	189
6.5.1	Investment agreements and the hierarchy of Union legal acts.....	189
6.5.2	The position and effect of investment awards	193
6.5.2.1	The effect of investment awards on the Union and its institutions.....	194
6.5.2.2	The effect of investment awards on the Member States	198
6.5.3	Discussion and interim conclusion.....	199
6.6	<i>The prior involvement of the CJEU</i>	202
6.7	<i>Interim conclusion</i>	204
7	THE PRINCIPLE OF NON-DISCRIMINATION	207
7.1	<i>The meaning of non-discrimination</i>	208
7.2	<i>The geographical scope of Article 18 TFEU</i>	210
7.3	<i>The substantive scope of non-discrimination</i>	213
7.4	<i>Corporate ownership structures</i>	214
7.5	<i>An overview of the arguments</i>	216
7.5.1	The argument against MFN treatment.....	216
7.5.2	The argument for the unilateral extension of benefits.....	220
7.6	<i>The face of discrimination</i>	221
7.7	<i>Interim conclusion</i>	223
PART IV DISCUSSION AND CONCLUSIONS		
8	AN APPRAISAL OF THE INVESTMENT COURT SYSTEM.....	227
8.1	<i>Implications of 'mixity' on the investment court system</i>	228
8.1.1	The fork in the investment court's road.....	228
8.1.2	Finding an appropriate legal basis	229
8.1.3	The politics of mixed agreements	231
8.1.4	The singing, conclusion and provisional application of Union agreements.....	235
8.1.5	Interim conclusion: A 'mixed' future for the investment court system.....	237
8.2	<i>The investment court system as a reform initiative</i>	237
8.2.1	Preliminary remarks: perceptions of legitimacy.....	238

8.2.2	Deviating from the principle of party autonomy.....	242
8.2.3	The independent judiciary.....	245
8.2.4	Coherence, consistency and accountability.....	249
8.2.5	Cost of proceedings.....	252
8.2.6	Other aspect: parallel proceedings, frivolous claims and transparency.....	253
8.2.7	Authoritative interpretations.....	254
8.2.8	Interim conclusion.....	258
8.3	<i>The investment court system in light of the principle of autonomy.....</i>	260
8.3.1	The opinion of Advocate General Bot.....	261
8.3.2	The interpretation of EU law as a matter of fact.....	262
8.3.3	The prevailing interpretation of the Court of Justice.....	266
8.3.4	Identifying the respondent to a dispute.....	268
8.3.4.1	The contracting party.....	269
8.3.4.2	The Financial Responsibility Regulation.....	271
8.3.4.3	Effects of determinations.....	275
8.3.4.4	Balancing autonomy concerns and diverging political interests.....	276
8.3.4.5	Interim Conclusion.....	278
8.3.5	The state aid exception.....	279
8.3.6	The exclusion of direct effect.....	280
8.3.7	Interim conclusion.....	281
8.4	<i>The investment court system and the principle of non-discrimination.....</i>	282
8.4.1	The effective application of EU law.....	282
8.4.2	The investment court system: Stepping stone or stumbling block?.....	284
8.5	<i>Interim conclusion.....</i>	285
9	CONCLUSIONS.....	287
9.1	<i>The interplay of law and policy.....</i>	289
9.2	<i>The modest contribution of the Treaty of Lisbon.....</i>	290
9.3	<i>Reasserting state control.....</i>	291
9.4	<i>External factors: History as a guiding post.....</i>	292
9.5	<i>A few final remarks.....</i>	293
	BIBLIOGRAPHY.....	295
	<i>Cases.....</i>	295
	<i>Legal instruments.....</i>	306
	<i>Policy documents and reports.....</i>	310
	<i>Press releases and statements.....</i>	316
	<i>Literature.....</i>	317
	<i>Other.....</i>	345

ABBREVIATIONS

AB	Appellate Body
AG	Advocate General
BGH	Bundesgerichtshof (German Federal Court of Justice)
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CEE	Central and Eastern European
CETA	Comprehensive Economic and Trade Agreement
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
DG	Directorate General
DSU	WTO Dispute Settlement Understanding
DTT	Double Taxation Treaty
EEA	European Economic Area
EEC	European Economic Communities
EC	European Communities
ECAA	European Common Aviation Area
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EFTA	European Free Trade Area
EP	European Parliament
EPA	European Partnership Agreement
EPC	European Patent Convention
EPCt	European Patents Court
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement

FTC	NAFTA Free Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IBA	International Business Association
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
IMF	International Monetary Fund
INTA	European Parliament Committee on International Trade
IPA	Investment Protection Agreement
ISDS	Investor-State Dispute Settlement
ITI	International Tribunal for Investment
ITLOS	International Tribunal for the Law of the Sea
MAI	Multilateral Agreement on Investment
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal
OLG	Oberlandesgericht (German Higher Court)
SCC	Stockholm Chamber of Commerce
TEU	Treaty on European Union
TFEU	Treaty on Functioning of the European Union
TRIMs	WTO Agreement on Trade Related Investment Measures
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Trade and Investment Partnership Agreement
UN	United Nations
UNCITRAL	United Nations Conference on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
US	United States
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 INTRODUCTION

It was a cold and cloudy Thursday in February of 2015 when Bernd Lange, chairperson of the European Parliament's (EP) INTA Committee, circulated the draft of a report with recommendations to the Commission on the trade negotiations between the EU and the US.¹ By that time the envisaged Transatlantic Trade and Investment Partnership (TTIP) agreement had already come under severe criticism. Protesters were roaming the streets of capitals in many of the Member States,² and the unequivocal results of the public consultation of stakeholders and civil society on investment protection and ISDS, outright rejecting this particularly controversial aspect of the agreement, provided a devastating blow to Commission's pro-TTIP advocacy.³ The INTA draft report was all but ignorant of these developments. On the contrary, with respect to the envisaged ISDS mechanism the committee's recommendations were clear—"such a mechanism is not necessary in TTIP given the EU's and the US' developed legal systems".⁴

This would ultimately put in motion one of the most profound ISDS reform initiatives in recent history. When the INTA report was put to a vote on 8 July

¹ European Parliament, INTA, 'Draft report containing the European Parliament's recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' (2014/2228(INI), PE549.135), 5 February 2015 accessible at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-549.135+01+DOC+PDF+V0//EN&language=EN>> Art. 1(d)(xiv).

² Aline Roberts, 'Anti-TTIP demonstrations seize European capitals' *EURACTIV* (13 October 2014) <<https://www.euractiv.com/section/trade-society/news/anti-ttip-demonstrations-seize-european-capitals/>>.

³ In 2014 the Commission described the TTIP agreement as "[t]he cheapest stimulus package imaginable", and was strong on its intention to include ISDS provisions that were endorsed as "an important tool for protecting EU investors abroad", see European Commission, 'FAQ on the EU-US Transatlantic Trade and Investment Partnership (TTIP)', 17 June 2013 accessed at <http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151351.pdf>.

⁴ Parliament, (2015), *op cit.*, Art. 1(d)(xiv).

2018 it had been amended to reveal a subtler, though by no means less demanding drafting. The EP, thus, recommended to the Commission

“to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives[.]”⁵

What the EP wanted to see from the Commission was, in other words, a reform of traditional investor-state arbitration.⁶ And the Commission, indeed, delivered. All post-Lisbon IIAs negotiated by the Commission now incorporate the Investment Court System (ICS), a permanent, treaty-centred and court-like ISDS mechanism.

Public opposition to investment agreements is by no means a phenomenon that is confined to the European context. Whereas the international investment regime has largely managed to escaped public attention for some time, it has come under increasing scrutiny in recent decades.⁷

“Contentions that the international investment regime lacks legitimacy come from many directions. Some suggests that ad hoc tribunals produce inconsistent law, which undermines the ultimate goals of stability and predictability. Others point to the reduced scope for state regulation. Still others claim that the regime is systematically biased in favour of business interests and capital exporting states.”⁸

Much of the critique gravitates around ISDS, and the concomitant idea of empowering private investors to arbitrate their disputes against the host state

⁵ European Parliament, 'Resolution containing the European Parliament's recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' (T8-0252/2015), 8 June 2015 accessible at <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0252>> Art. 2(c)(xv).

⁶ Nikos Lavranos, 'New developments in the interaction between international investment law and EU law' (2010) 9(3) *The Law & Practice of International Courts and Tribunals* 409-41, 430-31.

⁷ Lauge N. Skovgaard Poulsen, *Bounded rationality and economic diplomacy: the politics of investment treaties in developing countries* (Cambridge University Press: 2015).

⁸ Michael Waibel *et al.*, 'The backlash against investment arbitration: Perceptions and reality' in Michael Waibel, *et al.* (eds), *The backlash against investment arbitration: Perceptions and reality* (Wolters Kluwer: 2010) xxxvii-li, xxxviii.

directly before an international tribunal.⁹ Investment treaty arbitration has taken centre-stage of an intensely polarized debate.

Although none of the post-Lisbon agreements is yet in force, the ICS represents, at the time of writing, the most concrete policy proposal to address institutional ISDS reform. This study investigates the Commission's ICS initiative on the backdrop of rising concerns against investor-state arbitration, and assesses whether the ICS can overcome the challenges that lie ahead. This is no easy undertaking. In 1983 John H. Jackson observed that trying to capture developments in international economic law is "like trying to describe a landscape while looking out the window of a moving train – events tend to move faster than one can describe them."¹⁰ It will transpire from the ensuing discussions that this is certainly true for developments in the Union foreign investment policy and the informed reader will certainly agree that the current realities are a far cry from the comprehensive Union foreign investment policy that the Commission envisaged almost a decade ago.¹¹

The EP report on the TTIP negotiations is unlikely to make the history books. Yet, it aptly demonstrates the interplay of political actors and legal frameworks that shape not only EU external relations but perhaps even the development of international law.

1.1 Aim of this study and delimitation

The aim of this study is to analyse the Union's participation in structural reform processes of investor-state arbitration through the ICS initiative. It sets out to explore aspects of law and policy with implications on the Union's legal and political capacity to conclude IIAs with ISDS provisions, and clarifies to what extent the Treaties determine the structural and procedural features of the ICS. For the purpose of this analysis capacity is conceived of as a multidimensional concept, including aspects that are internal to the EU legal order, i.e. the existence and nature of substantive competence over ISDS¹² and the compatibility of

⁹ Jan Paulsson, 'Arbitration without privity' (1995) 10(2) *ICSID Review* 232-57, 232; Charles N. Brower, I. I. Charles H. Brower and Jeremy K. Sharpe, 'The coming crisis in the global adjudication system' (2003) 19(4) *Arbitration International* 415-40, 418.

¹⁰ John H. Jackson, William J. Davey and Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations*, 4 edn (West Group: 2002) xv.

¹¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a comprehensive European international investment policy' (COM(2010)343 final), 7 July 2010.

¹² See *infra* Chapter Five.

concrete policy choices with the Treaties,¹³ as well as external aspects that condition the realization of the ICS.¹⁴ The analysis of the compatibility of the ICS with the Treaties in particular is inspired by existing legal challenges against ISDS in the context of the EU legal order. Both *Achmea*¹⁵ as well as the currently pending *CETA* opinion¹⁶ are in this respect concerned with the principle of autonomy and the principle of equal treatment, and the present study adopts a similar focus.

Although this study's contribution is primarily to scholarship in EU external relations law, it contextualizes the ICS within the multilateral ISDS reform initiatives.¹⁷ Indeed, the ICS is not a policy initiative that occurs in isolation. The political, economic and ideological context that has shaped the investment treaty regime, and which has likewise given rise to the wide-spread criticism against investor-state arbitration¹⁸ provides the relevant framework for any meaningful inquiry into the ICS. This motivates the contextual approach adopted for the present study,¹⁹ and the concomitant evaluation of the ICS in light of the criticism against investor-state arbitration.²⁰

The extent to which the present study can contribute to research on EU foreign investment policy is naturally limited by theoretical and methodological choices, which are spelled out in more detail in the subsequent sections. More generally, however, it touches upon a number of related aspects that would deserve a more detailed analysis but falls outside of the scope of the present study.

First, the analysis is limited to questions pertaining to the Union and its interaction with third countries. This naturally excludes a comprehensive discussion of intra-EU BITs and related investment disputes, which are subject to a peculiar set of considerations and generally distinguishable from situations involving the relationship between the Union and third countries.²¹ This being

¹³ Note that issues regarding the Union's competence to conclude international agreements including the ICS are considered distinct from issues regarding the compatibility of the ICS with the Treaties. This issue is discussed in more detail *infra* in Chapters Six and Seven.

¹⁴ See *infra* Chapter 8.2.

¹⁵ Case C-284/16 *Slovak Republic v Achmea BV* [2018], EU:C:2018:158, for a discussion, see *infra* Chapter 6.3.1.

¹⁶ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement)*, for a discussion, see *infra* 6.3.1.

¹⁷ See *infra* Chapter 4.4.

¹⁸ See *infra* Chapter 3.3.

¹⁹ e.g. discussion on the interplay of legal and economic factors for the regulatory framework of the MNE, in Peter T. Muchlinski, *Multinational Enterprises and the Law*, 2 edn (Oxford: 2007) 33-43.

²⁰ See *infra* Chapter 8.2.

²¹ The author has elaborated on this issue elsewhere, see Hannes Lenk, 'Constitutional constraints on intra-EU BITs in the Union legal order' in Stephan W. Schill, Christian J. Tams and Rainer Hofmann (eds), *International investment law and constitutional law* (forthcoming: 2019); Joel Dahlquist,

said, the *Achmea* judgment, which resolves some of the questions concerning the compatibility of intra-EU BITs with the Treaties, carries some relevance also for IIAs with third countries. The reasoning of the CJEU and the opinion of Advocate General Wathelet in *Achmea* are, therefore, briefly discussed.²²

Second, existing IIA between individual Member States and third countries are subject to similar limitations. A regulation governing transitional arrangements is already in place but is of limited relevance for the present study.²³ The issue of termination of existing Member State BITs is briefly introduced as part of the discussions on the Union's competence,²⁴ but these agreements warrant a thorough and more comprehensive assessment, to which this study cannot commit.²⁵

Hannes Lenk and Love Rönneid, 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden' (2016), SIEPS, 2016:4epa; for a comprehensive overview over the issues posed by intra-EU BITs consider Angelos Dimopoulos, 'Taming the conclusion of inter se agreements between EU Member States: The role of the duty of loyalty' (2015) 34(1) *Yearbook of European Law* 286-318; Angelos Dimopoulos, 'The validity and applicability of international investment agreements between EU Member States under EU and international law' (2011b) 48(1) *Common Market Law Review* 63-93; Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39(2) *Legal Issues of Economic Integration* 179; Ursula Kriebaum, 'The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective' (2015) *ELTE Law Journal* 27-35; Nikos Lavranos, 'The End of Intra-EU BITs Is Nearing', *Arbitration Blog*, 13 May 2016 <accessed at <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is-nearing/>>; Dominik Moskvan, 'The clash of intra-EU Bilateral Investment Treaties with EU law: a bitter pill to swallow' (2015) 22 *Columbia Journal of European Law* 101-381; P. Ortolani, 'Intra-EU Arbitral Awards vis-a-vis Article 107 TFEU: State Aid Law as a Limit to Compliance' (2015) 6(1) *Journal of International Dispute Settlement* 118-135; Davide Rovetta and Maurizio Gambardella, 'Intra-EU BITs and EU law: What to learn from the Micula battle' (2015) 10(6) *Global Trade and Customs Journal* 194-97; Christer Söderlund, 'Intra-EU BIT investment protection and the EC Treaty' (2007) 24(5) *Journal of International Arbitration* 455-68; Christian Tietje and Clemens Wackernagel, 'Enforcement of intra-EU ICSID awards' (2015) 16(2) *The Journal of World Investment & Trade* 205-47; Hanno Wehland, 'The enforcement of intra-EU BIT awards Micula v Romania and beyond' (2016) 17(6) *The Journal of World Investment & Trade* 942-63; Hanno Wehland, 'Intra-EU investment agreements and arbitration: Is European Community law an obstacle?' (2009) 58(2) *International and Comparative Law Quarterly* 297-320; Marek Wierzbowski and Aleksander Gubrynowicz, 'Conflict of norms stemming from intra-EU BITs and EU legal obligations: Some remarks on possible solutions' in Christina Binder and Christoph Schreuer (eds), *International investment law for the 21st century: Essays in honour of Christoph Schreuer* (Oxford University Press: 2009).

²² See *infra* Chapter 6.3.1.1.

²³ OJ L 351/40, 20 December 2012, 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.

²⁴ See *infra* Chapter 5.3.3.2.

²⁵ For an overview over this issue consider Markus Burgstaller, 'The future of bilateral investment treaties of EU Member States' in Marc Bungenberg, Joern Griebel and Steffen Hindelang (eds),

Third, it cannot be denied that a multilateral ISDS reform would benefit tremendously from the harmonisation of substantive standards of investment protection. In other words, a procedural reform of the system of adjudication can only lead to limited improvements in light of the subsisting divergences in the underlying investment agreements' substantive scope of protection.²⁶ This is not, however, the subject of the present analysis that focuses exclusively on the ICS as an institutional and procedural ISDS reform initiative.

Fourth, as part of the analysis of the ICS in light of the principle of equal treatment this study embarks on a brief comparison between IIAs and DTT. This is motivated by the fact that the case law of the CJEU on intra-EU DTTs is frequently invoked to reject the argument that IIA fall squarely within the scope of application of the principle of equal treatment.²⁷ It must be acknowledged that this comparison is by all means superficial. The elimination of double taxation is subject to a particular set of considerations, and so are the motivations and workings of DTTs. This study lays no claim to a comprehensive study of intra-EU DTTs and the reader is therefore directed to the relevant literature elsewhere.²⁸

Lastly, although this study places particular relevance on the broader economic, political and historical context, Chapter Two cannot but provide a snapshot of the relevant literature and theories. Especially literature in economics

International investment law and EU law (Springer: 2011b) 55-77; Luca Pantaleo, 'Member States prior agreements and newly EU attributed competence: What lesson from foreign investment' (2014) 19(2) *European foreign affairs review* 307-24; Elsa Milanese, 'European Union restrictions to the free movement of capital v. BITs guarantees: learning from the European Court of Justice case law' in Giorgio Sacerdoti and Anna De Luca (eds), *General interests of host states in international investment law* (Cambridge: Cambridge University Press: 2014), 300-04.

²⁶ Rob Howse, 'Designing a multilateral investment court: Issues and options' (2017) 36(1) *Yearbook of European Law* 209-36, 217.

²⁷ See *infra* Chapter Seven.

²⁸ e.g. Niels Bammens, *The principle in non-discrimination in international and european tax law* (IBDF: 2013); Emmanuel Raingard de la Blétière, 'The impact of EU law on the elimination of double taxation of business income' in Gauthier Blanluet and Phillippe J. Durand (eds), *Cahiers de Droit Fiscal International: Key practical issues to eliminate double taxation of business income* (2011) 59-79; Servaas van Thiel, 'Removal of income tax barriers to market integration in the European Union: litigation by the Community citizen instead of harmonization by the Community legislature?' (2003) 12(1) *EC Tax Review* 4-19; on tax competition and globalization, see Philipp Genschel, 'Globalization, tax competition, and the welfare state' (2002) 30(2) *Politics & Society* 245-275; on methods for the elimination of double taxation under DTTs, see David Kleist, 'Methods for elimination of double taxation under double tax treaties' (University of Gothenburg 2012), 170 *et seq*; for an overview of the permanent establishment concept from a tax law perspective, see Linus Jacobsson, 'Permanent establishment through related persons: A study on the treatment of related persons under Article 5 of the OECD Model Tax Convention' (University of Uppsala 2018), 52-92; for a discussion of the relevant case law in Swedish, see Jesper Johansson, 'EU-domstolens restriktionsprövning: i mål om de grundläggande friheterna och direkta skatter' (University of Stockholm 2016), 135 *op cit*.

and business studies differentiates between various types of FDI,²⁹ which are motivated by a broad spectrum of diverging political considerations and business interests.³⁰ The ensuing analysis does not, however, take these differentiations into consideration.

1.2 Research question

In light of these preliminary considerations, the research question is phrased as follows:

What are the factors that constrain the Union's participation in ISDS reform, and how are these factors reflected in the ICS initiative?

An answer to this question requires three separate, albeit interrelated investigations.

First, it is pivotal to assess whether the Union enjoys substantive treaty-making competence over ISDS, that is to say whether the Union is capable of participating in ISDS reform through the conclusion of international agreements, and what form these agreements would take.³¹ Second, this study must determine to what extent the principle of autonomy of the EU legal order, and the principle of non-discrimination, conditions institutional and procedural characteristics of ISDS provisions in EU IIAs.³² Third, the ICS needs to be evaluated both in light of EU law, and as a response to criticism of investor-state arbitration; and must explore the contribution that the ICS brings to multilateral ISDS reform processes.

1.3 The point of departure in theory

It transpires from the above, that this study presents an investigation into the constitutional rules and principles of Union external relations law that govern the conclusion of international agreements with ISDS provisions. Although the relevant principles are all embedded in the Treaties, they are primarily developed through the jurisprudence of the CJEU. These are the relevant legal factors. Additionally, the present study illustrates the impact of non-legal aspects on the

²⁹ Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave: 2002) 4-6.

³⁰ For a comprehensive overview of economic theories from the business perspective, see Hwy-Chang Moon, *Foreign Direct Investment: A Global Perspective* (World Scientific Publishing: 2016) Chapter 2; and Moosa (2002), *op cit.*, Chapter 2.

³¹ See *infra* Chapter Five.

³² See *infra* Chapters Six and Seven.

Commission's policy proposal for a treaty-centred investment court. This investigation rests on a number of assumptions about the nature of (international) law, the Union legal order, the role of the CJEU, and the relevance of contextual analysis for the study of legal phenomena. It is the purpose of this section to make explicit these theoretical frameworks and terminological choices that guide the ensuing analysis.

1.3.1 *Constructivism*

In any society there are competing views on how a particular social activity should be regulated. This is why “there also have to be differing opinions about what the law should say.”³³ Legal sources cannot, therefore, be reduced to expressions of a singular truth about the law that the jurist sets out to uncover, but are rather instruments that allow an insight into the spectrum of the acceptable normative arguments.³⁴ It is the task of normative legal science then to reveal the arguments that are lurking behind legal rules and critically evaluate their consequences.

In the positivist legal tradition law exists in a “social, economic, and political vacuum”³⁵. Such an approach inevitably requires an internal perspective on law as a coherent system that is defined and analysed exclusively by reference to its own sources.³⁶ The role of legal doctrine is, thus, reduced to a discovery of the law as it already existed.³⁷ As a social phenomenon, however, legal sources must be studied within their relevant context, both internal and external. This raises questions as to the role of external aspects in legal analysis. Traditional doctrinal scholarship has come under pressure as being too focused on legal practice and as not fulfilling the requirements of scientific research.³⁸ Legal academic research was, thus, seen to be “narrow, conservative, illiberal, unrealistic and boring” with lack of focus on the “big” picture.³⁹ This has triggered a plethora of different approaches to the academic study of law that attempt to integrate external views

³³ Jan M Smits, 'Redefining normative legal science: Towards an argumentative discipline' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of human rights research* (Intersentia: 2009) 45-59, 50.

³⁴ Smits (2009), *op cit.*, 58.

³⁵ David Ibbetson, 'Historical research in law' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of legal studies* (Oxford University Press: 2005) 863-78, 864.

³⁶ Smits (2009), *op cit.*, 46-47; on claims of the autonomous nature of legal reasoning, see Brian H. Bix, 'Law as an Autonomous Discipline' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press: 2005) 975-86, 977-78.

³⁷ Aleksander Peczenik, 'A theory of legal doctrine' (2001) 14(1) *Ratio Juris* 75-105, 90, notably Peczenik rejects the idea of a strong link between a monocentric view on the law and legal positivism (98-99).

³⁸ Jaap Hage, 'Law and coherence' (2004) 17(1) *Ratio Juris* 87-105.

³⁹ William Twining, *Blackstone's tower: The English law school* (Sweet & Maxwell: 1994) 141.

into legal analysis.⁴⁰ It is important to acknowledge, however, that a contextual study of legal sources is not *prima facie* at odds with an approach that primarily focuses on the ordering and systematization of legal sources and is concerned with the internal coherence of a legal system.⁴¹ Smits, for instance, observed:

“[T]he core question in the debate should not be so much how *other* disciplines and methodologies can help us to make the academic study of law more ‘scholarly’, but how the legal approach *itself* can be made more consistent and match better the expectations one has about a truly scholarly discipline of law.”⁴²

Clearly, while external (non-legal) aspects cannot—and should not—be the decisive element in a normative assessment of legal sources, neither can these aspects be entirely ignored.⁴³ Relevant external factors must in this respect be determined in relation to the type of social activity that is being regulated.

It emerges from these observations that the present study takes its point of departure in a constructivist approach to international law. In other words, it perceives of international law as a social phenomenon that governs a range of social interactions in the international realm,⁴⁴ including international economic activity such as foreign investment.⁴⁵ International investment law is, thus, deeply embedded in a particular social context. Consider, for instance, studies that have revealed a positive correlation between inward FDI flows and public attitudes towards globalization.⁴⁶ The societal context of FDI becomes even more obvious

⁴⁰ Twining (1994), *op cit.*, 143-44; for an overview over the diversity of the “law and” approaches to law consider only the wide range of academic journals that are now available, and the range of handbooks on these topics such as e.g. Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington, *The Oxford Handbook of law and politics* (Oxford University Press: 2008); Jeffrey N. Gordon and Wolf-Georg Ringe, *The Oxford Handbook of Corporate Law and Governance*, 1 edn (Oxford University Press: 2018); Francesco Parisi, *The Oxford Handbook of law and economics*, 1 edn (Oxford University Press: 2017).

⁴¹ Generally on coherence as a fundamental purpose of legal doctrine, see Peczenik (2001), *op cit.*, particularly 78-80.

⁴² Smits (2009), *op cit.*, 48, footnotes omitted.

⁴³ Smits calls this the external normative approach, see Smits (2009), *op cit.*, 50.

⁴⁴ Moshe Hirsch, ‘The sociology of international law: Invitation to study international rules in their social context’ (2005) 55(4) *University of Toronto Law Journal* 891-939, 891; generally on the topic of law as a social phenomenon, see Perfecto V. Fernandez, ‘Understanding law as social phenomenon’ (1990) 65 *Phillipine Law Journal* 30-41.

⁴⁵ Moshe Hirsch and M. Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press: 2015) 18.

⁴⁶ Marcus Noland, ‘Public Attitudes, Globalization, and Risk’ (2004), Institute for International Economics, Working Paper No WP 04-2 11; in a later study Noland links public attitudes with trade flows, and demonstrates that public attitudes correlate with cultural affinity and political ideology, see Marcus Noland, ‘Affinity and International Trade’ (2005), Institute for International Economics,

considering the general assumption that direct investment leads to important knowledge and technology spill-overs.⁴⁷ The economic rationale underlying the protection of investment through the conclusion of bilateral and regional investment agreements, the political and ideological background to the empowerment of private investors to pursue their claim directly before an international tribunal, and the public perception over the legitimacy of ISDS, therefore, all shape the relevant context for this study.⁴⁸ More importantly, though, they inform the dominant normative view on a legal rule, norm or principle and thereby exert an influence over its interpretation and application. Constructivism, therefore, lays the path for a contextual approach to the study of the ICS that facilitates the consideration of policy factors in legal analysis.

1.3.2 *The nature of the Union and its institutions*

A few words should also be directed at the nature of Union law, considering that the present research endeavour primarily contributes to scholarship on EU external relations. Attempts to define the Union as an organization is a complex endeavour. It is in this respect common to draw on conceptions of federalism, intergovernmentalism and supranationalism to emphasize respectively the role of the Member State or the Union institutions as drivers of European integration. Federalist approaches attempt to reveal characteristics in the relationship between the Union and its Member States that resemble the organization in federal states. Intergovernmentalism is based on the idea that the Member State control the European Union, which is thus portrayed as a traditional international organization. Supranationalism views the Union and its institutions as actors with autonomous powers.

Mitrany⁴⁹ and Haas⁵⁰ are in this context considered to have provided the intellectual pedigree that have inspired European integration theories based on supranationalism. Mitrany, himself a functional intergovernmentalist, saw

Working Paper No WP 05-3 8; Joel R. Paul, 'Cultural resistance to global governance' (2000) 22(1) *Michigan Journal of International Law* 1-84.

⁴⁷ Vudayagi N. Balasubramanyam, Mohammed Salisu and David Sapsford, 'Foreign direct investment and growth in EP and IS countries' (1996) 106(434) *The Economic Journal: the Quarterly Journal of the Royal Economic Society* 92-105, 95.

⁴⁸ See *infra* Chapter 8.2.1.

⁴⁹ David Mitrany, *A working peace system: an argument for the functional development of international organization* (Royal Institute of International Affairs: 1943) note, however, that Mitrany himself did not support supranationalism but advocated functional integration based on intergovernmentalism. Yet, his globalist perspective has inspired subsequent scholars to break with the intergovernmentalist paradigm.

⁵⁰ Ernst B Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (University of Notre Dame Press: 2004).

multilevel governance structures as a pragmatic solution to tackle policy issues that permeate national borders. Haas elaborated on this, arguing that economic integration will ultimately lead to political integration. Regionalism will, thus, transcend the nation state that continues to invest politically into common institutions.⁵¹ Supranationalism was, thus, developed precisely to challenge traditional views on the role of the nation state in international law. Examining statements on the nature of the ECSC from jurists who participated in the negotiation of the Rome Treaty, Haas observed in 1958 that:

“The feature common [...] is an admission that supranationality refers to a type of integration in which more power is given to the new central agency than is customary in the case of conventional international organisations, but less than is generally yielded to an emergent federal government.”⁵²

It is not surprising, therefore, that the use of supranationalism as a theoretical model to analyse the Union, its institutions and their relationship to the Member States has entrenched the understanding of the Union as a *sui generis* institution, i.e. an organization that cannot be explained by reference to either purely federalist or purely intergovernmentalist thought. Indeed, Weiler and Haltern were forthright in their statement that it has become “increasingly artificial to describe the legal structure and processes of the Community with the vocabulary of international law.”⁵³

This approach is, however, problematic. Basedow, for instance, observed that a shortcoming of both supranationalism and intergovernmentalism is the intrinsic polarization of institutional power. Whereas functional and neo-functional conceptions of supranationalism identify the Commission as the only engine of integration, liberal intergovernmentalism depicts the Member State to be in full control over the process of integration. According to Basedow, however, the influence of the Commission and the Member States varies across policy domains and time.⁵⁴ Supranational or intergovernmental theories may therefore be more or less helpful to describe structures of Union policy-making, depending on the field of study and the actors involved. In the context of international economic policy this involves *inter alia* the Commission, the Council, the EP, but also the CJEU.

⁵¹ Haas (2004), *op cit.*, 45.

⁵² Haas (2004), *op cit.*, 34.

⁵³ Joseph H. H. Weiler and Ulrich R. Haltern, ‘The autonomy of the Community legal order - Through the looking glass’ (1996) 37(2) *Harvard International Law Journal* 411-48, 422.

⁵⁴ Johann Robert Basedow, *The EU in the global investment regime: commission entrepreneurship, incremental institutional change and business lethargy* (Routledge: 2018) 15.

The role of the CJEU is discussed in more detail in the following section. For present purposes it is sufficient to recall briefly its role for European integration,⁵⁵ which is well reflected in Weiler's approach to supranationalism that draws a qualitative distinction between decisional and normative supranationalism,⁵⁶ and illustrates the elaborate interplay between the political decision-making in the Council and the facilitation of further integration through judicial decision making. Indeed, many of the core constitutional doctrines such as supremacy and direct effect were reactions to the political stalemate in the Council that resulted in the Luxembourg Accord of 1967. Likewise, functional principles such as the implied powers doctrine and the principle of autonomy were responses to this "policy paralysis".⁵⁷ As Chapters Five and Six illustrate, these principles are of particular relevance for the present study. Through its assessments of international agreements in accordance with Article 218(11) TFEU the CJEU has shaped much the CCP, and continues to define the constitutional limits of the Union's foreign investment policy; and motivates the heavy focus on the Court's case law in relevant parts of this study.

The influence of the Commission over international economic policy has traditionally been characterized by a high level of autonomy. In particular, the Commission has for some time represented the Union and its Member States in investment-related negotiations irrespective of the internal division of competence.⁵⁸ Basedow recently depicted the Commission as a central institutional actor driving the expansion of external competence for investment,⁵⁹ motivated by an integral policy preference to shape further economic integration through CCP.⁶⁰ He was, thus, able to explain Commission preferences beyond

⁵⁵ For a comprehensive account of this aspect and a rich selection of references, see Thomas Horsley, 'Reflections on the role of the Court of Justice as the motor of European integration: Legal limits to judicial lawmaking' (2013) 50(4) *Common Market Law Review* 931-65.

⁵⁶ Joseph Weiler, 'The Community system: The dual character of supranationalism' (1981) 1(1) *Yearbook of European Law* 267-306.

⁵⁷ With respect to the implied powers doctrine, see Panos Koutrakos, *EU international relations law*, 2nd edn (Hart Publishing: 2015) 83; on the function of implied exclusivity as a 'conflict rule', despite its constitutional character, see Fernando Castillo de la Torre, 'The Court of Justice and external competences after Lisbon: Some reflections on the latest case law' in Piet Eeckhout and López-Escudero (eds), *The European Union's external action in times of crises* (Hart Publishing: 2016) 129-86, 160; Schütze furthermore highlights that exclusivity plays a role in managing the primacy of Union law and the sovereignty of Member States in international law, without the constitutional imposition of a hierarchy of norms between the Union and Member States' legal orders, see Robert Schütze, *Cooperative federalism constitutionalized* (Oxford University Press: 2009a) 341.

⁵⁸ Basedow (2018), *op cit.*, 83.

⁵⁹ He draws on insights from policy entrepreneurship, see e. g. Joseph Alois Schumpeter, *The theory of economic development: an inquiry into profits, capital, credit, interest, and the business cycle* (Cambridge, Mass.: 1934); Robert Alan Dahl, *Who governs? Democracy and power in an American city*, 2. ed. edn (Yale University Press: 2005).

⁶⁰ Basedow (2018), *op cit.*

the simplistic neo-functionalist framework of pro-integration ideology, which would expect supranational actors to always act in the interest of preconceived ideological preferences.⁶¹ In light of the strong link between the internal market and foreign economic policy the Commission is seen to push for competences over foreign investment in order to safeguard the well-functioning of the internal market.⁶² This study illustrates at several points that this intricate relationship between the internal market and international economic policy informs *inter alia* the development of the CCP, the Court's rationale underlying implied competences and the principle of autonomy, and should generally be a guiding light for a normative assessment of the ICS in light of the principle of equal treatment.

The Commission can, thus, influence external policies by convincing decision-makers to adopt a new policies or by directly influencing the selection of policies.⁶³ Institutional ambiguities, and a developing political narrative provide in this respect for opportunities that can be exploited.⁶⁴ In other words, it is easier for the Commission to influence policy developments in areas involving multiple policy dimensions (e.g. international, supranational, national, sub-national, etc.) and competing political actors (e.g. different Directorates General of the Commission). This describes well the Union's foreign investment policy, that is currently undergoing an intensive policy (re-)orientation. As a policy field it displays complexity and interdependence with other fields of economic policy. It also requires a high level of institutional interaction (both within the Union as well as between Union institutions and the Member States). This should provide ample opportunities for the Commission to influence policy developments, and

⁶¹ see generally Mark A. Pollack, *The engines of European integration: delegation, agency, and agenda setting in the EU* (OUP: 2003); Steunenberg challenged the existence of an a priori pro-integrationist ideological preference, see Bernard Steunenberg, 'Is big brother watching? Commission oversight of the national implementation of EU directives' (2010) 11 *European Union Politics* 359-80; Karagiannis illustrates that a ideological preferences favouring further integration vis-à-vis a particular policy area varies across different entities in the Commission, see Yannis Karagiannis, 'Collegiality and the politics of European competition policy' (2010) 11(1) *European Union Politics* 143-64; Schafer demonstrates that ideological preferences in general function as heuristic framework for broder policy direction, see Jerome Schafer, 'European Commission officials' policy attitudes' (2014) 52(4) *Journal of Common Market Studies* 911-27.

⁶² Hussein Kassim, 'What Officials Believe' in Hussein Kassim, *et al.* (eds), *The European Commission of the Twenty-First Century* (Oxford University Press: 2013) 103-29, 114-15.

⁶³ Robert Ackrill and Adrian Kay, 'Multiple streams in EU policy-making: The case of the 2005 sugar reform' (2011) 18(1) *Journal of European Public Policy* 72-89, 75; Robert Ackrill, Adrian Kay and Nikolaos Zahariadis, 'Ambiguity, multiple streams, and EU policy' (2013) 20(6) *Journal of European Public Policy* 871-87.

⁶⁴ Paul Copeland and Scott James, 'Policy windows, ambiguity and Commission entrepreneurship: Explaining the relaunch of the European Union's economic reform agenda' (2014) 21(1) *Journal of European Public Policy* 1-19, 4; Nikolaos Zahariadis, 'Ambiguity and choice in European public policy' (2008) 15(4) *Journal of European Public Policy* 514-30, 518.

it is why the ICS is for present purposes seen to be a reflection of the Commission's policy preferences for structural ISDS reform also on the multilateral level.

It emerges from these observations that supranationalism provides a helpful theoretical perspective on the Union's international activity under the umbrella of the CCP, and explains the focus on the development of Commission's policy proposals for ISDS reform such as the detailed discussion of the ICS in Chapter Four.

Lately, the autonomous power of the Commission in the area of international economic relations is waning. With the Treaty of Lisbon, the EP has emerged as powerful actor in the conclusion of international agreements by the Union. Likewise, Member States are re-drawing a line along the formal attribution of competences over foreign investment policy and actively challenge the Commission's approach to IIAs. These oppositions are played out through national parliaments as well as Member State participation in the Council. Discussing the nature of future IIAs concluded by the Union, Chapter 8.1 is informed by this emergent power struggle that exposes the Commission to pressure from the EP and national parliaments. The influence of the Commission over external action is expected to be weakest over aspects of foreign investment policy that are not covered by the exclusive competence of the CCP.

Chapter Five elaborates in more detail on the scope and attribution of competences for ISDS. It is pivotal to understand at the outset, however, that competences cannot be created by other means than a Treaty amendment, and neither can the Commission affect a shift of the nature of competences. Although the division of competence is in constant flux,⁶⁵ Von Bogdandy and Bast have argued that these variations are merely the inevitable effect of the principle of pre-emption. The authors argue, therefore, that Member States could regain legislative autonomy in core areas of Union law by focusing on the scope of secondary Union law rather than Treaty amendments.⁶⁶ Consequently, although this study refers at several points to exclusive competences as a collective term, the exclusive character of implied treaty-making competences, though having an adverse effect of Member States' legislative autonomy, are at their core but effects of pre-emption.

⁶⁵ Lucia Serena Rossi, 'Does the Lisbon Treaty provide a clearer separation of competences between the EU and the Member States?' in Andrea Biondi, Piet Eeckhou and Stefanie Ripley (eds), *EU law after Lisbon* (Oxford University Press: 2012) 85-106, 87; Antonio Tizziano, 'The powers of the Community' in Commission of the European Communities (ed), *Thirty years of Community law* (Office for Official Publications of the European Communities: 1981) 43-68.

⁶⁶ Armin von Bogdandy and Jürgen Bast, 'The federal order of competences' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European constitutional law*, 2nd edn (Hart Publishing: 2009) 275-308, 292.

1.3.2.1 The role of the Court of Justice

It was observed earlier in this chapter that legal rules, norms and principles are expressions of the dominant normative view on the regulation of a particular social activity. The preceding section has furthermore alluded to the active role of the CJEU in European integration processes. This present section now sheds some more light on the role of the CJEU and the relevance of its case law for the present study. Paunio and Lindroos-Hovinheimo observed:

“[J]udicial decision-making is a process by which special legal meaning is given to texts. This means that the normative meaning of legal texts is created in a given context and in a given communicative situation.”⁶⁷

Within the context of the Union legal order, therefore, it is the role of the CJEU to determine and construct the meaning of Union law. The CJEU, in other words, determines the most suitable interpretation and in the exercise of its interpretive prerogative “defines and names legally relevant social facts”⁶⁸. Generally speaking, any provision of Union law is to be interpreted, having regard to “the spirit, the general scheme and the wording” of the Treaty,⁶⁹ but also requires the CJEU to take into account the context of the Union legal order and its objectives as they are set out in the Treaties.⁷⁰ Chapters Six and Seven in particular elaborate on how the CJEU has interpreted relevant constitutional principles in the context of EU external relations. It should be noted at this point, however, that the relevant social facts that the CJEU draws upon within this interpretive matrix, are not necessarily identical to the aspects that were explicated above as relevant context for this study. Yet, the present analysis is not concerned with an explanation of the Court’s jurisprudence, nor does it attempt to anticipate the outcome of pending cases. Rather, this is a normative effort that is concerned with what the law could be,⁷¹ an endeavour that in itself presupposes a construction of the relevant context.

The normative argument behind legal sources is, thus, brought to light through a process of argumentation that, albeit similar to the interpretive activity of the CJEU, may lead to very different revelations. Law is inherently contextual

⁶⁷ Elina Paunio and Susanna Lindroos-Hovinheimo, ‘Taking language seriously: An analysis of linguistic reasoning and its implications in EU law’ (2010) 16(4) *European Law Journal* 395-416, 408

⁶⁸ Paunio and Lindroos-Hovinheimo (2010), *op cit.*, 396.

⁶⁹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963], EU:C:1963:1, 12.

⁷⁰ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982], EU:C:1982:335, para. 20.

⁷¹ Although this is not meant in the traditional *de lege ferenda* meaning. Rather the present study is a constructive effort that attempts to contribute to shaping and creating knowledge over EU external relations law.

and the normative arguments derive from the communicative character of legal sources.⁷² Determining the meaning of words within the context of law is, thus, a value-laden process⁷³ that requires a frame of reference to appraise normative arguments as acceptable, suitable, adequate or otherwise. Within the context of academic legal analysis, the boundaries of normative reasoning are naturally defined by the accepted tenets of legal reasoning in any given legal system.⁷⁴ For the present study this implies that the spectrum of acceptable normative arguments is determined by the hierarchy of norms in the Union legal order, and in particular the significance of international law; and an open-mindedness that views the Court itself as creating legal meaning. Consequently, both the CJEU through interpretation⁷⁵ and legal doctrine through normative analysis⁷⁶ construct legal meaning and contribute to the further development of the Union legal order, rather than merely uncovering the pre-existing meaning of Union law. An academic inquiry into the ICS is, therefore, not confined to the Court's jurisprudence, but neither can it ignore the normative meaning created by the CJEU through its case law.

1.3.2.2 Hierarchy of norms in the Union legal order

Hierarchy is a fundamental characteristic of almost any legal system; an ordering of relationships between norms and legal acts in accordance to pre-determined parameters. Its primary function in a legal system is the resolution of conflicts between norms by means of establishing prevalence of one norm over the other.⁷⁷ More importantly, however, hierarchy is deeply embedded in theoretical preconceptions of law, and, to this extent it determines methodological approaches to the study of legal systems. More importantly, as the connecting factor between the legal validity of a norms and conceptions of democratic legitimacy of the law-making process it shapes our understanding of political order.⁷⁸ As an organizational principle, however, "its ability to coordinate an unlimited number of relations according to a variety of criteria"⁷⁹ is instrumental

⁷² Paunio and Lindroos-Hovinheimo (2010), *op cit.*, 408.

⁷³ *Ibid.*, 398.

⁷⁴ Smits (2009), *op cit.*, 54.

⁷⁵ Paunio and Lindroos-Hovinheimo (2010), *op cit.*, 414-15.

⁷⁶ Although Peczenik himself does not support this view, he acknowledges constructivist thinking in legal doctrine as a competing theoretical approach, see Peczenik (2001), *op cit.*, 90.

⁷⁷ Koen Lenaerts and Marlies Desomer, 'Towards a hierarchy of legal acts in the European Union? Simplification of legal instruments and procedures' (2005) 11(6) *European Law Journal* 744-65, 746

⁷⁸ Roland Bieber and Isabelle Salomé, 'Hierarchy of norms in European law' (1996) 33(5) *Common Market Law Review* 907-30, 910.

⁷⁹ Bieber and Salomé furthermore link the conception hierarchy as an organisational principle to the notion of increased efficiency of the workings of component parts, which leads them to

to studying the internal order of any given system. Hierarchy, in this latter sense, provides an analytical framework for the study of systems and their component parts.

The founding Treaties did not initially establish a formal hierarchy of norms,⁸⁰ beyond the general characterization of primary Union law (now including the Treaties, including annexes and protocols,⁸¹ accession agreements, the Charter of Fundamental Rights,⁸² and general principles of Union law⁸³) and secondary Union law.⁸⁴ Structure and stability of the system of Union legal acts was instead primarily developed and maintained through the CJEU with the help of certain organising principles that focused *inter alia* on the binding and non-binding effect of legal instruments, their general and individual scope of application, as well as their effect within the legal systems of Member States (i.e. supremacy and direct effect).⁸⁵ These organising principles were predominantly based on functional concerns.⁸⁶

Following lengthy reform processes⁸⁷ the Treaty of Lisbon now establishes a formal hierarchy between legislative,⁸⁸ delegated⁸⁹ and implementing acts⁹⁰ on the basis of their adoption procedure. This represents, however, only a fraction of the hierarchy of legal acts in the Union legal order, i.e. an ordering of legal sources

emphasize the need for mechanisms that guarantee coordination and synergy across various levels of a hierarchy within any given system, see Bieber and Salomé (1996), *op cit.*, 909.

⁸⁰ The Court did, however, differentiate between norms of fundamental character and norms of implementing character, see Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Küster and Berdt & Co.* [1970], EU:C:1970:115; Case C-240/90 *Germany v Commission (Sheepmeat)* [1992], EU:C:1992:408; Case C-417/93 *European Parliament v Council* [1995], EU:C:1995:127; Case C-156/93 *European Parliament v Commission* [1995], EU:C:1995:238.

⁸¹ Article 51 TEU.

⁸² Article 6(1) TEU.

⁸³ Alan Dashwood *et al.*, *Wyatt and Dashwood's European Union Law*, 6th edn (Hart Publishing: 2011) 321-22; Takis Tridimas, *The general principles of EU law* (Oxford University Press: 2006)

⁸⁴ Paul Craig and Gráinne de Búrca, *EU Law*, 5 edn (Oxford University Press: 2011) 109-12; Anthony Arnulft *et al.*, *Wyatt and Dashwood's European Union Law*, 4th edn (Sweet & Maxwell: 2000) 59-60; Gian Antonio Benacchio and Barbara Pasa, *A Common Law for Europe* (Central European University Press: 2005) 186-87; Deirdre Curtin and Tatevik Manucharyan, 'Legal Acts and Hierarchy of Norms in EU Law' in Damian Chalmers and Anthony Arnulft (eds), *The Oxford Handbook of European Union Law* (OUP: 2015) 104-24, footnote 16.

⁸⁵ Lenaerts and Desomer (2005), *op cit.*, 746-48.

⁸⁶ Bieber and Salomé (1996), *op cit.*, 914; Winter observed that the Court's case law on Article 189 EC reacted to three specific constitutional problems: the 'compulsory nature of a legal act', its 'generality of application', and its 'confederal nature', see Gerd Winter, 'Reforming the sources and categories of European Union law: A summary' in Gerd Winter (ed), *Sources and categories of European Union law: A comparative and reform perspective* (Nomos: 1996) 13-65, 15.

⁸⁷ Curtin and Manucharyan (2015), *op cit.*, 104-06; Lenaerts and Desomer (2005), *op cit.*, 748 *et seq.*

⁸⁸ Article 289 TFEU.

⁸⁹ Article 290 TFEU.

⁹⁰ Article 291 TFEU.

within the category of secondary Union law.⁹¹ As Bieber and Solomé rightly observe, “[h]ierarchy is generally perceived as a problem concerning the relationship between acts adopted on the base of the Treaties, and acts adopted subsequently with a view to the implementation of those acts.”⁹² Chapter 6.5 elaborates in detail on the position of IIAs and investment awards within the Union legal order and demonstrates that they fit uncomfortably into this notion of hierarchy of Union legal acts. For present purposes, therefore, hierarchy is instrumental in analysing normative arguments about the conclusion of IIAs with ISDS provisions as it allows a glimpse into how the CJEU validates arguments over the interpretation of the Union’s legal order.

1.3.3 *The investment treaty regime: terminological considerations*

The term ‘investment treaty regime’ is used throughout this study to refer to the over 3000 IIAs that now constitute the modern investment treaty regime.⁹³ The use of this term requires some reflections. International legal regimes are sets of principles, norms, rules, procedures and institutions that determine the interactions of actors and participants in a particular field of international law. Indeed, this understanding is in line with definitions provided by Keohane and Nye⁹⁴ and Haas⁹⁵ who emphasize the effect of norms, rules and procedures on the behaviour of actors and participants.⁹⁶ Whereas norms are understood as the rights and obligations of actors,⁹⁷ rules set out more specific prescriptions and proscriptions on actors’ behaviour. Procedures are more akin to common—accepted—practices for interactions within the regime.

⁹¹ Schütze points out that the terms secondary EU law and secondary EU legislation are sometimes used indiscriminately, but that secondary EU law comprises, in fact, primary EU legislation because the Treaties cannot be included in the concept of legislation, see Robert Schütze, ‘The morphology of legislative power in the European Community: Legal instruments and the federal division of power’ (2006) 25(1) *Yearbook of European Law* 91-151, 106. Following the Lisbon Treaty, legislative acts constitute primary EU legislation, whereas non-legislative acts are secondary EU legislation, together these form secondary EU law.

⁹² Bieber and Salomé (1996), *op cit.*, 913.

⁹³ Salacuse uses the term ‘treatification’ of investment law, see Jeswald Salacuse, ‘The treatification of international investment law’ (2007) 13(1) *Law and Business Review of the Americas* 155-66.

⁹⁴ Robert O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Little Brown: 1977) 553.

⁹⁵ Haas described regimes as “norms, rules, and procedures agreed to in order to regulate an issue-area”, see Ernst Haas, ‘Why collaborate? Issue-linkage and international regimes’ (1980) 32(3) *World Politics* 357-405, 397.

⁹⁶ Keohane and Nye argue that regimes “regularize” state behaviour through norms, rules and practices, see Keohane and Nye (1977), *op cit.*, 19.

⁹⁷ For Haas, norms are formalized preferences that inspire more precise rules and procedures, see Haas (1980), *op cit.*, 396.

Krasner furthermore adds principles as a defining regime feature. As opposed to norms and rules, principles set out “beliefs of fact, causation and rectitude”⁹⁸ and are, thus, intimately tied to ideology. Krasner defines regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”⁹⁹ Expectations arise because actors are believed to adhere to the norms and rules and settle disagreements and challenges in accordance with established procedures.¹⁰⁰ Regimes are, thus, characterized by durability and predictability and a sense of internal cohesion, rather than the pursuit of short-term objectives. In a regime, actors are willing to sacrifice short-term interests for the achievement of long-term goals.¹⁰¹

Applying Krasner’s definition to IIAs, Bonnitcha, Poulsen and Waibel were able to identify common principles (i.e. the belief that investment flows increase prosperity and the belief that the protection of property rights increases investment flows), norms (i.e. the establishment of rights for investors that are independent of the domestic legal domain, and without substantive obligations), rules (i.e. investment protection and liberalization commitments) and decision-making procedures (i.e. through negotiation and dispute settlement).¹⁰² Bull highlighted the importance of institutions for regimes, as they secure adherence to rules.¹⁰³ The investment treaty regime lacks strong institutional support comparable to that of the WTO for the trade law regime. However, it is notable that the institutionalization of dispute settlement through ICSID, the multilateral characteristics that *ad hoc* tribunals exhibit¹⁰⁴ and the increasing role of regional organizations such as the EU in the negotiation of IIA increases the level of institutionalization of the investment treaty regime.

Commonalities amongst structural, substantive and procedural features across IIAs¹⁰⁵ and ideologies underlying the negotiation of IIAs with ISDS provisions have led to a convergence of expectations of investors, host and home states on a global scale. The term ‘investment treaty regime’ captures these common features and facilitates a discussion of IIAs as a general phenomenon. Focusing

⁹⁸ Stephen Krasner, ‘International regimes’ (1982) 36(2) *International Organization* 185-205, 186.

⁹⁹ Krasner (1982), *op cit.*, 186.

¹⁰⁰ Haas (1980), *op cit.*, 396.

¹⁰¹ Krasner (1982), *op cit.*, 187.

¹⁰² Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press: 2017) 8 *et seq.*

¹⁰³ Institutions, for Bull, are sets of common practices and habits that shape collaboration for the achievements of common interests, see Hedley Bull, *The anarchical society: a study of order in world politics* (Macmillan: 1977) 74.

¹⁰⁴ Stephan W. Schill, *The Multilateralization of International Investment Law* (CUP: 2009).

¹⁰⁵ Jeswald Salacuse, ‘The emerging global regime for investment’ (2010) 51(2) *Harvard International Law Journal* 427-73, 432.

on coherence, rather than diversity and fragmentation, also invites the identification and discussion of trends and general developments.

Lastly, Bonnitcha, Poulsen and Waibel make the important point that foreign investment activity is regulated by a plethora of legal instruments and institutions. This includes not only IIAs and ISDS, but also investment insurance, investment contracts, DTT, trade arrangements, regional integration projects, environmental arrangements, and many more. The investment treaty regime, albeit core to the regulation of foreign investment activity, is but a part of the 'broader investment regime complex'.¹⁰⁶

1.3.4 *A synthesis*

The Union is a complex phenomenon. Stuck in between pre-conceived models about political organization, its institutional and constitutional structure sits uncomfortably with the notion of an international organization in a state-centric system of international law. In spite of being an autonomous structure with a self-defined sense of purpose, it nonetheless serves the political preferences collectively defined by its Member States, as participation in the European project still derives from the consent of the sovereign nation state. Where regional economic integration fails to realize the anticipated economic and welfare benefits; where the interdependencies between economic and non-economic values and regulations are becoming enmeshed in a multi-level governance structure that is hardly comprehensible for ordinary citizens; where politics exploit this lack of clarity to spread populist anti-globalization narratives; Member States are at liberty to cut ties and leave—as Brexit very well illustrates.

Describing the Union in terms of intergovernmentalism, supranationalism, federalism, or through a prism of political pragmatism strikes the balance of power and control between the Union and its Member State at different points on a polarized scale. Individually they allow for a glimpse into this complex legal construct—a peek behind the curtain of politics and law, but the Union is difficult to describe with a single theory of political organization. Indeed, the power balance varies in dependence of policy areas and time, the perceptions of actors and their interaction (both horizontally and vertically) with other actors, as well as the preconceptions and biases of individual officials whose actions are shaped by their own experiences and backgrounds. Understanding the Union requires therefore above all one thing—context!

A theoretical lens that views law a social phenomenon invites a broader range of considerations to penetrate a study of legal structures governing foreign investment in the context of Union law. While, social constructivism recognizes

¹⁰⁶ Bonnitcha, Poulsen and Waibel (2017), *op cit.*, 6-7.

states as actors that engage in social relations,¹⁰⁷ perceiving the Union as supranational in CCP is inclusive of the Union as an actor engaging in social interaction with third countries through the medium of law. Zooming into the Commission and its policy preferences, the Court and its impact on shaping the constitutional framework for external relations, or the EP and its influence on defining investment policy provides a contextualized narrative for the presentation of the normative arguments that are underlying the ICS as an ISDS reform initiative. All of these aspects inform the tensions over ISDS provisions in Union IIAs, and they all are liable to define the future prospects of a Union as an actor in ISDS reform.

Pollack observed that the Commission's ability to shape policy is constrained by

“member state uncertainty regarding the problems and policies confronting them and on the Commission's acuity in identifying problems and policies that can rally the necessary consensus among member states in search of solutions to their policy problems.”¹⁰⁸

The theoretical approach outlined above facilitates a contextual study of the ICS that analyses the Commission's policy preferences in light of the Court's approach to constitutional limits, and pressure from the national parliaments and the EP arising out of their demands for a genuine ISDS reform.

1.4 Method and material

Despite its contextual approach, the present study is not to be mistaken for an external perspective on law. It does not inquire how economics, political science or history informs an inquiry into ISDS as a legal construct, its reform or the ICS initiative. The perspective of law in context does not, therefore, stand in conflict with the otherwise traditional 'legal' methodology.¹⁰⁹ Although certain parts of the subsequent chapters draw on material from other disciplines and statistical data, this study investigates legal sources as empirical material. It can therefore be described as qualitative empirical research, meaning that it makes inference from observations of the real world, i.e. assessing the effect of legal norms, jurisprudence, and criticism voiced in the public domain on current and future policy proposals.¹¹⁰ The previous section already clarified that legal sources are

¹⁰⁷ Hirsch and Hirsch (2015), *op cit.*

¹⁰⁸ Mark A. Pollack, 'Delegation, agency, and agenda setting in the European Community' (1997) 51(1) *International Organization* 99-134, 128.

¹⁰⁹ Smits (2009), *op cit.*, 54.

¹¹⁰ The present study, thus, follows the broad definition of empirical research presented by Epstein and King, who observe in their 2002 study on empirical legal scholarship that: "As long as the facts

conceived of as expressions of normative arguments that this study endeavours to reveal.¹¹¹ Reference to material from other disciplines is merely instrumental in as far as it informs the relevant context and desirable policy choices.

The specific material studied is primarily comprised of the three post-Lisbon IIAs that currently feature the ICS, i.e. CETA,¹¹² the EU-Singapore IPA¹¹³ and the EU-Vietnam IPA,¹¹⁴ and the proposal for the modernization of the EU-Mexico FTA, which provides sufficient detail on the envisaged ICS.¹¹⁵ This is supported by the material that is most relevant to the issues discussed in the individual chapters. Chapter Two stands out as it primarily draws on scholarship from *inter alia* economics, business administration and international relations in order to explain how foreign investment as an economic phenomenon developed to create the basic conditions in which the modern investment treaty regime could flourish. As that chapter progresses, legal scholarship becomes more relevant, although much of the legal scholarship used in this chapter adopts a contextual or historical method. The origins of ISDS are, thus, described as a historical phenomenon rooted in political power relations of empire with Asia, Africa and the Americas; direct relating legal developments in international law to political domination.

Chapter Three and Four are descriptive in nature drawing on leading text books, and handbooks for practitioners. Some of the descriptions of ISDS are illustrated with relevant investment disputes or examples of investment treaties, and controversial issues are emphasized with reference to scholarship for further elaboration. This discussion necessarily includes an exposé of legal sources in international investment law, which Dolzer and Schreuer have described as a multi-layered system, including general principles of public international law, general standards of international economic law and distinct rules that are particular to the investment domain.¹¹⁶ This part also includes a review of scholarship on the criticism against investor-state arbitration and a

have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical." Epstein Lee and King Gary, 'Empirical research and the goals of legal scholarship: The rules of inference' (2002) 69 *University of Chicago Law Review* 1-209, 2-3

¹¹¹ Smits' argumentative approach explains the function of legal sources as "informing us about the strength of a normative viewpoint", see Smits (2009), *op cit.*, 58.

¹¹² OJ L11/23, 14 January 2017, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA).

¹¹³ EU-Singapore Investment Protection Agreement, accessible at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>.

¹¹⁴ EU-Vietnam Investment Protection Agreement, accessible at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>>.

¹¹⁵ EU-Mexico FTA, Agreement in principle accessible at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>>.

¹¹⁶ Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (Oxford University Press: 2012) 3.

characterization of political responses to this criticism. Different strands of criticism are identified from relevant scholarship in international investment law, but not evaluated. Instead, Chapter 3.3 merely provides a selection of scholarship that normatively portrays ISDS as being in a legitimacy crisis. To demonstrate the inherent tension the chapter balances these accounts with a selection of empirical studies and scholarship that is normatively defeating these claims.

The introduction to the ICS in Chapter Four describes and compares the various ICS formations in order to emphasize commonalities and differentiations between these three versions. This should help to highlight trends in the design of the ICS over time and provide a coherent picture over the Commission's policy preferences. The identification of individual institutional and procedural features serves as a benchmark for the assessment of the ICS in Chapter Eight. Multilateral reform processes are discussed on the basis of the limited material available from the UNCITRAL meetings, and serve primarily to identify whether the Commission's approach reflects policy preferences *vis-à-vis* the ICS.

The analysis of the ICS is conducted, on the one hand, in light of Union law, and, on the other hand, in light of the criticism against investor-state arbitration. Chapters Five, Six and Seven study for that purpose the relevant case law of the CJEU. Judgments of the CJEU are given authoritative value as describing the meaning of Union law at a particular point in time. Where relevant, these authorities are criticized by reference to a broader array of materials, taking into account scholarship but also previous trends in the case law of the CJEU and alternative methods of legal interpretation. The selection of criteria for the assessment is guided by the three most relevant cases in this field. The focus for the assessment of the Union's treaty-making competence for the conclusion of international agreements featuring ISDS provisions, for instance, is on a discussion of the Court's approach in its *EUSFTA* opinion. The principle of autonomy and the principle of equal treatment are singled out as central factors determining the compatibility of ISDS provisions with the Treaties, as both *Achmea* judgment¹¹⁷ as well as the pending *CETA* opinion¹¹⁸ have identified these aspects as controversial. As the ICS has not yet been assessed by the CJEU, this study tries to compare the institutional and procedural features of the ICS with situations that have previously given rise to assessments of the principle of autonomy and equal treatment.

With respect to the latter this study identifies and discusses various strands of case law from the CJEU with respect to the meaning of the principle of equal treatment in Union law with respect intra-EU agreements. This involves *inter alia* a comparison of IIAs with the Court's case law on intra-EU DTTs. With the help

¹¹⁷ Case C-284/16 *Achmea* *op cit.*

¹¹⁸ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement)* *op cit.*

of scholarship in the relevant fields, this chapter isolates the main arguments and evaluates whether such a comparison is feasible. Extracting the main arguments for and against the application of the principle of equal treatment to international agreements between the Union and third countries from scholarship on intra-EU agreements, this section assesses whether the situation of intra-EU and extra-EU international agreements is sufficiently comparable to allow for the construction of a normative argument.

Chapters Six and 8.3.2 makes reference to international law, and in particularly jurisprudence of the ICJ, the PCIJ and rulings by the WTO AB, as well as related scholarship. This provides an alternative perspective on the meaning and effect of sources of international law (such as international agreements and investment awards) in the Union legal order. The WTO does not only govern economic relations that fall broadly within the ambit of CCP, it also fundamentally informs the evolution of this policy field. More importantly, dispute settlement is the very hallmark of both investment law and WTO, and, unlike other international fora, the Commission frequently appears before WTO tribunals.¹¹⁹

Chapter Eight evaluates the ICS, bringing together the insights gained in Chapters Two through Seven and situates the ICS as a reform proposal into the wider context of the historical development of ISDS. It compares the institutional and procedural features of the ICS with those of investor-state arbitration and determines whether differences reflect improvements in light of existing criticism. It also matches institutional and procedural features of the ICS with the core elements of the principle of autonomy in order to evaluate its compatibility with the Treaties. Lastly, extrapolating the objectives underlying the ICS initiative, and expectations at the new system as expressed by the Commission and in scholarship, Chapter 8.4 evaluates whether the ICS is instrumental in advancing the multilateral ISDS reform process.

1.5 Theoretical, scholarly and policy contribution

The present analysis contributes to theory, existing empirical scholarship and policy. It contributes to theory in EU external relations law with a contextual approach to the study of the Union's foreign investment policy. In spite of an abundance of scholarship in this area,¹²⁰ it has yet to situate this policy field into

¹¹⁹ Christophe Hillion and Ramses A. Wessel, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions' in Marise Cremona, Anne Thies and Ramses A. Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing: 2017) 7-30, 10.

¹²⁰ e. g. Jan Bischoff, 'Just a little BIT of "mixity"? The EU's role in the field of international investment protection law' (2011) 48(5) *Common Market Law Review* 1527-691527; Marc Bungenberg, 'The Politics of the European Union's Investment Treaty Making' in Tomer Broude, Marc L. Busch and Amelia Porges (eds), *The Politics of International Economic Law* (Cambridge University Press: 2011);

its wider economic, historical, and political context. Basedow has recently adopted an innovative approach to study the Union as foreign investment policy actor by focusing on the Commission as a policy entrepreneur, and investigating business preferences and lobbying patterns in the context of an emergent Union foreign investment policy.¹²¹ The present study integrates an examination of the Union's policy preferences regarding ISDS into scholarship on the historical and ideological roots of investor-state arbitration clauses in IIAs, and encourages a broader contextual study of Union external relations law.

A second theoretical contribution relates to the integration of civil society criticism and policy as a legally relevant factor for the analysis of the Union's capacity to conclude future investment agreements. Scholarship in this area tends to adopt an internal approach that reduces questions of capacity to questions of substantive competence and legal compatibility.¹²² The present study broadens this approach, investigating the ICS as an institutional ISDS reform initiative that needs to address the common criticism against investor-state arbitration.

This study also makes an empirical contribution to our understanding of an increasingly important field of EU law. When Dimopoulos published his seminal work 'EU foreign investment law' in 2011, the Union's post-Lisbon investment policy was still in its infancy.¹²³ His work is of significance to the field as it portrays the Union as a comprehensive actor in investment-related negotiations long before the Lisbon Reform took effect. More recently, Fecák published a comprehensive account of the Union's post-Lisbon investment policy up until

Jan Ceyskens, 'Towards a common foreign investment policy? - Foreign investment in the European Constitution' (2005) 32(3) *Legal Issues of Economic Integration* 259-91; Angelos Dimopoulos, 'Creating an EU investment policy: Challenges for the post-Lisbon era of external relations' in Paul James Cardwell (ed), *EU external relations law and policy in the post-Lisbon era* (T. M. C. Asser Press: 2012) 401-22; Szilárd Gáspár-Szilágyi, 'Quo vadis EU investment law and policy? The shaky path towards the international promotion of EU rules' (2018) 23(2) *European foreign affairs review* 167-86; Christoph Herrmann, 'The role of the Court of Justice of the European Union in the emerging EU investment policy' (2014) 15(3-4) *The Journal of World Investment and Trade* 570-84; Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way towards a Common Investment Policy?' (2011) 21 *European Journal of International Law* 1049.

¹²¹ Basedow (2018), *op cit*.

¹²² e. g. Marc Bungenberg, 'The Division of Competences between the EU and its Member States in the Area of Investment Politics' in Marc Bungenberg, Joern Griebel and Steffen Hindelang (eds), *International Investment Law and EU Law* (Springer: 2011); Markus Burgstaller, 'European law and investment treaties' (2009) 26(2) *Journal of International Arbitration* 181-216; Thomas Eilmansberger, 'Bilateral investment treaties and EU law' (2009) 46(2) *Common Market Law Review* 383-429; Nikolaos Lavranos, 'Designing an International Investor-to-State Arbitration System After Opinion 1/09' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy after Lisbon: Special Issue* (Springer Verlag: 2013) 199; Dorota Leczykiewicz, 'Common commercial policy: The expanding competence of the European Union in the area of international trade' (2005) 6(11) *German Law Journal* 1673-85.

¹²³ Angelos Dimopoulos, *EU foreign investment law* (Oxford University Press: 2011a).

2015.¹²⁴ The last few years have seen an explosion of reactions to legal developments in the field, either in the form of edited selections, or individual articles. This study fills an empirical gap by discussing relevant developments in jurisprudence, policy and scholarship up until early 2019, and represents the first contribution to comprehensively evaluate the ICS in light of Union law and the criticism against investor-state arbitration.

Finally, this study also contributes to policy in this field as it engages with institutional ISDS reform initiatives. In particular this study contributes to the shaping of policy preferences over multilateral ISDS reform, as it analyses the ICS as a concrete policy proposal, and assesses its significance for the ongoing multilateral negotiations in UNCITRAL. More generally, it contributes with an illustration of how policy preferences are shaped through the interaction of legal frameworks and political actors. In this respect this study demonstrates that institutional and procedural features of the ICS are predetermined by constitutional constraints of the Union legal order, whereas others respond to legitimacy concerns regarding investor-state arbitration.

1.6 The argument in a nutshell

This investigation comprises a total of ten chapters that are organized in four parts. Part One, describes the background for the problem that this study engages with, and thereby shapes the relevant narrative for the subsequent analysis. Part Two context over the relevant legal structures under investigation, i.e. investor-state arbitration and the ICS. Part Three introduces the Union's constitutional framework in as far as it governs ISDS provisions, including the Union's substantive treaty-making competences, and the compatibility of ISDS provisions with the Treaties. Part Four analyses the ICS as an ISDS reform initiative in light of both Union law and the criticism against investor-state arbitration. With the exception of the last chapter, every chapter begins with a brief contextualization of the relevant issue in relation to other chapters of the book and the theme of this study more generally. Likewise, every chapter, with the exception of the present and the last chapter, conclude with a brief but analytical discussion that summarizes the findings and illustrates their relevance for the overall argument.

This study argues that although the Treaty of Lisbon has empowered the Union with explicit treaty-making competence over FDI, its role as an actor in the ongoing ISDS reform process faces a number of challenges. First, it emerges from Chapter Five that the Union's competence to conclude international agreements featuring ISDS provisions is dependent on the support of the Member States. As there are no sign of the necessary majority amongst the

¹²⁴ Tomáš Fecák, *International Investment Agreements and EU Law* (Kluwer Law International 2016).

Member States that would allow the Union to pursue the ICS through exclusive IIAs, Chapter 8.1 argues that the policy dimension of mixed agreements exposes the ICS to the parliamentary scrutiny in all Member States in addition to the EP.

Moreover, this study argues that the parliamentary support needed for the ICS to see the light of day, presupposes that the institutional and procedural features of the ICS address the demands for democratic legitimation of ISDS, which can only be achieved if the ICS is perceived as genuine response to the criticism against investor-state arbitration that currently dominates the debate in civil society. Evaluating the ICS in light of the criticism exposed in Chapter 3.3, Chapter 8.2 concludes that Commission's reform initiative primarily attempts to improve the current system by increasing its influence over the substance, structure and process of investor-state adjudication. Chapter 8.2.7 further argues that it is in particular the trade committee that emerges as a powerful body that reserves extensive powers to the Commission. Although these aspects might indeed be perceived of as improvements, they do little to alleviate the underlying legitimacy concerns.

In addition, Chapter Six illustrates that ISDS provisions are likely to be incompatible with principle of autonomy, considering that they continue to remove the CJEU from disputes that are concerned with economic activity that would otherwise come before the Court. Chapter 8.3 concludes that the ICS incorporates no design features that address these general concerns. On the contrary, the remaining resemblance to institutional investor-state arbitration only exacerbates this shortcoming.

Another relevant issue in light of Union law is the principle of equal treatment. Although the case law of the CJEU does not currently dictate an application of this principle to ISDS provisions in IIAs concluded by the Union with third countries, Chapter Seven advances the normative argument that considering their impact on the competitive conditions of economic operators on the internal market, ISDS provisions should not in principle be excluded from an assessment of non-discrimination. Chapter 8.4 subsequently illustrates that the only viable solution is the establishment of a multilateral investment court. Yet, as the negotiations in UNCITRAL are slowly progressing, the ICS risks becoming a stumbling block for multilateral ISDS reform. Most importantly, it locks the Union into a predetermined set of policy preferences that it imposes on other participating states. Having considered the history and ideology of ISDS provisions, Chapter 8.5 ultimately concludes that the ICS risks repeating the mistakes of previous reform initiatives that likewise imposed Western policy preferences rather than working towards a truly multilateral consensus.

PART I
THE CONTEXT

2 THE ECONOMIC, HISTORICAL AND POLITICAL CONTEXT OF THIS STUDY

An understanding of current developments in international investment law and arbitration presupposes some knowledge of FDI as an economic phenomenon. Although the origins of both, investment law and FDI activity date far back in time, it is in particular the rise of neo-liberalist market policies in the second half of the 20th century that drove the economic integration processes that spurred FDI flows. Together with an increased focus on international institution building and the proliferation of international courts and tribunals throughout that period, these developments facilitated the emergence of the modern investment treaty regime. This historical context shaped the political and economic ideology that resulted ISDS becoming a core element of IIAs, and informs the criticism that has dominated the discourse in this field over the past decades. Most importantly, however, it frames the political, economic and ideological constraints within which the Commission constructs the Union's foreign investment policy, and develops a role for the Union as an actor in ISDS reform.

The present chapter establishes the relevant context for this study, and lays the foundation for the evaluation the ICS in light of external challenges. In other words, what do we learn from history about the contribution that the Union can make with its ICS initiative to structural ISDS reform. Although this study gravitates around ISDS as a legal structure it benefits greatly from insights that other fields of inquiry provide into FDI, historical trends, its economic rationale and its ideological underpinnings. The following section, therefore, explores some of the developments that have preconditioned the emergence of the modern investment treaty regime (Section 2.1), and ISDS as a preferred policy choice for the resolution of investor-state disputes (Section 2.2). Section 2.3 subsequently explains the existing tensions regarding ISDS by reference to an underlying ideological criticism.

2.1 The emergence and evolution of the investment treaty regime

The past two centuries have witnessed a development of intense economic integration that have made economic transactions and markets less susceptible to national borders.¹²⁵ It is convenient to explain the rise of investment law and arbitration as a side effect of these trends of economic globalization. Indeed, the main argument of the present section is precisely that economic integration informs the emergence and structure of the modern investment treaty regime. However, such a general observation ignores important variations in the factors that were driving economic globalization during different historical periods. This section focuses on the changing role of FDI in recent waves of economic globalization (Section 2.1.1.), the origins of legal protection of foreign investments (Section 2.1.2.), and the characteristic features of the modern investment treaty regime (Section 2.1.3.)

2.1.1 *The multinational enterprise as a driver of foreign direct investment*

Technological advances over the past decade have radically shaped the dominant model for the organization of international economic activity and thereby elevated the role that FDI plays for the international economy. The transformative forces that technological innovation exerts on economic integration are captured in the concept of economic globalization. It describes the “immense number of structural adjustments that the world is undergoing as a result of the evolution of a related group of new technologies [...]”.¹²⁶ It is important to note at the outset that these processes of structural adjustment have taken place for hundreds of years, and globalization is hardly a recent, nor historically isolated, phenomenon. Economic globalization focuses on innovation as a force that drives the gradual integration of national markets into one global economy.¹²⁷ The present section utilizes the term, however, merely as an analytical concept to explain the rise of the MNE as a defining feature of the post-war international economy.¹²⁸

¹²⁵ For a comprehensive account of the economic history of globalization, see Kevin H. O'Rourke and Jeffrey G. Williamson, *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy* (The MIT Press: 1999).

¹²⁶ Richard G. Lipsey, 'Globalization and National Government Policies: An Economist's View' in John H. Dunning (ed), *Governments, Globalization, and International Business* (Oxford University Press: 1997) 73-113, 73.

¹²⁷ Some authors differentiate the internationalization, multinationalization and globalization of economic markets as qualitatively different stages of economic transformation, e.g. Panos Mourdoukoutas, *The Global Corporation: The Decolonization of International Business* (Quorum Books: 1999) 15-17.

¹²⁸ Lipsey (1997), *op cit.*, 79.

In order to illustrate the intrinsic link between FDI and the economic activity of the MNE, and notwithstanding the fact that a more technical definition is applied in Chapter 5.5, the present section understands FDI as:

“process whereby residents of one country ([home country]) acquire ownership of assets for the purpose of controlling the production, distribution and other activities of a firm in another country (host country).”¹²⁹

Section 2.1.1.1 first compares two waves of economic globalization in order to explain how historical, technological and political events and ideologies have shaped market conditions that favour FDI activity. Subsequently section 2.1.1.2 discusses the emergence of the MNE as the dominant model of business organization. Section 2.1.1.3 introduces different economic motivations for FDI activity.

2.1.1.1 Foreign direct investment in the context of global economic integration

The periods between 1870 and 1914 and from 1960 onwards are distinctly characterized by a high level of economic integration.¹³⁰ The driving factors behind these two waves of economic globalization are, however, markedly different. Despite some international rules on transport and telecommunication, the level of mobility for goods, services and capital were largely defined by national laws.¹³¹ Unlike the preceding decades between 1815 and 1860, there was no decrease in tariffs between 1870 and 1914.¹³² In fact, the rise in international competition that was triggered by the price convergence in commodities sparked increased protectionism and a retreat to mercantilist trade policies in the years leading up to World War I.¹³³ Instead, the integration of markets at the end of the 19th century was primarily fuelled by technological advances in the shipping and rail transport sector such as gradual improvements to the steam ship engine and the invention of the refrigerator.¹³⁴ Together with significant infrastructure investments such as the construction of the Suez Canal these processes led to a dramatic decrease in transport costs that favoured above all commodity markets.¹³⁵ Economic

¹²⁹ Moosa (2002), *op cit.*, 1.

¹³⁰ Richard E. Baldwin and Philippe Martin, 'Two Waves of Globalization: Superficial Similarities, Fundamental Differences' in Horst Siebert (ed), *Globalization and Labor* (Mohr Siebeck: 1999) 3-58, 4.

¹³¹ Dolzer and Schreuer (2012), *op cit.*, 1.

¹³² O'Rourke and Williamson (1999), *op cit.*, 43 *et seq.*

¹³³ Baldwin and Martin (1999), *op cit.*, 47; Paul Bairoch and Richard Kozul-Wright, 'Globalization myths: Some historical reflections on integration, industrialization and growth in the world economy' (1996), (UNCTAD/OSG/DP/113) UNCTAD Discussion Paper, New York 7.

¹³⁴ In particular the gradual improvements of steam ship engines and the invention of the refrigerator, see O'Rourke and Williamson (1999), *op cit.*, 43 *et seq.*

¹³⁵ Dani Rodrik, 'Has globalization gone too far?' (1997) 39(3) *California Management Review* 29-53, 35.

globalization, thus, materialized in spite of protectionist trade policies that were insufficient to offset the benefits of reduced transport costs.

This first wave of economic globalization is characterized by the deindustrialization of the global South and the industrialization of Western economies.¹³⁶ Throughout this period Western economies imported primary goods and exported manufactured items, often into the regions from where the primary goods were being extracted.¹³⁷ This is also reflected in investment flows. Capital markets in 1914 were generally speaking better integrated than they were at the end of the 20th century.¹³⁸ However, investments in this time were largely portfolio investments, i.e. capital movements that did not require a local presence.¹³⁹ Direct investment, i.e. establishment, predominantly targeted commodities and large-scale infrastructure projects in the transport sector.¹⁴⁰ Although the role of FDI during this period should not be downplayed,¹⁴¹ it was primarily a means for actors in Western economies to exercise control over distribution networks and further reduce costs of transportation to reap the benefits of commodity price convergence.¹⁴²

The two World Wars crippled the global economy, and it was not until the 1960's that integration processes once again spurred economic development. Additionally, having only recently acquired independence from colonial—or otherwise economic—occupation, developing states were sceptical of foreign capital, and particularly FDI.¹⁴³ The hostile attitude is illustrated by the increasing number of nationalizations in developing and communist states from the 1950's through to the

¹³⁶ Bairoch and Kozul-Wright argue that the scale of deindustrialization of developing countries between 1860 and 1913 is caused by an unprecedented inflow of manufactured goods from Western European economies, see Bairoch and Kozul-Wright (1996), *op cit.*, 16.

¹³⁷ Jeffrey D. Sachs and Andrew Warner, 'Economic reform and the process of global integration' (1995) *Brookings Papers on Economic Activity* 1-118, 6.

¹³⁸ O'Rourke and Williamson (1999), *op cit.*, 213; Rodrik (1997), *op cit.*, 34.

¹³⁹ Stephen J. Kobrin, 'The Architecture of Globalization: State Sovereignty in a Networked Global Economy' in John H. Dunning (ed), *Governments, Globalization, and International Business* (Oxford University Press: 1997) 146-71, 153.

¹⁴⁰ Kozul-Wright and Bairoch demonstrate that portfolio investment had exceeded growth of trade and FDI by 1913, see Bairoch and Kozul-Wright (1996), *op cit.*, 11.

¹⁴¹ Dunning demonstrates that market-seeking FDI was quite significant during this period not least because the emerging trade protectionism in the years leading up to World War II incentivised investments in foreign production for foreign markets, see John H. Dunning, *Multinational enterprises and the global economy*, 2. ed. edn (Edward Elgar: 2008); see also Bairoch and Kozul-Wright (1996), *op cit.*, 11.

¹⁴² Dunning (2008), *op cit.*, 163 *et seq*; Muchlinski (2007), *op cit.*, 12; O'Rourke and Williamson (1999), *op cit.*, 211-12; Bairoch and Kozul-Wright (1996), *op cit.*, 11; on the composition of FDI in this period, see also Baldwin and Martin (1999), *op cit.*, 35-36; on the link between direct investment and trade in the years immediately after World War II consider also Hymer's thesis, see Stephen H. Hymer, *The international operations of national firms: A study of direct foreign investment* (MIT Press: 1976) 80-82.

¹⁴³ Nathan M Jensenet *al.*, *Politics and Foreign Direct Investment* (University of Michigan Press: 2012) 2.

1970's.¹⁴⁴ A particularly sensitive sector was natural resources, where developing and communist states pushed collectively in the UN for the adoption of a New International Economic Order that recognized greater sovereign control over natural resources.¹⁴⁵ Capital-exporting states, conscious of the imperial context that informed much of the 19th century FDI activity changed the political narrative vis-à-vis FDI.¹⁴⁶ By the end of the 1950s, most Western states had adopted a liberal economic agenda that advocated the benefits of FDI for economic development.¹⁴⁷ This view also penetrated the more general trend towards increasing international cooperation and institution building that fundamentally characterized the post-war period.¹⁴⁸ The proliferation of international agreements and international organizations thereby actively facilitated economic globalization.¹⁴⁹

The Havana Charter, which was signed in 1948, for instance read: “international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress.”¹⁵⁰ Beginning in the 1970's neo-liberalism took a foothold in international economic governance, and markedly inspired the international trading and financial system as it was emerging after World War II.¹⁵¹ The World Bank in particular started to actively promote domestic legal reforms in developing countries that were focused on the eradication of capital restrictions, and the protection of foreign investments.¹⁵² The liberalization of trade and capital was embraced as “a driver of global growth, [and] an engine of mutual prosperity”.¹⁵³ Facing the effects of the 1980s financial crisis, developing countries were in urgent need to attract foreign capital, while the breakup of the Soviet Union and Yugoslavia hailed the success of global capitalism.¹⁵⁴ Owing in part to the neo-liberal ideology of institutional policies advocated by the World Bank and the IMF,¹⁵⁵ FDI liberalization, thus, rapidly developed into a core

¹⁴⁴ Sherif H. Seid, *Global regulation of foreign direct investment* (Ashgate: 2002) 14, in particular figure 2:1; Kenneth J. Vandeveld, *Bilateral investment treaties: History, policy and interpretation* (OUP: 2010) 42-43.

¹⁴⁵ United Nations, 'Declaration on the Establishment of a New International Economic Order'

¹⁴⁶ Taylor St John, *The rise of investor-state arbitration: Politics, law, and unintended consequences* (Oxford University Press: 2018) 61.

¹⁴⁷ Baldwin and Martin (1999), *op cit.*, 51-52.

¹⁴⁸ Wolfgang Friedmann, *The Changing Structure of International Law* (Stevenson & Sons: 1964)

¹⁴⁹ Muchlinski (2007), *op cit.*, 16.

¹⁵⁰ Article 12, Havana Charter for an International Trade Organization (1948) (UN Doc E/CONF.2/78).

¹⁵¹ Andrew Lang, *World trade law after neoliberalism: Re-imagining the global economic order* (Oxford University Press: 2011) 54.

¹⁵² John Williamson, 'Democracy and the Washington Consensus' (1993) 21(8) *World Development* 1329-36.

¹⁵³ Lang (2011), *op cit.*, 53.

¹⁵⁴ Antony Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press: 2005) 245.

¹⁵⁵ The World Bank and IMF institutionally legitimate their mission by linking economic development to 'good governance', see Anghie (2005), *op cit.*, 258-63; Lang (2011), *op cit.*, 53-54

economic development strategy in developing countries.¹⁵⁶ International institutionalization, together with the emergent view of institutional economics in the 1980s, which was ideologically rooted in the premise that FDI inflows were dependent on the domestic level of property right protection, partly explains the intense process of treatification of investment law in the post-war era.¹⁵⁷

As opposed to 1914, therefore, the post-war period of economic globalization is above all characterized by liberal trade policies that were geared towards progressive market integration. The political agenda complemented technological advances, which had a major impact on the structure of economic markets. Transport costs continued to decrease, albeit at levels that were insignificant compared to the late 19th century. More importantly, a sharp drop in telecommunication costs facilitated a shift in the dominant model of economic organization, enabling companies to reap efficiency benefits in developing countries, such as lower labour costs, through the establishment of global value chains (i.e. the delocalization and global fragmentation of production units).¹⁵⁸ Industrial techniques linked to FDI effectively reindustrialized the global South and lead to an “internationalization of production through MNE.”¹⁵⁹ Notably, MNE activity in the post-war period functioned less as a driver of economic integration, than it was a response to the favourable political climate, and facilitated by technological advances.¹⁶⁰ The period of economic globalization since the 1960’s, and especially the past two decades, have witnessed a diversification in both the direction and composition of FDI flows, which since the 1990s went to a larger degree into the service sector.¹⁶¹

2.1.1.2 The emergence of the modern multinational enterprise

MNE activity is not a phenomenon that is uniquely confined to the post-war period of economic globalization.¹⁶² Innovation in telecommunication technology and the emergence of global capitalism throughout the second wave of economic globalization markedly facilitated the mobility of enterprises and the fragmentation and delocalization of corporate units. The liberalization of inward investment and

¹⁵⁶ Karl P. Sauvant, 'The rise of international investment, investment agreements and investment disputes' in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 3-16, 6.

¹⁵⁷ Muchlinski (2007), *op cit.*, 21.

¹⁵⁸ Baldwin and Martin (1999), *op cit.*, 36-37; this trend was particularly pronounced from the mid-1990s, see Bernard Hoekman and Michel Kostecki, *Political economy of the world trading system: WTO and beyond* (Oxford University Press: 2001) 12-13.

¹⁵⁹ Kobrin (1997), *op cit.*, 147.

¹⁶⁰ Mody observes that FDI activity primarily occurred where conditions were already favourable, see Ashoka Mody, *Foreign direct investment and the world economy* (Routledge: 2007) 2; see to this extent also Bairoch and Kozul-Wright (1996), *op cit.*, 21.

¹⁶¹ Jensen *et al.* (2012), *op cit.*, 3; Moosa (2002), *op cit.*, 16-22.

¹⁶² Dunning (2008), *op cit.*, 173.

other FDI-friendly policies adopted under the prevalent liberal economic ideology presented important locational advantages.¹⁶³ In particular, the significant reduction in tariffs through the GATT—and later WTO—regime, as well as the creation of large free trade areas (e.g. NAFTA and EU) have had a significant effect on the spatial conditions and accessibility of markets, further incentivising FDI.¹⁶⁴

Whereas commodity markets were particularly integrated by 1913, the post-war period of economic globalization led above all to an integration of capital markets and created economic conditions that encouraged MNE activity.¹⁶⁵

“By the early 1990s, there were some 37,000 [MNEs]. The number of those based in 14 major developed home countries more than tripled during the past two decades, from 7,000 in the late 1960s to nearly 26,000 in the early 1990s. The total number of foreign affiliates stands at some 206,000, a dramatic acceleration over the 3,500 manufacturing affiliates established between 1946-1961.”¹⁶⁶

As a consequence, FDI flows increased significantly throughout the second half of the 20th century.¹⁶⁷

These processes of economic globalization since the 1960’s, and the rise of the MNE as the dominant mode of economic organisation cleared the path for a global economy.¹⁶⁸ As Kobrin aptly describes it:

“The modern international economic system of cross-border linkages between discrete national markets is being replaced by a global, postmodern, networked mode of organization where the very concept of geographically based economic activity may not even be relevant.”¹⁶⁹

¹⁶³ Bonnitcha, Poulsen and Waibel (2017), *op cit.*, 41.

¹⁶⁴ Baldwin and Martin (1999), *op cit.*; Muchlinski (2007), *op cit.*, 24; this also had a significant effect on the spatial distribution of FDI, see Dunning (2008), *op cit.*, 194; for a more comprehensive account for the years between the mid-1970’s to the mid-1990’s, see John H. Dunning, 'The changing geography of foreign direct investment: explanations and implications' in Nagesh Kumar (ed), *Globalization, foreign direct investment and technology transfer* (Routledge: 1998) 43-89.

¹⁶⁵ O'Rourke and Williamson (1999), *op cit.*, 217-19; on the link between MNE activity and FDI, see also Nathan M Jensen, *Nation-States and the multinational corporation: a political economy of foreign direct investment* (Princeton University Press: 2006) 24.

¹⁶⁶ UNCTAD, 'World investment report: Transnational corporations, employment and the workplace' (UNCTAD/DTCI/10) 131, references omitted.

¹⁶⁷ Lipsey (1997), *op cit.*, 81; Moon (2016), *op cit.*, 5; Mody (2007), *op cit.*, 3-4, and 8.

¹⁶⁸ Muchlinski (2007), *op cit.*, 23; Amroso distinguishes three stages of this development, the local firm is closely linked to local markets, the national capitalist firm is characterized by a certain level of internationalization but is still distinguishable by its nationality, the transnational firm has lost any such affiliation, see Bruno Amroso, *On Globalization: Capitalism in the 21st Century* (Macmillan Press: 1998) 86-89.

¹⁶⁹ Kobrin (1997), *op cit.*, 154.

The proliferation of IIAs as “instruments of globalization”¹⁷⁰ in the second half of the 20th century must be understood in light of these broader transformative processes.

2.1.1.3 Motivations for foreign direct investment

From the perspective of states, several economic theories have tried to explain FDI activity.¹⁷¹ According to neo-classical economic theory FDI contributes positively to the economic development of the capital-importing state, as it leads to technology spill-over, increases competition and generates employment.¹⁷² On the opposite end of the theoretical spectrum is dependency theory, which proclaims that FDI suppresses economic development and perpetuates the low status of underdeveloped countries in the world economy.¹⁷³ At the heart of this theoretical strand lies the view that MNEs have no vested interest in the economic development of the host state and largely escape its jurisdiction, leaving the host state powerless to regulate the activity of MNE.¹⁷⁴ The resistance of developing countries to FDI in the 1960’s and 70’s that was briefly touched upon in the previous sub-section illustrates the policy implications of dependency theory. The spectrum between neo-classical economic theory and dependency theory is filled with shades of government intervention, i.e. the view that the state should intervene to a greater or lesser extent in correcting market failures.¹⁷⁵

It will become clearer in the ensuing discussions that neo-classical economic thinking is deeply entrenched in ISDS, both ideologically and institutionally, whereas dependency theory is reflected in the criticism surrounding ISDS, leading to the current backlash against investor-state arbitration.

2.1.2 *Investment law in the context of the legal history of the protection of property in international law*

The origins of the modern investment treaty regime are deeply embedded in the historical context of 19th century European imperialism that entrenched notions of sovereignty and property in Western claims to the universality of international law.¹⁷⁶

¹⁷⁰ Bonnitcha, Poulsen and Waibel (2017), *op cit.*, 1.

¹⁷¹ For an overview over economic theories describing the investor’s perspective, see Moon (2016), *op cit.*, 33 *et seq.*

¹⁷² Seid (2002), *op cit.*, 10-11; For a comprehensive study on the effect of FDI in host countries along these parameters, see Moosa (2002), *op cit.*, Chapter 3; see also Nagesh Kumar, *Globalization and the Quality of Foreign Direct Investment* (Oxford University Press: 2002).

¹⁷³ Jensen *et al.* (2012), *op cit.*, 4.

¹⁷⁴ Seid (2002), *op cit.*, 20-21.

¹⁷⁵ *Ibid.*, 25-27.

¹⁷⁶ Kate Miles, ‘International investment law and universality: Histories of shape-shifting’ (2014) 4(3) *Cambridge Journal of International and Comparative Law* 986-1010; Antony Anghie, ‘The evolution of

Encounters of European states and non-European peoples have always been characterized by the creation of ‘otherness’, and the imposition of European conceptions of civilization on the ‘uncivilised’ world.¹⁷⁷ Non-European peoples—the ‘uncivilised’—lacked the fundamental qualities of sovereignty and could not, therefore, object to their occupation and dispossession.¹⁷⁸ Through the assertion of the Westphalian notion of ‘sovereignty’ and its concomitant idea of ‘civilization’ as universal concepts of international law, European nations legitimized the imposition of European social and cultural norms,¹⁷⁹ and European conceptions of ‘property’ and ‘ownership’ on non-European societies.¹⁸⁰

Throughout the 17th and 18th century territorial expansion was largely carried out by trading companies that were granted quasi-sovereign powers (e.g. Dutch East India Company, English East India Company, and French East India Company).¹⁸¹ This changed in the mid-19th century when European states assumed direct responsibility for their colonies. Notably, this was accompanied by a paradigmatic shift in the narrative for justification of colonial expansion. Whereas trade was still the main reason for the establishment of colonies, this was now woven into the civilizing mission itself; trade became essential for economic and moral development of non-European peoples.¹⁸²

Imperial ambitions were not, however, exclusively supported through territorial expansion. Indeed, the negotiation of treaties with non-European peoples further cemented Western—and mostly British—commercial supremacy.¹⁸³ These treaties pursued commercial interests either directly, or indirectly through the establishment of territorial and jurisdictional control. Notably, treaty practice did not exclusively take place in the context of Western economic imperialism. On the contrary, FCN treaties, which are widely perceived to be the forerunner of modern IIAs, were

international law: Colonial and postcolonial realities’ (2006) 27(5) *Third World Quarterly* 739-53, 746; for a comprehensive account of how the shift from naturalist to positivist thinking as the dominant theory in international law supported the assertion of universality of European international law, see Antony Anghie, ‘Finding the peripheries: Sovereignty and colonialism in nineteenth-century international law’ (1999) 40(1) *Harvard International Law Journal* 1-80; more generally on the European origins of international law, see Martti Koskenniemi, ‘International law in Europe: Between tradition and renewal’ (2005) 16(1) *European Journal of International Law* 113-24, 114.

¹⁷⁷ Benedict Kingsbury, ‘Sovereignty and inequality’ in Andrew Hurrell and Ngaire Woods (eds), *Inequality, globalization and world politics* (Oxford University Press: 1999) 66-94, 73-74

¹⁷⁸ Anghie (1999), *op cit.*, 25.

¹⁷⁹ Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law 1870-1960* (Cambridge University Press: 2002) 74-75.

¹⁸⁰ Kate Miles, *The Origins of International Investment Law* (Cambridge University Press: 2013) 31.

¹⁸¹ Kate Miles, ‘International investment law: Origins, imperialism and conceptualizing the environment’ (2010) 121(1) *Colorado Journal of International Environmental Law & Policy* 1-47, 12-14; for a detailed account on the Dutch East India Company, see Miles (2013), *op cit.*, 35-41.

¹⁸² Anghie (1999), *op cit.*, 63-64; on the link between ‘good governance’ and commerce, see Anghie (2005), *op cit.*, 252-53.

¹⁸³ Koskenniemi (2002), *op cit.*, 111.

initially concluded between European nations and between them and the US providing for reciprocal commercial privileges.¹⁸⁴ In relationships between European nations and non-European nations, on the other hands, these agreements were utilized to impose political and commercial control.¹⁸⁵

A more intrusive European presence in Asia, Africa and the Americas during the 19th century led to the conclusion of 'unequal'¹⁸⁶ or capitulation treaties, which were often forced upon parties under the threat of military intervention. Through establishing spaces of direct consular control, extraterritorial jurisdiction, and nonreciprocal rights vis-à-vis commercial activity these agreements provided a platform for the imposition of European conceptions of property protection.¹⁸⁷ Miles observed that "the neutrality of the language disguised the imposed nature of the agreement and the brutality inflicted to secure financial benefits for European states, traders and investors."¹⁸⁸ They were instrumental in the displacement of local authority and key to the establishment of the 'informal empire'.¹⁸⁹ Their relevance for modern investment law, however, was their role in cementing European claims to the universality of 'property' and 'ownership' in international law.¹⁹⁰

Engagement in these specific regimes was accompanied by more general developments in international law, which illustrate the profound conviction of European nations in a 'right to commerce'.¹⁹¹ Already Grotius who is widely considered to be the 'father of international law',¹⁹² inspired by writings of Vittoria and Suárez, claimed expansive trading rights under international law. Indeed, the emerging legal doctrines of the 17th and 18th century viewed property of nationals in foreign territories as extensions of the state,¹⁹³ and supported the subsequent formulation of the doctrine of diplomatic protection,¹⁹⁴ and the emergence of an international minimum standard in the 19th century.¹⁹⁵ Interferences with foreign property gave, thus, rise to intervention of the home state on behalf of the individual, a right that was on many occasions enforced through the threat of force

¹⁸⁴ Vandeveldel (2010), *op cit.*, 20-25; Charles Lipson, *Standing Guard: protecting foreign capital in the nineteenth and twentieth centuries* (University of California Press: 1985) 11-12.

¹⁸⁵ Miles (2010), *op cit.*, 5.

¹⁸⁶ 'Unequal' both because they resulted from imposition, but also because they reflected unequal obligations, see Anghie (1999), *op cit.*, 41.

¹⁸⁷ Miles (2010), *op cit.*, 7-8.

¹⁸⁸ *Ibid.*, 6.

¹⁸⁹ *Ibid.*, 27.

¹⁹⁰ Lipson (1985), *op cit.*, 20-21; Miles (2013), *op cit.*, 24, for the impact of trading companies in this respect, see 41.

¹⁹¹ Anghie (2005), *op cit.*, 20-22, 67-74, 251, and 270-71.

¹⁹² Miles (2010), *op cit.*, 13.

¹⁹³ Anghie illustrates that the centrality of commerce to international law was already advocated by Vittoria, see Anghie (2006), *op cit.*, 744.

¹⁹⁴ J. Crawford, *Brownlie's Principles of Public International Law* (OUP Oxford: 2012) 611.

¹⁹⁵ Miles (2010), *op cit.*, 15; Miles (2014), *op cit.*, 999.

or military intervention.¹⁹⁶ Diplomatic protection, thus, complemented the network of existing treaties with an effective framework for the enforcement of property rights.¹⁹⁷ Miles demonstrates, however, that Grotius was had ties with the Dutch East India Company and advocated its territorial and commercial objectives through legal doctrine.¹⁹⁸ Ultimately, therefore, the development of the protection of foreign property in international law was imbued with the prevailing political interests of the day.

It was in particular the assertion of an international minimum standard in the late-19th century that triggered reactions from the Latin American countries, that gave rise to *inter alia* the Calvo doctrine.¹⁹⁹ In essence, Calvo proposed that foreign nationals should not acquire more extensive rights under international law than nationals of the host state, and appealed to a principle of non-intervention that would prevent states from lending military or political might to its nationals in foreign property disputes.²⁰⁰ The Calvo doctrine did not resonate with Europe and the US, where it was broadly rejected.²⁰¹ As a consequence it was unsuccessful to penetrate the Eurocentric development of international rules on the protection of foreign property.²⁰²

The political narrative shifted in the inter-war period to focus on the dissolution of colonial empires. Instead of territorial annexation, overseas territories were put under a mandate system with objective of ensuring their “well-being and development” under the tutelage of international supervision.²⁰³ Yet, economic subordination and otherness remained central to international law, only that it was now defined in relation to the level of economic development rather than civilization.²⁰⁴ Only the post-war period of decolonisation empowered newly independent states to participate in the organization of an international community, which materialized in the contestation of European conceptions of international law. It was already illustrated that freed of the constraints of territorial and economic imperialism of the 19th century, developing countries were sceptical of foreign capital in the immediate post-war period, but in particular of FDI. Unsurprisingly, in light of the colonial experience, FDI was perceived as an avenue for capital-

¹⁹⁶ Lipson (1985), *op cit.*, 14-15, and 54.

¹⁹⁷ for a discussion of nineteenth century settlements, see Miles (2013), *op cit.*, 56-69.

¹⁹⁸ Miles (2014), *op cit.*, 995-96.

¹⁹⁹ Dolzer and Schreuer (2012), *op cit.*, 67-68.

²⁰⁰ Wenhua Shan, ‘From “North-South Divide” to “Private-Public Debate”’: Revival of the Calvo doctrine and the changing landscape in international investment law’ (2007) 27(3) *Northwestern Journal of International Law & Business* 631-64, 632.

²⁰¹ Basedow (2018), *op cit.*, 63; Dolzer and Schreuer (2012), *op cit.*, 67; Shan (2007), *op cit.*, 633.

²⁰² Miles (2010), *op cit.*, 18.

²⁰³ Covenant of the League of Nations (1919), Article 22.

²⁰⁴ Anghie (2006), *op cit.*, 746-47.

exporting countries to exercise control.²⁰⁵ Claims of postcolonial countries to regain control over their own natural resources resulted in the adoption of capital restrictive policies.

Simultaneously, the spread of socialism in Eastern Europe, Asia, the Americas and Africa manifested itself in a number of large-scale nationalizations in the Soviet Union, a number of Central and Eastern European states, and Mexico.²⁰⁶ The claim that these expropriations were justified as part of broader economic development programmes was resoundingly rejected. Notably, US Secretary of State Cordell Hull reasserted the pre-war traditional view on the international minimum standard in a letter to the Mexican Ambassador, leading to what is commonly known as the Hull formula of ‘prompt, adequate and effective’ compensation.²⁰⁷ The traditional view was also supported in arbitral practice throughout this period.²⁰⁸

In an attempt to have their interests recognized, developing and communist countries utilized their newly held majority in the UN to pass a number of instruments in pursuit of a New International Economic Order.²⁰⁹ The initiative purported to establish broad rights for states to nationalize foreign-owned assets. Capital-exporting states responded by rolling out their first BIT programmes, securing beneficial investment rights for their nationals abroad.²¹⁰ The conclusion of BITs accelerated throughout the 1980s, fuelled by a financial crisis in developing countries²¹¹ and the collapse of the Soviet Union and Yugoslavia, and reached its peak in 1990s.²¹² The systematic reassertion of European conceptions of property—and, thus, investment—protection was also institutionally supported by the establishment of ICSID in 1965.²¹³

The 19th century imperialism was characterised by the paradox between, on the one hand, rejecting non-European peoples as not sovereign, but, on the other hand,

²⁰⁵ St John (2018), *op cit.*, 63; Vandeveld (2010), *op cit.*, 41; on the impact of that view on the negotiations of the ITO, see Richard Toye, ‘Developing multilateralism: The Havana Charter and the fight for the International Trade Organization, 1947–1948’ (2003) 25(2) *The International History Review* 282-305, 287.

²⁰⁶ Vandeveld (2010), *op cit.*, 42-43; Basedow (2018), *op cit.*, 64.

²⁰⁷ Dolzer and Schreuer (2012), *op cit.*, 68; Riyaz Dattu, ‘A journey from Havana to Paris: The fifty-year quest for the elusive Multilateral Agreement on Investment’ (2000) 24(1) *Fordham International Law Journal* 275-316, 282.

²⁰⁸ Miles (2014), *op cit.*, 1004-05.

²⁰⁹ Miles (2014), *op cit.*, 1005; Vandeveld (2010), *op cit.*, 47; United Nations, ‘Declaration on Permanent Sovereignty Over Natural Resources’; United Nations, ‘Charter of Economic Rights and Duties of States’; Nations, ‘Declaration on the Establishment of a New International Economic Order’, *op cit.*

²¹⁰ Jeswald Salacuse, ‘BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries’ (1990) 24 *The International Lawyer* 655-75, 660; Vandeveld (2010), *op cit.*, 48.

²¹¹ Basedow (2018), *op cit.*, 65.

²¹² Basedow (2018), *op cit.*, 65; Dattu (2000), *op cit.*, 286; Dolzer and Schreuer (2012), *op cit.*, 70.

²¹³ Miles (2014), *op cit.*, 1006.

embracing their legal capacity to enter into international agreements.²¹⁴ This vividly illustrates the “chaotic, variable, and often improvised nature of international law”²¹⁵ as an instrument to advance the territorial and commercial interests of empire.²¹⁶ Emphasizing its symbolic legitimating function, international law was invoked to “sometimes turn questionable claims into approved obligations or prerogatives.”²¹⁷ Legal doctrines, initially devised to support these political ambitions,²¹⁸ became subsequently entrenched in international law through the constant assertion and reassertion of their universality and the fierce rejection of any contestation from developing countries. Miles aptly concludes that “it is of fundamental importance to the shape and character of international investment law that the context in which its principles were developed was one of exploitation and imperialism.”²¹⁹ It is in this backdrop that the process of economic globalization throughout these periods appears inherently ideological, where liberal market policies were exploited to wield greater control and power over markets in weaker parts of the global system.²²⁰

2.1.3 *The modern investment treaty regime*

The preceding section illustrated that the emergence of international investment law is deeply embedded in the socio-political context of 19th century imperialism and 20th century decolonisation. Key to the imposition of Western conceptions of property protection as universal concepts of international law was the forceful assertion of rights with military means under the cover of diplomatic protection. In an environment where capital-importing countries have become more assertive over their own natural resources, the sites of contestation over property rights in international law shifted from sporadic encounters over individual property disputes to the systematic assertion of these rights through institution building and codification. Whereas these processes had favourable effects on trade,²²¹ post-war history is replete with unsuccessful attempts to establish a multilateral framework for the regulation of foreign investment.²²² This section briefly revisits this history of failed attempts (section 2.1.3.1) before introducing the modern investment treaty

²¹⁴ Anghie (2006), *op cit.*, 745.

²¹⁵ Miles (2014), *op cit.*, 990.

²¹⁶ Anghie (1999), *op cit.*, 39.

²¹⁷ Lipson (1985), *op cit.*

²¹⁸ Koskenniemi (2002), *op cit.*, 126-30.

²¹⁹ Miles (2010), *op cit.*, 10.

²²⁰ Amroso (1998), *op cit.*, 52.

²²¹ Dunning (2008), *op cit.*, 186.

²²² Muchlinski differentiates between attempts to conclude an investment protection regime (incl. the MAI), and attempts to establish a framework that balances investor rights and state interests (incl. the Havana Charter), see Peter T. Muchlinski, “The rise and fall of the Multilateral Agreement on Investment: Where now?” (2000) 34(3) *The International Lawyer* 1033-53, 1034.

regime that is built on an intricate network of BITs, some regional FTAs and a small number of quasi-multilateral IIAs (section 2.1.3.2).

2.1.3.1 Multilateralism in international investment law

Within the framework of the Bretton Woods conference, discussions on the establishment of the ITO were held between 1946 and 1948, leading to the adoption of the Havana Charter. The US in particular lobbied for the inclusion of provisions on the protection of their national investors abroad, but negotiations ultimately resulted in a compromise that balanced the protection of foreign investments with the right of host states to take ‘any appropriate safeguard necessary’. In capital-exporting states the initiative was perceived to provide excessive protection to developing countries, whereas it was considered to be too permissive to MNEs by capital-importing states.²²³ Never ratified by US Congress, the ITO was ultimately abandoned.²²⁴ GATT survived as the new multilateral trading system, but did not cover investment activity.²²⁵

The 1960s witnessed on the one hand, the drafting of the OECD Convention on the Protection of Foreign Property and the adoption of first OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations in 1961. These were pledges to liberal economic policy by Western European countries, the US and Canada. The Codes remain key OECD policy instruments, and although the Draft Convention was never adopted, it provided a template for numerous BITs that were concluded in during 1960s and 1970s.²²⁶ On the other hand, developing countries succeeded in the adoption of the UN Declaration on Permanent Sovereignty over Natural Resources in 1962, allowing more intrusive government action with foreign property for the benefit of economic development. This latter development was ultimately feeding into the adoption of the NIEO initiative in 1974.

It was not until the 1980s that another attempt at the establishment of a multilateral framework for the regulation of foreign investment was taken within the framework of GATT. Yet again, the US advocated an extension of core non-discrimination provisions of GATT to cover investment activity, providing impetus

²²³ Dattu (2000), *op cit.*, 287.

²²⁴ Basedow (2018), *op cit.*, 64; for a discussion of the Havana Charter, see George Bronz, ‘The international trade organization charter’ (1949) 62(7) *Harvard Law Review* 1089-125; on the US policy perspective on reasons behind the non-ratification of the Havana Convention, see Todd S. Shenkin, ‘Trade-related investment measures in bilateral investment treaties and the GATT: Moving toward a multilateral investment treaty’ (1994) 55(2) *University of Pittsburgh Law Review* 541-606, 556-58.

²²⁵ Vandevelde (2010), *op cit.*, 41.

²²⁶ Muchlinski (2000), *op cit.*, 1035-36; Dolzer and Schreuer (2012), *op cit.*, 72.

to include this issue in the Uruguay round GATT negotiations in 1986.²²⁷ Two investment-related multilateral agreements, GATS and TRIMs, were adopted during the Uruguay round. The TRIMs negotiations, however, were of limited success as they resulted in little more than the restatement of a prohibition against the implementation of trade distorting performance requirements in violation with national treatment (Article III GATT) and the prohibition of quantitative restrictions (Article XI GATT).²²⁸ GATS provides a somewhat more successful attempt to achieve investment liberalization in services. Indeed, the agreement acknowledges linkages between trade and investment by explicitly covering 'commercial presence', which is essentially FDI.²²⁹ A comprehensive multilateral framework for foreign investment and investment protection could not, however, be achieved within GATT.

With a sense of disillusionment from the outcomes of the Uruguay negotiations, the US proposed negotiations on a multilateral investment agreement within the OECD.²³⁰ Behind this initiative was the simple but pragmatic idea that perhaps a group of like-minded countries could succeed where multilateral consensus could not be attained,²³¹ because of resistance from developing countries to accept a neo-liberal framework for investment protection.²³² Initially welcome with much optimism by OECD members and business representatives, the Multilateral Agreement on Investment (MAI)²³³ suffered a complete breakdown when negotiations were suspended indefinitely in October 1998.²³⁴ In spite of being an OECD initiative, opposition against the MAI was building up amongst OECD members.²³⁵ In the aftermath of the *Ethy*²³⁶ NAFTA case in 1997 the sentiment towards investment protection and ISDS shifted as Western governments and non-governmental organizations woke up to ISDS as a procedural avenue for aggrieved

²²⁷ Basedow (2018), *op cit.*, 91; Stefan D Amarasinha and Juliane Kokott, 'Multilateral investment rules revisited' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008) 119-51, 125.

²²⁸ Basedow (2018), *op cit.*

²²⁹ Vandeveld (2010), *op cit.*, 68.

²³⁰ Basedow (2018), *op cit.*, 140-41.

²³¹ Amarasinha and Kokott (2008), *op cit.*, p. 126.

²³² Basedow (2018), *op cit.*, 139; Dattu (2000), *op cit.*, 295.

²³³ OECD, Report by the Committee on International Investment and Multinational Enterprises / and the Committee on Capital Movements and Invisible Transactions, 'A Multilateral Agreement on Investment' (DAFFE/CMIT/CIME(95)13/FINAL), 5 May 1995.

²³⁴ Amarasinha and Kokott (2008), *op cit.*, 127; for a background on the MAI negotiations, see Dattu (2000), *op cit.*, 295-303; Rainer Geiger, 'Regulatory expropriation in international law: Lessons from the Multilateral Agreement on Investment' (2002) 11(1) *New York University Environmental Law Journal* 94-109; Muchlinski (2000), *op cit.*

²³⁵ Basedow (2018), *op cit.*, 149-54.

²³⁶ *Ethyl Corporation v. Canada* Award on Jurisdiction of 24 June 1998, UNCITRAL.

foreign investors to challenge domestic regulatory policy decisions.²³⁷ Moreover, key constituencies of what was proclaimed to be a multilateral initiative, were largely excluded from the negotiation process, leading to strong opposition from developing countries.²³⁸

For the Commission in particular the MAI breakdown was an opportunity to revive the investment negotiations within the WTO.²³⁹ At the WTO Ministerial meeting in Singapore in 1996 it was decided to look further into the relationship of trade and investment, albeit for purely educational purposes.²⁴⁰ The inclusion of investment amongst the items of WTO Doha round negotiations in 2001 was strongly rejected by developing countries,²⁴¹ and the issue eventually dropped in 2003 when it transpired that no progress would be made. To this date, the WTO working group on trade and investment remains inactive and without a specific mandate.²⁴²

2.1.3.2 Bilateralism in international investment law

The modern investment treaty regime is made up of a network of around 3300 individual IIAs.²⁴³ Immediately after World War II the US initially continued to conclude FCN treaties. Germany was first to roll out a BIT programme, spearheaded by the first agreement concluded with Pakistan in 1959. Other European states followed suit in the 1960s and 70s.²⁴⁴ In the 1980s the conclusion of BITs picked up pace and in the mid-1990s four new BITs were concluded on average per week.²⁴⁵ The two first decades of the 21st century are characterized by a gradual decline in the conclusion of BITs, although the relevance of regional IIA and FTAs with investment provisions has become more pronounced.²⁴⁶

²³⁷ Geiger (2002), *op cit.*, 105; Muchlinski (2000), *op cit.*, 1046; on the role of NGOs in the MAI negotiations, see Basedow (2018), *op cit.*, 154 and 157-58.

²³⁸ Geiger (2002), *op cit.*, 97-102; Muchlinski (2000), *op cit.*, 1037-48.

²³⁹ Vice-President of the European Commission 'The Rt Hon Sir Leon Brittan QC, European Parliament Plenary Session, SPEECH/98/212, 20 October 1998 accessed at <http://europa.eu/rapid/press-release_SPEECH-98-212_en.htm>.

²⁴⁰ Basedow (2018), *op cit.*, 161-62.

²⁴¹ Basedow (2018), *op cit.*, 161-62; Muchlinski (2000), *op cit.*, 1034.

²⁴² Amarasingha and Kokott (2008), *op cit.*, 128-29.

²⁴³ UNCTAD reported a total of 3 322 IIAs of which 2 946 were BITs and 376 were other treaties with investment provisions, see UNCTAD, 'World Investment Report 2018: Investment and new industrial policies' (UNCTAD/WIR/2018) 88.

²⁴⁴ Dolzer and Schreuer (2012), *op cit.*

²⁴⁵ UNCTAD, 'World investment report 2013: Global value chains: Investment and trade for development' accessible at <https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf> Figure III.7 on p. 102.

²⁴⁶ UNCTAD, 'World investment report' (2018), *op cit.*, 88-89, in particular Figure III.3.

Indeed, the EU has frequently engaged in this practice since the conclusion of the agreements with Mexico and Chile in 2000 and 2003, respectively.²⁴⁷ This has further intensified with the Treaty of Lisbon that endowed the Union with external competence over FDI.²⁴⁸ All post-Lisbon initiatives for the negotiation and conclusion of trade and investment agreements have been initiated with comprehensive chapters on investment, including liberalization provisions and investment protection.²⁴⁹ In light of Opinion 2/15 this is now changing.²⁵⁰ Chapter Five will discuss this issue in more detail, suffice it to highlight that the Council has recently adopted a new strategy for the negotiation of investment agreements, which are now negotiated as stand-alone IPAs.²⁵¹ Whereas investment relations with between the Member States and third countries is still largely governed by their own BITs, the new generation of EU IPAs will gradually replace these agreements.²⁵²

Notably, some states have decided to terminate, update or replace their existing BITs in response to criticism and recent trends in investor-state arbitration practice.²⁵³ These developments are discussed in more detail in Chapter 3.3. Be that as it may, most IIA currently in place display remarkably similar features.²⁵⁴ All agreements provide for a set of substantive standards, including *inter alia* protection from expropriation without adequate compensation, non-discrimination provisions, fair and equitable treatment, full protection and security, umbrella clauses, and dispute settlement provisions.²⁵⁵ There have been attempts to explain developments in investment treaty-making through an analytical prism of multilateralization. Schill, a prominent advocate of this approach describes this process as:

“[T]he paradoxical phenomenon that [international investment law] is developing towards a multilateral system with rather uniform rules and principles relating to investment protection on the basis of bilateral treaties. Unlike genuinely bilateral treaties, IIAs do not stand

²⁴⁷ Basedow (2018), *op cit.*, 170 *et seq.*

²⁴⁸ Article 207 TFEU.

²⁴⁹ See *infra* Chapter 5.1.2.

²⁵⁰ Opinion 2/15 *Free Trade Agreement between the European Union and Singapore* [2017], EU:C:2017:376

²⁵¹ European Council, 'Draft Council conclusions on the negotiation and conclusion of EU trade agreements' (ST 8549 2018 INIT) accessible at <<http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>>.

²⁵² OJ L 257/121, 28 August 2014, Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

²⁵³ Yoram Z. Hafel and Alexander Thompson, 'When do states renegotiate investment agreements? The impact of arbitration' (2018) 13(1) *The Review of International Organizations* 25-48, 30, for discussion see 37 *et seq.*

²⁵⁴ Susan D. Franck, 'The legitimacy crisis in investment treaty arbitration: Privatizing public international law through inconsistent decisions' (2005) 73(4) *Fordham Law Review* 1521-625, 1529-33.

²⁵⁵ Bonnitcha, Poulsen and Waibel (2017), *op cit.*, 3-6; Dolzer and Schreuer (2012), *op cit.*, 75-77

isolated in governing the relations between two states; they rather develop multiple overlaps and structural interconnections that create a relatively uniform and treaty-overarching legal framework for international investment relations based on uniform substantive and procedural principles with little room for insular deviation.”²⁵⁶

As a normative position, this perspective is very attractive because it encourages actors within the system, including adjudicators, to interpret and apply the rules of international investment law in a manner that benefits systemic development and defeats potential power imbalances between participating states.²⁵⁷ As an analytical framework, however, it hides the origins of rules on investment protection in economic imperialism and the persistent imposition of Western standards on the world. Vandervelde observes that post-war FCN treaties concluded by the US were not based on *quid pro quo* bargaining, but rather mutually beneficial arrangements. Quoting President Truman in a speech to Congress in 1949, “we do not, of course, ask privileges for American capital greater than [...] those we ourselves grant in this country”, he concludes that FCN treaties primarily created a framework for liberal policy to stimulate cross-border business activity.²⁵⁸

It is, of course, true that IIAs are applied indistinctly to capital-importing and capital exporting states alike.²⁵⁹ Indeed, the realization that capital-exporting states may well be on the receiving end of investor-state disputes partly informs the opposition of OECD members to the MAI initiative. It is, however, equally true that the US rejected the ITO proposal, which balanced liberal trade and investment policy with interests of developing countries to exercise greater control over their natural resources.²⁶⁰ Despite reciprocity in the application of IIAs, the structure and content of the modern investment treaty regime is nonetheless deeply embedded in its context of imposition and Eurocentrism.

A converging trend in international investment law may well be noticeable, and, indeed, the present study describes the current state of investment law with the terminology of an investment treaty ‘regime’. This necessarily recognizes a certain degree of commonalities and converging features across the network of BITs and regional investment agreements.²⁶¹ Using ‘multilateralism’ as a term to describe the

²⁵⁶ Stephan W. Schill, 'Ordering paradigms in international investment law: Bilateralism—multilateralism—multilateralization' in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The foundations of international investment law: Bringing theory into practice* (Oxford University Press: 2014) 109-41, 114.

²⁵⁷ Schill (2014), *op cit.*, 134-37.

²⁵⁸ Kenneth J. Vandervelde, *The first bilateral investment treaties: U.S. post-war friendship, commerce, and navigation treaties* (Oxford University Press: 2017) 227-28.

²⁵⁹ Schill (2014), *op cit.*, 119.

²⁶⁰ Basedow (2018), *op cit.*, 64; Shenkin (1994), *op cit.*, 556.

²⁶¹ Krasner describes a regime as a set of "principles, norms, rules, and decisionmaking procedures around which actors' expectations converge in a given area of international relations", see D. Krasner

modern investment treaty regime, however, lends symbolic legitimation to the history of international investment law, at the expense of further entrenching traditional conceptions of investment protection.

2.2 The origins of investor-state dispute settlement

Although several arbitrations were arising out of property disputes in the 19th and early 20th century,²⁶² these were a far cry from contemporary investment treaty disputes. Indeed, FCN treaties did not typically include arbitration clauses.²⁶³ Instead, issue-specific claims commissions were established after the fact.²⁶⁴ This is well illustrated at the example of the mixed claims commissions that were set up to hear disputes against Venezuela at the turn of the 19th century.

Torn by civil war, Venezuela defaulted on a number of loans issued by German, British and Italian bond holders.²⁶⁵ In a political environment where the US and European imperial powers were vying over the dominant position in Latin America, these disputes presented an opportunity to strengthen commercial presence in the country.²⁶⁶ Inspired by the Calvo doctrine Venezuela relied on the national treatment standard, rejecting the legitimacy of foreign intervention. Ultimately, however, Venezuela was forced to consent to international arbitration after Germany, Britain and Italy bombarded the Venezuelan coastline and occupied ports and customs houses.²⁶⁷ Notably, it was not contested whether compensation was due and the arbitration was, therefore, merely about the wrongful nature of the measures taken and the amount of compensation that was payable.²⁶⁸ Diplomatic protection and arbitration in this period were not procedural alternatives, but military and commercial dominance was used to coerce weaker states of the global system into dispute settlement; legitimating military intervention with legal arguments.

Stephen, *Power, the State, and Sovereignty: Essays on International Relations* (Routledge: 2009) 113; this definition has since been applied descriptions of the network of investment treaties, see Bonnitca, Poulsen and Waibel (2017), *op cit.*, 2; Salacuse (2010), *op cit.*, 432-32.

²⁶² For a discussion of the Venezuelan Arbitrations, see Miles (2013), *op cit.*, 67-69.

²⁶³ Vandevelde (2010), *op cit.*, 31.

²⁶⁴ Joost Pauwelyn, 'At the edge of chaos?: Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed' (2014) 29(2) *ICSID Review* 372-418, 401; Vandevelde (2010), *op cit.*, 25.

²⁶⁵ St Johns observed that "[t]he size of the default was not exceptional, and it followed many previous cycles of lending and default, the result of decades of irresponsible lending and unsteady government." St John (2018), *op cit.*, 57.

²⁶⁶ St John (2018), *op cit.*, 57; Miles points out that the US and Britain were generally cautious in their espousal of claims concerning unpaid bonds, waiting until their national had exhausted the local courts before intervening, see Miles (2013), *op cit.*, 53-54.

²⁶⁷ Miles (2013), *op cit.*, 68.

²⁶⁸ Miles (2013), *op cit.*, 68.

2.2.1 *The emerging role of arbitration for international property disputes*

The role and use of arbitration in international commercial relations changed radically in the 20th century. The Drago-Porter Convention of 1907 and subsequently Article 2(4) of the UN Charter gradually restricted the use of force in international law, elevating arbitration as the primary avenue for the settlement of disputes and depriving diplomatic protection of its dominant role in international property disputes. Indeed, the ensuing development from ‘gunboat diplomacy’ to the institutionalization of international arbitration would ultimately lead to the gradual judicialization of investment treaty conflicts.²⁶⁹ The relevance of the PCA and the PCIJ, created respectively in 1899 and 1922, as permanent structures for the resolution of international disputes increased in the inter- and post-war period. This is due in part to the drastic increase in nationalizations by *inter alia* the Soviet Union and Mexico.²⁷⁰ FCN treaties also started to incorporate references to these institutions more frequently. International arbitration, however, was largely reserved for state-to-state disputes.

Without individual standing before international tribunals, however, foreign investors who experienced interferences with their investments would first of all turn to domestic courts to seek relief.²⁷¹ This principle was also embraced by post-war FCN treaties, which strengthened access to local courts for foreign investors.²⁷² Considering that investment disputes often concern the application of municipal law of the country where the investment is made, conflict of law rules would often identify the domestic courts of the host state as the appropriate judicial forum.²⁷³ More importantly, encroachments on foreign investments are frequently the result of the host state’s exercise of sovereign powers, or at the very least, committed by agents of the state in the exercise of public authority. The public international law principle of sovereign immunity would in these cases prevent the host state and its

²⁶⁹ Susan D. Franck, ‘Challenges facing investment disputes: reconsidering dispute resolution in international investment agreements’ in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 143-92, 150-51; Philippe Sands, ‘Reflections on international judicialization’ (2016) 27(4) *European Journal of International Law* 885-900, 886; see also Cesare P. R. Romano, ‘The proliferation of international judicial bodies: The pieces of the puzzle’ (1999) 31(4) *New York University Journal of International Law and Politics* 709-51.

²⁷⁰ Vandevelde (2010), *op cit.*, 35.

²⁷¹ Dolzer and Schreuer (2012), *op cit.*, 231; David Collins, *An Introduction to International Investment Law* (Cambridge University Press: 2017) 217.

²⁷² Vandevelde (2010), *op cit.*

²⁷³ August Reinisch and Loretta Malintoppi, ‘Methods of dispute resolution’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008) 691, 696; even in instances where private international law rules conflict with conceptions of territoriality in public international law, deference is often given to the court that is closest to the dispute, see Crawford (2012), *op cit.*, 475.

agents from being brought before a foreign court.²⁷⁴ Yet another drawback to litigation in domestic courts is that rights acquired under international agreements cannot easily be invoked directly before domestic courts.²⁷⁵

In order to pursue a treaty claim before an international tribunal the investor depends on her home state to exercise diplomatic protection.²⁷⁶ Not in the expectation that the home state will employ diplomatic pressure or ‘gunboat’ diplomacy to vindicate interferences with the investor’s property, but in the hope that the host state will take up the dispute in state-to-state adjudication. Notably, there is no right to diplomatic protection in international law, nor is the espousal of the investor’s claim entirely based on factors pertaining to the legal nature of the dispute.²⁷⁷ As the ICJ observed in *Barcelona Traction*:

“The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.”²⁷⁸

Although sentiment with respect to the use of force under the banner of diplomatic protection shifted significantly at the turn of the 19th century, it was nevertheless a means for Western states of utilizing a legal avenue to attain political objectives.

In the exercise of diplomatic protection a state does therefore not act on behalf of the investor, but essentially asserts its own right to pursue the claim in its own name.²⁷⁹ This being said, with respect to disputes initiated under state-to-state dispute settlement provisions in BITs the state’s broader interests are likely to overlap with the specific interests of the investor.²⁸⁰ It is, nevertheless, important to

²⁷⁴ UN Convention on Jurisdictional Immunities of States and Their Property (GA Res 59/38, Annex); for a discussion, see Crawford (2012), *op cit.*, 488-91; Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press: 2012); Ernest Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer: 2005).

²⁷⁵ Reinisch and Malintoppi (2008), *op cit.*, 696.

²⁷⁶ Draft Articles on Diplomatic Protection (2006) (UN GA Res 61/35, Supplement 10).

²⁷⁷ For an overview over diplomatic protection, see Peter Muchlinski, ‘The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution’ in Christina Binder, *et al.* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press: 2009) 341-62.

²⁷⁸ *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, 1970 ICJ Reports, 3, para. 79

²⁷⁹ *Panevezys-Saldutiskis (Estonia v Lithuania)*, 1939 PCIJ Reports Series A/B No. 76, p. 16; *Mavrommatis Palestine Concessions (Greece v United Kingdom)* Decision on Jurisdiction, 1924 PCIJ Reports Series A No. 2, p. 12.

²⁸⁰ ILC, ‘Preliminary report on diplomatic protection, by Mr. Mohammed Bennouna, Special Rapporteur’ (A/CN.4/484), 1 February 1998 para. 21-24; for an endorsement of that view, see *CMS Gas Transmission Company v Republic of Argentina* [2003], Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ICSID Case No, ARB/01/8, para. 45; for an example of diplomatic protection asserted under BITs see e.g. *Italy v Cuba* where Italy claimed to exercise its own legal right while pursuing the interests of its investors, and although the issue was not explicitly addressed the

acknowledge that the investor will relinquish all control over strategic decisions related to the dispute. And compensation, if any, is paid to the state with no legal obligation to pass that payment on to the investor.²⁸¹ It is for these—and other—reasons that diplomatic protection has been described as “a remedy so replete with pitfalls that it is unlikely to be of much practical value as a means of settling an investment dispute with the host state.”²⁸²

2.2.2 *The institutionalization of direct standing for investors*

On this backdrop, the ICC began working on a draft convention in the 1920s that would have opened ICC arbitration for investment disputes. Key to that approach was the ‘privatization’ of investment dispute resolution by way of furnishing investors with direct standing before a newly established International Court of Arbitration.²⁸³ Having been discussed throughout several decades, the draft convention was published in 1949 but was never formally endorsed.²⁸⁴ Efforts to institutionalize investor-state arbitration were also taken in the direct aftermath of World War II. The ILA drafted two statutes in 1948 envisaging respectively investor-state arbitration and the establishment of an investment court.²⁸⁵ Although these initiatives were largely unsuccessful, the emergent international institutional framework in the post-war period nonetheless reflected the prevailing political and economic view that now endorsed FDI as a key instrument for economic development.²⁸⁶

Recalling that international law no longer tolerated the use of force under the cover of diplomatic protection, the creation of an institutional framework for

tribunal appears to have accepted that view, see *Italian Republic v Republic of Cuba* [2005], Interim Award, 15 March 2005, Ad Hoc Arbitration, paras. 24, 62 and 65; for a discussion of the case, see Michele Potestá, ‘Interstate arbitration-bilateral investment treaties-diplomatic protection-exhaustion of local remedies-definition of investment’ (2012) 106(2) *American Journal of International Law* 341-47; and Enrico Milano, ‘The investment arbitration between Italy and Cuba: The application of customary international law under scrutiny’ (2012) 11(3) *The Law & Practice of International Courts and Tribunals* 499-524.

²⁸¹ Muchlinski (2009), *op cit.*, 343.

²⁸² Muchlinski (2007), *op cit.*, 705.

²⁸³ Note that the details of the International Court of Arbitration were not determined (Article 14), see ICC, Committees on Foreign Investments and Foreign Establishments, ‘International Code of Fair Treatment for Foreign Investments of 1949’, UNCTAD/DTCI/30(Vol.III), International investment instruments: A compendium, UNCTAD, III, Annex C, 273, accessible at <https://unctad.org/en/Docs/dtci30vol3_en.pdf>.

²⁸⁴ Arghyrios A. Fatouros, ‘An international code to protect private investment-proposals and perspectives’ (1961) 14(1) *The University of Toronto Law Journal* 77-102, 86.

²⁸⁵ ILA, International investment instruments: A compendium, ‘Draft Statutes of the Arbitral Tribunal for Foreign Investment and of the Foreign Investments Court of 1948’, International investment instruments: A compendium, UNCTAD, III, Annex C, 259.

²⁸⁶ See *supra* Section 2.1.1.1.

investor-state dispute resolution could be legitimated as a venue of 'depoliticization',²⁸⁷ and an essential instrument to promote economic development and social progress. Indeed, although the political environment was favourable for the creation of an international framework governing foreign investment activity, there was an apparent lack of consensus on substantive standards of protection in the immediate post-war period. It was on that backdrop that Aron Broches, then General Counsel of the World Bank, observed that the creation of a procedural framework for the settlement of investment disputes between the investor and the host state might be more successful.²⁸⁸

Out of this context emerged the Washington Convention in 1965.²⁸⁹ The convention, which set up ICSID, was initially designed for the settlement of investor-state disputes arising out of investment contracts. However, reference to ICSID was swiftly included in domestic arbitration laws²⁹⁰ and IIAs.²⁹¹ In the two decades following its inception, the ICSID case load was negligible. However, the changing attitude in developing and former communist states towards FDI from the 1980s, combined with significant lobbying activity of ICSID officials broke this trend. Ratifications of the ICSID Convention increased markedly,²⁹² ISDS provisions became standard in IIAs and ICSID became the main forum for the settlement of investor-state disputes.²⁹³ Indeed, with her comprehensive historical account of ICSID, St John illustrates that the active promotion of ICSID by key figures at the World Bank, contributed tremendously to the emergence of ISDS provisions in IIAs more generally.²⁹⁴

²⁸⁷ The US recently referred explicitly to 'depoliticization' as a principal rationale underlying ISDS, see *Republic of Ecuador v United States of America* Statement of Defense of Respondent, UNCITRAL, PCA Case No 2012-5, 12; for a discussion of the meaning of 'depoliticization', see Ursula Kriebaum, 'Evaluating social benefits and costs of investment treaties: Depoliticization of investment disputes' (2018) 33(1) *ICSID Review* 14-28, 15-20; see also Franck (2005), *op cit.*, 1538; Rainer Geiger, 'The multifaceted nature of international investment law' in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 17-27, 19; David Schneidermann, 'Compensating for democracy's 'defects': The case of international investment law' in Christian Joerges and Carola Glinski (eds), *The European crisis and the transformation of transnational governance: Authoritarian managerialism versus democratic governance* (Bloomsbury Publishing: 2014) 47-70, 50.

²⁸⁸ Dolzer and Schreuer (2012), *op cit.*, 73; St John (2018), *op cit.*, 71.

²⁸⁹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965); for comprehensive historical accounts of ICSID, see Antonio Parra, *The history of ICSID* (Oxford University Press: 2012); and St John (2018), *op cit.*

²⁹⁰ One of the first references to ICSID could be found in the Tunisian Investment Code of 1969; for another example see also Article 8, Law No. 43 of 1973 on the Investment of Arab and Foreign Funds and the Free Zone. For a discussion, see Paulsson (1995), *op cit.*, 235.

²⁹¹ The first references to ICSID in BITs can be found in Article 11 of the Indonesia-Netherlands Agreement on Economic Cooperation of 1968, and Article 7 of the Italy-Chad BIT of 1969.

²⁹² St John (2018), *op cit.*

²⁹³ St John (2018), *op cit.*, 206.

²⁹⁴ St John (2018), *op cit.*, 192 *et seq.*

This corresponds to earlier observations that depicted international financial institutions as drivers of economic globalization. The preamble to the ICSID Convention illustrates this vividly by recognizing “the need for international cooperation for economic development, and the role of private international investment therein”. In a similar vein, the Report of the Executive Directors on the ICSID Convention clarifies that the establishment of ICSID was informed by “the desire to strengthen the partnership between countries in the cause of economic development.”²⁹⁵ These objectives are reiterated in the accounts of leading commentators who describe ICSID as “an instrument of international policy for the promotion of economic development”²⁹⁶ through the stimulation of FDI.²⁹⁷

2.3 Investor-state dispute settlement and its ideological criticism

The use of arbitration for the resolution of investor-state disputes is, thus, legitimated by narratives about the ‘depoliticization’ of property disputes; praised as a successful turn from ‘gunboat diplomacy’. Brower and Schill observe in this context that the process of economic globalization since the 1960s led to a change in the world’s social and economic environment that has created the need for legal institutions that structure and stabilize foreign investment activities and help to regulate conflicts that unavoidably arise out of increases in investment cooperation.”²⁹⁸ Franck also refers to the depoliticising effect of ISDS that insulate investors from “international politics and governmental bureaucracy.”²⁹⁹

Emphasizing traits such as neutrality and objectivity, ISDS is credited as contributing to a ‘rules-based system of international investment’.³⁰⁰ The objective of ISDS is, thus, “stabilizing the expectations of foreign investors” and to invigorate substantive commitments.³⁰¹ Underlying this view is the idea that ISDS corrects market failures in the form of structural imbalances between the investor and the host state. In effect, however, it restricts government intervention in favour of the protection of private property rights, which reinforces neo-classical economic thinking.

²⁹⁵ World Bank, ‘Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 18 March 1965 para. 9

²⁹⁶ Citing Georges Delaume, see Muchlinski (2007), *op cit.*, 718.

²⁹⁷ Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 2 edn (Cambridge University Press: 2009) 4-5.

²⁹⁸ Charles N. Brower and Stephan W. Schill, ‘Is arbitration a threat or a boon to the legitimacy of international investment law?’ (2009) 9(2) *Chicago Journal of International Law* 471-98, 473.

²⁹⁹ Franck (2005), *op cit.*, 1538.

³⁰⁰ Geiger (2008), *op cit.*, 19.

³⁰¹ Brower and Schill (2009), *op cit.*, 477.

Whereas these accounts portray ISDS as an impartial dispute settlement system that operates largely independent of the domestic judiciary and its perceived national biases,³⁰² Miles emphasizes that narratives of depoliticization likewise reiterate assertions of universality in international law.³⁰³ Not least because its institutionalization with ICSID perpetuates structural features that derive from Western conceptions of ‘good governance’, including principles and institutions such as democracy, transparency and the rule of law.³⁰⁴

This narrative of depoliticization is not uncontested, and has come under severe criticism by scholars from developing states. Shalakany, for instance, argues that under the cloak of a technocratic and depoliticized dispute settlement system, lurk the extensive political capabilities of international arbitration (including investment arbitration) that “offer a legitimating medium for the effective disempowerment of national legislative potentials”.³⁰⁵ Chimni joins this critique arguing that international institutions more generally are vehicles for the creation of social conditions that favour economic globalization.³⁰⁶ These claims are not surprising, and are not easily discredited, in light of the predominant economic ideology that is deeply entrenched in investment treaty law and arbitration. Notable is furthermore that while developed countries account for the lion share of both inwards and outwards FDI flows, developing countries remain a major recipient.³⁰⁷ Alvarez and Khamsi, thus, observe that many investment agreements were asymmetrical leaving developing countries no alternative other than to “yield to the power of wealth disparities that such agreements reflect and perpetuate.”³⁰⁸ Although the neo-liberal economic ideology of ISDS purports to emphasize reciprocity, it deflects from underlying power imbalances, and ignores the limited impact that developing countries have to shape the investment treaty regime.

Key to a description of ISDS as ‘depoliticizing’ is the description of investment disputes as ‘commercial’ in nature. This situates lawyers, technical experts and adjudicators at the centre of dispute settlement and drives an ideological wedge

³⁰² W. Michael Reisman, ‘International arbitration and sovereignty’ (2002) 18(3) *Arbitration International* 231-39.

³⁰³ Miles (2014), *op cit.*, 987.

³⁰⁴ Anghie (2005), *op cit.*, 249.

³⁰⁵ Amr A. Shalakany, ‘Arbitration and the Third World: A plea for reassessing bias under the specter of neoliberalism’ (2000) 41(2) *Harvard International Law Journal* 419-68, 435.

³⁰⁶ B. S. Chimni, ‘International institutions today: An imperial global state in the making’ (2004) 15(1) *European Journal of International Law* 1-37.

³⁰⁷ Although developing and transition economies combined accounted in 2017 for 50% of FDI inflows, developed economies accounted for 70% of global FDI outflows, see UNCTAD, ‘World investment report’ (2018), *op cit.*, 2-6.

³⁰⁸ José E. Alvarez and Kathryn Khamsi, ‘The Argentine crisis and foreign investors: A glimpse into the heart of the investment regime’ (2008), Institute for International Law and Justice, IILJ Working Paper 2008/5 accessible at <<https://www.iilj.org/publications/the-argentine-crisis-and-foreign-investors-a-glimpse-into-the-heart-of-the-investment-regime/>> 4.

between the law of investment protection and the high politics of foreign affairs.³⁰⁹ Indeed, with the help of ISDS, the investment treaty regime “purports to empty economics of politics entirely”.³¹⁰ There is, however, a growing realization that the broader effects of investment arbitration are different from other forms of commercial arbitration. Paulsson remarked in 1995:

“By allowing direct recourse by private complainants with respect to such a wide range of issues, these treaties create a dramatic extension of arbitral jurisdiction in the international realm.”³¹¹

As a consequence, an ideological critique of investor-state arbitration is sometimes formulated through the lens of public law.³¹² Indeed, as arbitration professionals themselves have conceded, investor-state arbitration represents a “mechanism for the control of governmental discretion and not merely a system of international commercial disputes settlement,”³¹³ because it demonstrates features that are more akin to an international administrative review than commercial arbitration.³¹⁴

2.4 Interim conclusion

This Chapter illustrated that the modern investment treaty regime is built on an intricate network of BITs, regional and (quasi) multilateral agreements. This unwavering bilateralism and the inability to secure a multilateral consensus, reflects deep rifts between the interests of developed and developing states, that find its origins in the relentless expansion of empire throughout much of the 19th century. Reactions against the assertion by Western nations of far-reaching rights in international law for the protection of their nationals’ property abroad were as frequent as they were unsuccessful. Ensuring that Western conceptions of property and ownership were applied to foreign investment relations, capital-exporting countries often resorted to gunboat diplomacy. Lipson describes the role of

³⁰⁹ In his recent doctoral thesis, Rönnelid identifies four distinct uses of ‘depoliticization’ in legal scholarship, emphasizing respectively the legal domain as the adequate forum for decision-making, the de-escalation of political conflicts, the role of technical expertise in dispute resolution, and, lastly, differences between modern investment law and the protection of foreign property during the colonial era, see Love Rönnelid, ‘The emergence of routine enforcement of international investment law: Effects on investment protection and development’ (Uppsala University 2018), 126-28.

³¹⁰ Schneidermann (2014), *op cit.*, 50.

³¹¹ Paulsson (1995), *op cit.*, 233.

³¹² Gus Van Harten, *Investment treaty arbitration and public law* (Oxford University Press: 2007) 152 *et seq.*

³¹³ Muchlinski (2007), *op cit.*

³¹⁴ Brower and Schill (2009), *op cit.*, 490.

international law throughout this era as follows: “It legitimated, regulated and obscured well enough to permit the internationalization of capital.”³¹⁵

In the wake of World War II international law has witnessed a turn towards dispute settlement and a rise of legal institutions in order to prevent future aggressions by curtailing legitimacy for the use of force. Yet, the rise of the multilateral trading system was firmly established on neo-liberal economic policies, and the proliferation of BITs throughout the 1990’s has effectively institutionalized Western conceptions of foreign investment protection. Despite the profound lack of empirical evidence,³¹⁶ the notion that FDI is vital for economic prosperity remains dominant in international economic governance,³¹⁷ perpetuating the image of IIAs as instruments of economic globalization.³¹⁸

Investor-state arbitration plays a crucial role in the judicialization of investment law. Foreign investment protection that was secured through international agreements appeared less susceptible to changing political ideologies than national laws and, thus, more apt to provide continuity and protection to foreign investors.³¹⁹ Access to investor-state arbitration effectively removes all aspects of dispute settlement from the realm of politics. The empowerment of private investors to vindicate interferences with their foreign property directly before an international tribunal, aptly reflects the prominent focus on the foreign investor that influenced the development of international rules on property protection since the 19th century. And although its significance for the ‘depoliticization’ of investment relations is all but uncontested, ISDS provisions have become the centre around which the modern investment treaty regime gravitates.

Currently we see a survival of ISDS reform initiatives, and the ICS proposal is chief amongst them. However, rather than breaking with the existing paradigm, the ICS initiative perpetuates the reluctance to abandon the procedural empowerment

³¹⁵ Lipson (1985), *op cit.*, 57.

³¹⁶ Mary Hallward-Driemeier, ‘Do bilateral investment treaties attract FDI? Only a Bit ... and they could bite’ (2003), World Bank Policy Research Working Paper 3121 accessible at <<http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf>>; Christian Bellak, ‘Economic impact of investment agreements’ (2015), Vienna University of Economics and Business, Department of Economics Working Paper No 200 accessible at <<https://epub.wu.ac.at/4625/1/wp200.pdf>>; others claim to have demonstrated a positive correlation in the number of BITs and FDI flows, see e.g. Eric Neumayer and Laura Spess, ‘Do bilateral investment treaties increase foreign direct investment to developing countries?’ (2005) 33(10) *World Development* 1567-85; Jeswald W. Salacuse and Nicholas P. Sullivan, ‘Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain’ (2005) 46(1) *Harvard International Law Journal* 67-130; Rose-Ackerman and Tobin register a positive effect of BITs on FDI flows to developing countries that faded with the emergence of a global investment treaty regime, see Susan Rose-Ackerman and Jennifer L. Tobin, ‘Do BITs benefit developing countries?’ in Catherine A. Rogers and Roger P. Alford (eds), *The future of investment arbitration* (Oxford University Press: 2009) 131-43, 140.

³¹⁷ Franck (2005), *op cit.*, 1525 and 1527.

³¹⁸ Vandeveld (2010), *op cit.*, 69.

³¹⁹ Seid (2002), *op cit.*, 51.

of private investors in international law in favour of a return to domestic judicial institutions. Miles' work is crucial in this respect as she cogently observes that economic imperialism continues to be reflected in the modern investment treaty regime, pointing out that private business interests and political objectives of the state are still aligned.³²⁰ This chapter illustrated that despite contestation ISDS it is unlikely to disappear as a legal structure. This insight informs the emergent role of the Union as an actor in ISDS reform, which is aptly reflected in the evolution of the CCP that now embraces investment competence. Its ability to contribute to structural ISDS reform, however, mainly depend on whether the ICS is perceived as a genuine reform initiative or yet another attempt to impose European standards on the rest of the world.

³²⁰ Miles (2010), *op cit.*, 38-40.

PART II
INVESTOR-STATE DISPUTE SETTLEMENT

3 INVESTOR-STATE ARBITRATION AND ITS CRITICISM

The inclusion of ISDS provisions in virtually all modern IIAs has effectively led to the privatization of dispute resolution revolving around ‘public issues with economic and political consequences’.³²¹ Although natural and judicial persons generally lack the legal capacity to bring sovereign states before international courts and tribunals, the modern investment treaty regime has systemically empowered private investors to vindicate their rights under international agreements through international arbitration. The present Chapter is first of all devoted to familiarize the reader with relevant concepts and terminology, briefly exploring the available methods of dispute settlement (section 3.1), before introducing core institutional and procedural features of investor-state arbitration (section 3.2). Section 3.3 subsequently provides an overview over the most common accounts of criticism against investor-state arbitration, which is instrumental to the evaluation of the ICS in later parts of this study.³²² This Chapter argues that the intense criticism prompts the Union to choose between either exiting or reforming the existing system. The ICS indicates that the Union is positioning as an ISDS reform actor, a claim that is further substantiated in Chapter 4.

3.1 Methods of dispute settlement

There are a number of available methods for the resolution of investment disputes. Most common are conciliation and arbitration. Conciliation is useful where the investor and the host state are hopeful to find a solution that they both can agree upon.³²³ It does not, however, play a very prominent role for the resolution of

³²¹ Franck (2005), *op cit.*, 1522.

³²² See *infra* Chapter 8.2 and 8.3.

³²³ For a brief account of conciliation under ICSID, see Reinisch and Malintoppi (2008), *op cit.*, 702-04.

investment disputes.³²⁴ Arbitration, on the other hand, is formal and adversarial process, much like judicial proceedings. It is investment arbitration, and other recently proposed judicialized forms of investment dispute settlement that the focus of the present study.

3.2 Common features of investor-state arbitration

Most IIA furnish the investor with a choice between a plethora of available arbitration rules, i.e. ICSID, the ICSID Additional Facility, the UNCITRAL arbitration rules, and the arbitration rules of the SCC. Over time, ICSID emerged as the dominant institutional framework for the settlement of investment disputes. The ensuing discussion focuses, therefore, on core institutional and procedural features of ICSID arbitration. In addition to a set of procedural rules, ICSID provides institutional and administrative support, which operates under the umbrella of the World Bank. Notably, ICSID is only available where both Contracting Parties to the IIA in dispute have ratified the ICSID Convention. Currently, neither the Union itself nor all of its Member States are signatories to the ICSID Convention.³²⁵ The SCC offers another institutional framework that has grown to become an attractive choice for investment disputes under the ECT but is of no further relevance to the present study.³²⁶

The UNCITRAL arbitration rules as well as the ICSID Additional Facility rules provide an alternative to institutional arbitration. Although all formats of investment arbitration share core characteristics, it is helpful to differentiate between ICSID and non-ICSID arbitrations to highlight some important variations. Generally speaking, whereas ICSID arbitration stands out because of its ‘delocalized’ nature, the automatic enforcement of its awards, and its internal review procedure, non-ICSID arbitration is characterized by the involvement of domestic courts.

³²⁴ As of June 2018 only 11 conciliations were registered under ICSID (including conciliation under the ICSID Additional Facility), ICSID, ‘The ICSID Caseload - Statistics’ (Issue 2018-2) 8.

³²⁵ Only states that are members of the World Bank or, alternatively, State Parties to the Statute of the ICJ may sign the ICSID Convention. In accordance with Article II, section 2(b) of the Articles of Agreement of the International Bank for Reconstruction and Development, in conjunction with Article II, section 2 of the Articles of Agreement of the International Monetary Fund, membership of the World Bank and, thus, ICSID is thereby limited to states at the exclusion of international organizations. Additionally, Poland is also currently not an ICSID member. .

³²⁶ Roughly 50% of known disputes that were administered by the SCC until mid-2018 arose out of the ECT in application of the arbitration rules of the SCC.

3.2.1 Access to arbitration

It is common for ISDS provisions to impose certain requirements on the access to arbitration. A typical example is the waiting period, also known as ‘cooling off’ period, i.e. a period of time that has to pass before the investor may initiate arbitration, with the intention to facilitate the establishment of a dialogue between the disputing parties and allow, if possible, an amicable resolution.³²⁷ It is also not uncommon for IIA to include a reference to local remedies. There are only few IIA, however, that unequivocally require the exhaustion of local remedies.³²⁸ More common are provisions, which demand that the investor at least attempted a resolution of the dispute through the relevant domestic courts or administrative review procedures.³²⁹ Other provisions may stipulate a certain time frame to pursue local remedies.³³⁰ Tribunals have, however, frequently rejected the view that such provisions condition access to investment arbitration on the exhaustion of local remedies.³³¹ Their effect is, thus, akin to waiting periods coupled with an attempt to resolve the dispute in domestic fora.³³²

Many IIAs require that the investor makes a binding commitment regarding the forum for the dispute (so called ‘fork in the road’ clauses).³³³ A choice for local courts constitutes, therefore, likewise an exclusion of any other means of settlement provided for under the IIA.³³⁴ Notably, the exclusion of international arbitration does only become effective if the dispute submitted to the domestic courts and the

³²⁷ e.g. Article VII.3(a) of the US-Argentina BIT of 1991; Article 19(2) of the Romania-Egypt BIT of 1994; for a discussion, see Christoph Schreuer, ‘Travelling the BIT route: Of waiting periods, umbrella clauses and forks in the road’ (2004) 5(2) *The Journal of World Investment & Trade* 231-56, 232 *et seq.*

³²⁸ e.g. Article 9(3) of the China-Côte d’Ivoire BIT of 2002 requires the exhaustion of domestic administrative review procedures.

³²⁹ Article 14.3(i) of India Model BIT of 2016 requires that the investor first submits the dispute to the relevant local courts or administrative bodies, and limits the initiation of arbitration to the exhaustion of local remedies (Article 14.3(ii)(a)), but allows for a safeguard where domestic remedies were “diligently pursued” or where not reasonably available (Article 14.3(ii)(b)); for another example see Article 9(2) and (3) of the Argentina-Switzerland BIT of 1991.

³³⁰ e.g. Article 8 of the UK-Egypt BIT of 1975; Article 10 Germany-Argentina BIT of 1991.

³³¹ e.g. *Kılıç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan* [2013], Final Award, 2 July 2013, ICSID Case No. ARB/10/1, para. 6.2.7; *Emilio Agustín Maffezini v. The Kingdom of Spain* [2000], Decision on Jurisdiction, 25 January 2000, para. 28.

³³² Schreuer (2009), *op cit.*, 406-07; Christoph Schreuer, ‘Calvo’s grandchildren: The return of local remedies in investment arbitration’ (2005) 4 *The Law & Practice of International Courts and Tribunals* 1-17, 3-4.

³³³ Schreuer (2004), *op cit.*, 239 *et seq.*; Katia Yannaca-Small, ‘Parallel proceedings’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008a) 1008-48, 1026-27.

³³⁴ e.g. Article IX.3 of the Indonesia-Chile BIT of 1999.

dispute submitted to arbitration are identical.³³⁵ A variation of the classical 'fork-in-the-road' clause preserves international arbitration as an available avenue but requires the investor to withdraw the domestic claim as soon as the dispute was submitted to arbitration.³³⁶

More generally, arbitration is based on consent.³³⁷ In other words, the disputing parties must both agree to settle the dispute through arbitration. Consent to arbitration may be derived from a single commitment or multiple instruments relating to the investment.³³⁸ Nowadays, it is commonly provided for in IIAs, which are seen to provide a standing offer.³³⁹ The investors accepts the host state's offer by initiating arbitration in accordance with the terms of the IIA.³⁴⁰ This technical circumvention of a prior arbitration agreement between the parties has given way to the expression 'arbitration without privity'.³⁴¹ Consent to investment arbitration can also be found in domestic arbitration laws, although this option is less frequently used.³⁴²

3.2.2 *Fundamental principles of investment arbitration*

The very backbone of arbitration is the disputing parties' ability to shape the framework conditions for the resolution of their dispute. This principle of party autonomy enables the parties to agree on, amongst other things, the composition of the arbitration panel, the applicable law, and the place of arbitration. According to the most common procedure, either party will appoint one arbitrator to the panel, the third arbitrator is then nominated either by agreement of the parties or the appointed arbitrators.³⁴³ The procedure and prerequisites for nominees may differ in accordance to the IIA, which may make stipulations explicitly, or refer to the rules provided under a particular set of arbitration rules,³⁴⁴ most of which contain a

³³⁵ Schreuer (2009), *op cit.*, 366; for an example of arbitral practice where the tribunal declined jurisdiction on these grounds, see *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* [2009], 30 July 2009, ICSID Case No. ARB/07/21.

³³⁶ e.g. Article 9(4) of the Argentina-Switzerland BIT of 1991.

³³⁷ Schreuer describes it as an "indispensable condition", see Christoph Schreuer, 'Consent to arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008) 831-66, 831.

³³⁸ Schreuer (2008), *op cit.*, 832.

³³⁹ Schreuer (2009), *op cit.*, 205; Schreuer (2008), *op cit.*, 836.

³⁴⁰ *Generation Ukraine Inc. v Ukraine* [2003], Final Award, 16 September 2003, ICSID Case No. ARB/00/9, paras. 12.2. and 12.3.

³⁴¹ Paulsson (1995), *op cit.*

³⁴² Christoph Schreuer, 'Investment arbitration based on national legislation' in Hafner Gerhard, Matscher Franz and Kirsten Schmalenbach (eds), *Völkerrecht und die Dynamik der Menschenrechte* (Facultas: 2012) 527-37.

³⁴³ e.g. Article 14.5. of the India Model BIT of 2016.

³⁴⁴ e.g. Article VIII.2 of the US-Argentina BIT of 1991; Article 9(2) Argentina-Switzerland BIT of 1991.

default procedure for the appointment of arbitrators.³⁴⁵ In case that there is no agreement on the third arbitrator, or if the host country fails to appoint its arbitrator within the requisite time frame, the task falls to an appointing authority. The appointing authority is defined in the IIA or the applicable arbitration rules,³⁴⁶ and the function is often carried out by ICSID where the role of appointing authority falls on the Chair of the ICSID Administrative Council or Secretary-General of ICSID.³⁴⁷ In accordance with the UNCITRAL arbitration rules it falls on the Secretary-General of the PCA to nominate an appointing authority, or act as appointing authority herself if the parties so request.³⁴⁸ This safeguard avoids the arbitration from being stalled and guarantees that the panel can operate.

Although arbitration largely escapes litigation in domestic courts, it ultimately takes place within the remits of national jurisdiction.³⁴⁹ Indeed, it is the national arbitration legislation at the seat of arbitration that governs the process of investment arbitration.³⁵⁰ Likewise, the municipal courts at the place of arbitration have jurisdiction to stay the arbitration, grant interim measures, and hear potential challenges to the award.³⁵¹ The seat of arbitration is, thus, an important aspect for the parties to agree upon. The UNCITRAL rules of arbitration, indeed, require the determination of a seat of arbitration. This is not the case for ICSID arbitration that is delocalized, i.e. operating without a predetermined seat of arbitration and, thus, outside of the remits of the domestic arbitration law and beyond the reach of domestic courts.³⁵²

Another important aspect of party autonomy has traditionally been the choice of the applicable law.³⁵³ The disputing parties are in principle at liberty to determine

³⁴⁵ e.g. Article 38 ICSID; Article 9 UNCITRAL Arbitration Rules (UN Doc A/Res/65/22).

³⁴⁶ Under ICSID it is the Chairman of the ICSID Administrative Council that takes over the function of appointing authority (Rule 4 ICSID Rules of Procedure for Arbitration Proceedings), whereas under UNCITRAL the default rule nominates the Secretary-General of the PCA (Article 6 UNCITRAL Arbitration Rules).

³⁴⁷ Gus Van Harten, 'Investment treaty arbitration, procedural fairness, and the rule of law' in Stephan W. Schill (ed), *International investment law and comparative public law* (Oxford University Press: 2010b) 627-58, 645.

³⁴⁸ Article 6 UNCITRAL Arbitration rules.

³⁴⁹ This does not apply to ICSID Arbitration, which is discussed in more detail below.

³⁵⁰ For a comprehensive overview over a wide range of domestic arbitration laws, see Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (Sweet & Maxwell: 2007).

³⁵¹ For an overview, see Christoph Schreuer, 'Interaction of international tribunals and domestic courts in investment law' in Arthur W. Rovine (ed), *Contemporary issues in international arbitration and mediation: The Fordham Papers 2010* (Brill: 2011b) 71-94.

³⁵² Collins (2017), *op cit.*, 240; Schreuer (2009), *op cit.*, 899.

³⁵³ For a general overview over issues relating to the applicable substantive law in foreign investment disputes, see Jarrod Hepburn, 'Applicable law in TPP investment disputes' (2016) 17(2) *Melbourne Journal of International Law* 349-68; Jan H. Dahlhuisen and Andrew T. Guzman, 'The applicable law in foreign investment disputes' (2014) accessible at

the substantive law that is applicable to their relationship. In practice, however, investors have a limited ability to influence the applicable law in investment treaty disputes.³⁵⁴ A necessary consequence of the internationalization of investment disputes is the application of international law to the investment treaty disputes.³⁵⁵ Indeed, it is the very purpose of ISDS to situate investment disputes outside of the domestic system of judicial remedies and into the realm of international law. Where the IIA explicitly addresses this issue it frequently includes the agreement itself as well as other relevant international agreements and general principles of public international law.³⁵⁶ Some IIAs include the domestic law of the host state as applicable law in addition to international law, others omit reference to international law, or make no explicit stipulations as to the applicable law at all.³⁵⁷ Be that as it may, tribunals will in most circumstances be inclined to have recourse primarily to public international law.³⁵⁸ Notably, although ICSID includes domestic law as applicable law this is likely to be of more relevance to contractual disputes. The role of domestic law in treaty disputes is generally of incidental value only.³⁵⁹

Secrecy is another distinctive feature of arbitration. Although it is frequently presented as an advantage for the investor, the lack of transparency in investment arbitration has given rise to substantial criticism against the investment regime.³⁶⁰ It must be noted, however, that in recent years there have been significant developments in this respect. On the one hand, domestic courts have started to question the extensive interpretation of the principle of confidentiality in arbitration.³⁶¹ On the other hand, efforts have been undertaken by states³⁶² and

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209503&download=yes>; Ole Spierman, 'Applicable law' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008) 90-116; Virtus Chitoo Igboke, 'Determination, interpretation and application of substantive law in foreign investment treaty arbitrations' (2006) 23(4) *Journal of International Arbitration* 267-99; Antonio R. Parra, 'Applicable substantive law in ICSID arbitrations initiated under investment treaties' (2001) 16(1) *ICSID Review* 20-24.

³⁵⁴ Dahlhuisen and Guzman (2014), *op cit*; Spierman (2008), *op cit.*, 107.

³⁵⁵ Spierman (2008), *op cit.*, 107.

³⁵⁶ e.g. Article 1131(1) of NAFTA reads: "[...] in accordance with this Agreement and applicable rules of international law".

³⁵⁷ Spierman (2008), *op cit.*, 107.

³⁵⁸ Giorgio Sacerdoti, 'Investment arbitration under ICSID and UNCITRAL rules: Prerequisites, applicable Law, review of awards' (2004) 19(1) *ICSID Review* 1-48, 24-25.

³⁵⁹ Spierman (2008), *op cit.*, 108.

³⁶⁰ August Reinisch and Christina Knahr, 'Transparency versus confidentiality in international investment arbitration – The Biwater Gauff Compromise' (2007) 6(1) *The Law & Practice of International Courts and Tribunals* 97-118.

³⁶¹ Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press: 2008) 725-87, 751-53.

³⁶² e.g. Article 14.8 of the India Model BIT of 2016, Article 29 of the US Model BIT of 2012

arbitration institutions³⁶³ to increase the level of transparency. Indeed, hearings are increasingly being made accessible to the public,³⁶⁴ and a large number of investment awards are now available through online databases.³⁶⁵

3.2.3 Reviewing and enforcing the award

As a general point, there is currently no procedural avenue to substantively review investment awards, and challenges to awards are only available in limited circumstances. It is worth recalling at this point that the establishment of an appeals body was briefly discussed in the course of the 2006 ICSID amendments,³⁶⁶ but the proposal was not adopted amid lack of agreement amongst ICSID members.³⁶⁷ This being said, non-ICSID awards may be set aside (or vacated) in the domestic courts at the seat of arbitration,³⁶⁸ in accordance with the applicable arbitration law.³⁶⁹ The ICSID Convention, on the other hand, establishes an internal—self-contained—system of review.³⁷⁰ Accordingly, it is only the ICSID Committee that is entitled to hear challenges to ICSID awards, at the exclusion of any other remedy.³⁷¹ It is precisely the de-localized character of ICSID, which prevents domestic courts from interfering with ICSID arbitration, that is considered to be one of the most important procedural advantages of the system.³⁷² It is important to note at this point that the ICSID annulment procedure does not accommodate for the review

³⁶³ e.g. the 2006 amendments and the 2018 proposal to amend ICSID and the ICSID Additional Facility Rules, and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 2014, these are discussed in more detail below.

³⁶⁴ Colin Trehearne, ‘Transparency, legitimacy, and investor-state dispute settlement: What can we learn from the streaming of hearings?’, *Kluwer Arbitration Blog*, 8 June 2018 <accessed at <http://arbitrationblog.kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learn-streaming-hearings/>>.

³⁶⁵ e.g. investmentpolicyhub.unctad.org or www.italaw.com.

³⁶⁶ ICSID Secretariat Discussion Paper, *Possible improvements of the framework for ICSID arbitration*, October 2004, para. 7.

³⁶⁷ Working Paper of the ICSID Secretariat, Suggested changes to the ICSID Rules and Regulations, May 2005; for a discussion see Antonio R Parra, ‘Advancing reform at ICSID’ (2014) 11(1) *Transnational Dispute Management* 1.

³⁶⁸ Dolzer and Schreuer (2012), *op cit.*, 276.

³⁶⁹ e.g. Section 34, Swedish Arbitration Act (SFS 1999:116); § 1059, Zivilprozessordnung, for a comprehensive discussion of the role of domestic courts in non-ICSID arbitration, see Joel Dahlquist Cullborg, ‘The use of “non-ICSID” arbitration rules in investment treaty disputes: Domestic courts, commercial arbitration institutions and arbitral tribunal jurisdiction’ (University of Uppsala 2019), 118-221.

³⁷⁰ Article 52 ICSID; for a discussion of review in international investment arbitration with a particular focus on ICSID annulment, see Vladimír Balaš, ‘Review of Awards’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press: 2008), 1136 *et seq.*

³⁷¹ Article 43 ICSID; see also Collins (2017), *op cit.*, 240-41.

³⁷² Collins (2017), *op cit.*, 240; Schreuer (2009), *op cit.*, 899.

of the award on material grounds.³⁷³ In other words, the ICSID Committee cannot replace the legal reasoning of the ICSID tribunal,³⁷⁴ but merely annul the award for reasons of procedural impropriety.³⁷⁵

Respondent states are generally at liberty to resist the enforcement of investment awards in their own territories, raising the defence of state immunity.³⁷⁶ Be that as it may, the modern investment treaty regime furnishes investors with extensive powers to enforce investment awards globally. The enforcement of non-ICSID awards is in this respect governed by the national law at the place enforcement is sought and the New York Convention,³⁷⁷ which allows the investor to enforce the award against the assets of the respondent state in the territory of any of the 159 Contracting Parties. Likewise, ICSID awards are enforceable in the territory of any of the ICSID members.³⁷⁸ More importantly, ICSID awards are automatically enforceable,³⁷⁹ whereas the New York Convention allows respondent states to object to the recognition and enforcement of non-ICSID awards before the domestic courts at the place where enforcement is sought.³⁸⁰ This again reinforces the delocalized character of ICSID arbitration.

3.3 An overview of the criticism against investor-state arbitration

Criticism against investor-state arbitration raises ideological, sociological, institutional and regulatory concerns that conceal a wide range of conscious and unconscious biases, and market failures.³⁸¹ It is unsurprising, therefore, that ISDS has in recent years come under intense criticism. Vague treaty language and expansive procedural rights have enabled investors to challenge a large variety of government measures directly before international tribunals,³⁸² giving way to a

³⁷³ Schreuer observed that: "It has become a ritual for ad hoc Committees to stress their limited role. In particular, the distinction between annulment and appeal is repeated like a mantra at the beginning of almost every decision." See Christoph Schreuer, 'From ICSID annulment to appeal half way down the slippery slope' (2011a) 10(2) *The Law & Practice of International Courts and Tribunals* 211-25, 215-16.

³⁷⁴ Dolzer and Schreuer (2012), *op cit.*

³⁷⁵ David D. Caron, 'Reputation and reality in the ICSID annulment process: Understanding the distinction between annulment and appeal' (1992) 7(1) *ICSID Review* 21-56, 25; Franck (2005), *op cit.*, 1547; Schreuer (2009), *op cit.*, 901.

³⁷⁶ Dolzer and Schreuer (2012), *op cit.*, 281-82.

³⁷⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958.

³⁷⁸ Dolzer and Schreuer (2012), *op cit.*, 281.

³⁷⁹ Article 54 ICSID.

³⁸⁰ Article V of the New York Convention, *op cit.*

³⁸¹ Sergio Puig, 'Social capital in the arbitration market' (2014) 25(2) *European Journal of International Law* 387-424.

³⁸² Poulsen (2015), *op cit.*, 2.

general perception of foreign investors as a particularly privileged group of marked operators. As Simmons rightly observes:

“No other category of private individuals—not traders (who do not invest), not human beings in their capacity as human rights holders, not even national investors in their home state—is given such expansive rights in international law as are private actors investing across borders.”³⁸³

Criticism has specifically focused on three aspects, i.e. the arbitrator, the procedural aspects of the arbitration process, and the awards and their effects on the host state.³⁸⁴ However, in spite of addressing a wide range of different institutional and procedural features, the criticism gravitates broadly around the common narrative that ISDS is suffering from a ‘legitimacy crisis’.³⁸⁵ Franck elaborates on this conception, identifying a number of indicators for legitimacy including determinacy, coherence, justice, fairness, accountability, representation, and procedural propriety.³⁸⁶ Brower *et al.* also observed that legitimacy of any system of adjudication depends on traits that are commonly found in domestic judiciaries, i.e. a hierarchy of judicial instances, publicly accepted authority of adjudicators, finality of the decision, and a consistent body of case law.³⁸⁷ The present section provides an overview of the criticism against investor-state arbitration, focusing in particular on the neutrality of the arbitrators, the transparency and costs of the dispute settlement process, the consistency of awards, and the impact of ISDS on the State’s regulatory policy space.

This criticism and the concomitant distrust of civil society in investment dispute settlement has already triggered a range of policy responses. Indeed, in its 2015 World Investment Report, UNCTAD noted that “[m]aintaining the status quo is hardly an option, given today’s criticism of the existing system.”³⁸⁸ While some

³⁸³ Beth A. Simmons, ‘Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment’ (2014) 66(1) *World Politics* 12-46, 42.

³⁸⁴ For an overview, see Waibel *et al.* (2010), *op cit.*; but also UNCTAD, ‘Reform of investor-state dispute settlement: in search of a roadmap’ (IIA Issue Note No. 2, June 2013); UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), ‘Possible reform of investor-State dispute settlement (ISDS)’ (Thirty-sixth session, Vienna, 29 November - 2 December 2018, A/CN.9/WG.III/WP.149).

³⁸⁵ Franck (2005), *op cit.*, 1582-83; Brower and Schill (2009), *op cit.*, 473; Brower, Brower and Sharpe (2003), *op cit.*, 418; Stephan W. Schill, ‘International investment law and comparative public law – an introduction’ in Stephan W. Schill (ed), *International investment law and comparative public law* (Oxford University Press: 2010) 3-37, 6; M. Sornarajah, ‘A coming crisis: expansionary trends in investment treaty arbitration’ in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 39-79, 39-45.

³⁸⁶ Franck (2005), *op cit.*, 1585.

³⁸⁷ Brower, Brower and Sharpe (2003), *op cit.*, 418.

³⁸⁸ UNCTAD, ‘World investment report 2015: Reforming international investment governance’ (UNCTAD/WIR/2015) accessible at <<https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>> 145.

States have chosen to withdraw from ISDS, other States focus on reform initiatives. In an attempt to situate the ICS into the broader context of ISDS reform, this section therefore also entails an account of policy responses to the purported 'legitimacy crisis'.

Before moving on it is important to reiterate that the present study is not concerned with an evaluation of the criticism, but acknowledges it merely as an element of the broader political environment in which ISDS reform is taking place. This section will elaborate in more detail on the neutrality of the arbitrator (Section 3.3.1), the level of transparency (Section 3.3.2), the lack of consistency in investment awards (Section 3.3.3), and the impact of ISDS on the regulatory policy space of the respondent state (Section 3.3.4). Lastly, this section explains how state have responded to this criticism (Section 3.3.5).

3.3.1 *The neutrality of the arbitrator*

As early as 1996 Dezalay and Garth described the community of commercial arbitrators as 'club' or 'mafia',³⁸⁹ defined by a generational divide. On the one hand, the authors identify a group of 'grand old man', largely male, Caucasian and of European background, that is impenetrable for outsiders.³⁹⁰ On the other hand, they observed a younger generation of commercial lawyers with specialized knowledge of, and expertise in arbitration.³⁹¹ Since then a number of studies of investment arbitrators have been conducted, focusing *inter alia* on gender, ethnicity, nationality, educational and professional background.³⁹² These studies confirm that with the exception of few 'formidable women' the profile of the investment arbitrator remains white, male, and with an educational or professional background in Western

³⁸⁹ Yves Dezalay and Bryant G. Garth, *Dealing with virtue: international commercial arbitration and the construction of a transnational legal order* (University of Chicago Press: 1996) 10

³⁹⁰ Dezalay and Garth (1996), *op cit.*, 20.

³⁹¹ Schultz and Kovacs observed the rise of a third generation of commercial arbitrators with strong managerial skills, see Thomas Schultz and Robert Kovacs, 'The rise of a third generation of arbitrators? Fifteen years after Dezalay and Garth' (2012) 28(2) *Arbitration International* 161-71.

³⁹² Susan D. Franck *et al.*, 'The diversity challenge: Exploring the "invisible college" of international arbitration' (2015) 53(3) *Columbia Journal of Transnational Law* 429-506; Susan D. Franck, 'Empirically evaluating claims about investment treaty arbitration' (2007) 86(1) *North Carolina Law Review* 1-87; Chiara Giorgetti, 'Who decides who decides in international investment arbitration' (2013) 35(2) *University of Pennsylvania Journal of International Law* 431-86, 458-61; Malcom Langford, Daniel Behn and Runnar Lie, 'The Revolving Door in International Investment Arbitration' in Anne van Aaken, *et al.* (eds), *The Judicialization of International Law* (Oxford University Press: 2018) 128-58; Puig (2014), *op cit.*; Gus Van Harten, 'The (lack) of women arbitrators in investment treaty arbitration', *Columbia FDI Perspectives* <accessed at http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf>.

developed countries.³⁹³ The fact that investment arbitrators are often private commercial lawyers raises concerns over whether they possess the traits that justify their extensive adjudicative powers over matters so closely connected to the exercise of the states' regulatory prerogatives.³⁹⁴

The most profound concern with respect to investment arbitrators is that they are often (perceived or *de facto*) biased towards a particular outcome. Such bias could materialize as the result of predetermined political and ideological positions of the arbitrator in question,³⁹⁵ or simply because the arbitrator (wrongly) perceives her role as a representative of the party appointing her to the panel.³⁹⁶ This is reiterated in recent empirical studies that have demonstrated that the dissenting opinion in investment arbitrations is in the vast majority of cases the arbitrator appointed by the losing party.³⁹⁷ Paulson argued that this does not necessarily reflect a bias of the arbitrator, rather than a competent decision of the appointing party to select an arbitrator that endorses a favourable view on the legal issues at stake. But this stands in stark contrast with "the fundamental premise of arbitration: *mutual* confidence in arbitrators".³⁹⁸

³⁹³ Puig (2014), *op cit*; on the issue of gender imbalance, see Lucy Greenwood and C. Mark Baker, 'Getting a better balance on international arbitration tribunals' (2012) 28(4) *Arbitration International* 653-67; Van Harten, *op cit*.

³⁹⁴ Gus Van Harten, *Investment treaty arbitration and public law* (Oxford University Press: 2008) 122; Frederick M. Abbott, 'The political economy of NAFTA Chapter Eleven: Equality before the law and the boundaries of North American integration.(Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter 11)' (2000) 23(3-4) *Hastings International and Comparative Law Review* 303-09, 308; Stephan Wilske and Martin Raible, 'The arbitrator as guardian of international public policy? Should arbitrators go beyond solving legal issues?' in Catherine A. Rogers and Roger P. Alford (eds), *The future of investment arbitration* (Oxford University Press: 2009) 249-72, 260

³⁹⁵ Michael Waibel and Yanhui Wu, 'Are arbitrators political? Evidence from international investment arbitration' (2017) accessible at <<http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>>; Franck (2005), *op cit*, 1600.

³⁹⁶ For a selection of illustrative anecdotes, see Jan Paulsson, 'Moral hazard in international dispute resolution' (2010) 25(2) *ICSID Review* 339-55.

³⁹⁷ Albert Jan van den Berg, 'Dissenting opinions by party-appointed arbitrators in investment arbitration' in Mahnouch H Arsanjani, *et al.* (eds), *Looking to the future: Essays on international law in honour of W Michael Reisman* (Martinus Nijhoff: 2011) 821-43, 824; for a broader context of international commercial arbitration see also Alan Redfern, 'Dissenting opinions in international commercial arbitration: the good, the bad and the ugly - The 2003 Freshfields lecture' (2004) 20(3) *Arbitration International* 223-43; this concern is not universally shared, see 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) 29(1) *Arbitration International* 7-44; see also the reply to Brower and Rosenberg in Albert Jan van den Berg, 'Charles Brower's problem with 100% - Dissenting opinions by party-appointed arbitrators in investment arbitration' in David D. Caron, *et al.* (eds), *Practicing virtue: inside international arbitration* (Oxford University Press: 2015) 504-14.

³⁹⁸ Paulsson (2010), *op cit*, 349.

Another concern with respect to arbitrators is their vested interest in a system that depends on its reputation as an effective forum for the resolution of investment disputes.³⁹⁹ Investment arbitrators are appointed on an *ad hoc* basis and receive remuneration that is directly dependent on the circumstances and economic value of the dispute.⁴⁰⁰ Investor-State arbitration has therefore been criticized as providing incentives for arbitrators to create attractive conditions for investors that not only motivate to use ISDS but in fact secures the arbitrator's appointment in future cases.⁴⁰¹ The professional reputation of the arbitrator is of particular importance in this respect.⁴⁰² Indeed, Puig observed:

“In any event, lacking stare decisis, strong ethical rules, and a formal hierarchy, strategic behaviour on the part of arbitrators is likely to be more prevalent, whether to secure future appointments, to advance the authority of positions, or to persuade other arbitrators about the correctness of their previously held decisions.”⁴⁰³

For critics of ISDS, the inherent risk of this reputational pressure is that it manifests as a pro-investor bias.⁴⁰⁴

This concern is indeed perpetuated by practice, which has solidified a small number of career arbitrators who account for the lion share of appointments.⁴⁰⁵ Brower and Schill, on the other hand, have argued that a the arbitrator's reputation functions as positive element that instils legitimacy in ISDS.⁴⁰⁶ Indeed, available empirical data does not support the claim that the majority of investment awards are decided in favour of the investor,⁴⁰⁷ nor does it suggest that the arbitrators are incentive driven when adopting a particular legal position.⁴⁰⁸ Political ideology and a developing country nationality, on the other hand, is positively correlated to specific outcomes.⁴⁰⁹ Be that as it may, it is undeniable that criticism over a perceived

³⁹⁹ M. Sornarajah, 'Power and justice in foreign investment arbitration' (1997) 14(3) *Journal of International Arbitration* 103-40, 118.

⁴⁰⁰ Waibel and Wu (2017), *op cit.*, 6.

⁴⁰¹ Van Harten (2007), *op cit.*, 172; for an opposing view, see Brower and Schill (2009), *op cit.*, 490-91.

⁴⁰² Dezalay and Garth (1996), *op cit.*, 18-19.

⁴⁰³ Puig (2014), *op cit.*, 401.

⁴⁰⁴ Gus Van Harten, 'Perceived bias in investment treaty arbitration' in Michael Waibel, *et al.* (eds), *The backlash against investment arbitration: Perceptions and reality* (Wolters Kluwer: 2010a) 433-53.

⁴⁰⁵ Puig (2014), *op cit.*, 403-04; Langford, Behn and Lie (2018), *op cit.*, 136-42.

⁴⁰⁶ Brower and Schill (2009), *op cit.*, 492.

⁴⁰⁷ Daniel Behn, 'Legitimacy, evolution, and growth in investment treaty arbitration: Empirically evaluating the state-of-the-art' (2015) 46(2) *Georgetown Journal of International Law* 363-415363, 372-73; Franck (2007), *op cit.*, 50; Poulsen, however, suggests that three out of five cases are either decided in favour of the investor or settled, see Poulsen (2015), *op cit.*, 2.

⁴⁰⁸ Waibel and Wu (2017), *op cit.*, 24.

⁴⁰⁹ *Ibid.*, 24.

bias nonetheless persists and continues to set the tone for ISDS reform initiatives.⁴¹⁰

A related problem is the ability of arbitrators to act as party-appointed expert or counsel on dispute concerning similar legal questions. Where these appointments occur simultaneously the problem is commonly referred to as ‘double-hatting’.⁴¹¹ Expected to act independently as appointed arbitrator and simultaneously advocating the interests of a client on a similar matter creates an obvious ‘issue conflict’ that is insufficiently regulated in existing legal frameworks.⁴¹² Langford *et al.* were able to demonstrate that the top 25 lawyers that have acted as counsel in ICSID proceedings were involved in between 13 to 31 cases.⁴¹³ A similar concentration can be identified in expert witnesses were five experts appeared in 11 per cent of all witness appearances.⁴¹⁴ More importantly, the five persons that have held most simultaneous appointments in different roles are all amongst the 25 most powerful actors in the investment arbitration community.⁴¹⁵ Sands, therefore, remarks:

“There is also the most unfortunate practice of those who act as counsel and arbitrator in ISDS cases, a sort of revolving door in which the same person can spend a morning drafting a pleading on the meaning of ‘fair and equitable treatment’ (in one case) and then an afternoon drafting an award on the meaning of ‘fair and equitable treatment’ (in another case). [...] Speaking from experience, it can be an unfortunate situation to find yourself deliberating with fellow arbitrators knowing that one or more of them is actually litigating the very point on which you are striving to write an award.”⁴¹⁶

3.3.2 Transparency

With respect to transparency, investment arbitration is generally guided by confidentiality, meaning that proceedings are held behind closed doors and relevant

⁴¹⁰ Van Harten argues that the problem is one of "perceived bias, not actual impartiality", see Van Harten (2007), *op cit.*, 173.

⁴¹¹ Langford, Behn and Lie (2018), *op cit.*, 128.

⁴¹² For an illustration consider the recent challenge against Prof. Gaillard who was appointed as arbitrator to an investment dispute against Ghana while simultaneously acting as counsel for an investor in a dispute against Marocco concerning similar issues of expropriation, District Court of the Hague, civil law section, *The Republic of Ghana v Telekom Malaysia Berhad* [2004], 13/2004 (HA/RK 2004.667); see also the discussion in Judith Levine, ‘Dealing with arbitrator "issue conflicts" in international arbitration’ (2006) 61(1) *Dispute Resolution Journal* 60-67.

⁴¹³ Langford, Behn and Lie (2018), *op cit.*, 144.

⁴¹⁴ *Ibid.*, 146.

⁴¹⁵ *Ibid.*, 155-58.

⁴¹⁶ Sands (2016), *op cit.*

materials, including the final award, are not always available to the public.⁴¹⁷ Transparency was addressed in many recent reforms, through amendments to institutional arbitration rules or the treaty text of model BITs.⁴¹⁸ The most significant development in this respect are perhaps the UNCITRAL transparency rules, which require *inter alia* the publication of UNCITRAL awards for all disputes based on IIAs that were signed after 1 April 2014.⁴¹⁹ However, despite positive trends towards more openness in investor-state arbitration, the prevailing view of ISDS as confidentiality-driven commercial arbitrations, rather than public hearings still raises legitimacy concerns.⁴²⁰ The 2006 amendments to the ICSID convention, for instance, failed to address access to documents, leaving publication of awards and access of non-disputing parties at the whim of the parties.⁴²¹ In an empirical study from 2015 Behn finds that a high percentage of cases (39%) still remain confidential, although a higher share of ICSID than non-ICSID cases is made public.⁴²² His findings furthermore suggest that awards rendered against the respondent state are more likely to be made public.⁴²³ Transparency can be expected to improve as the share of non-ICSID awards covered by the UNCITRAL Transparency rules will gradually increase.

3.3.3 Consistency

Investment arbitration, including under institutional settings such as ICSID, does not presently provide for mechanisms that would ensure consistent decisions.⁴²⁴ Investment tribunals have, thus, arrived at conflicting interpretations of the same

⁴¹⁷ Franck (2005), *op cit.*, 1545.

⁴¹⁸ Gary B. Born and Ethan G. Shenkman, 'Confidentiality and Transparency in Commercial and Investor-State International Arbitration' in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press: 2009) 5-42, 32-33

⁴¹⁹ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (with a new article 1, paragraph (4), as adopted in 2013) Report of the United Nations Commission on International Trade Law, forty-sixth session, 8-26 July 2013 (A/68/17, Annex 1) accessible at <<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>>.

⁴²⁰ Behn (2015), *op cit.*, 379-80.

⁴²¹ Born and Shenkman (2009), *op cit.*, 28-29.

⁴²² Behn (2015), *op cit.*, 381.

⁴²³ Ibid.

⁴²⁴ Christian J. Tams, 'An appealing option? A debate about and ICSID appellate structure' (2009), *Essays in transnational economic law* (No 57, 2006) accessible at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413694> 19.

provision in different cases,⁴²⁵ similarly worded provisions in different treaties,⁴²⁶ and disputes initiate under different treaties regarding the same treatment.⁴²⁷ These inconsistencies aggravated the inherent unpredictability of investment treaty arbitration, and encourages practices such as forum shopping, i.e. the structuring of investments for the sole purpose of receiving protection with treaty-based arbitrations under multiple IIAs. Although leading commentators have observed that “a coherent case law strengthens the predictability of decisions and enhances their authority”,⁴²⁸ the view that inconsistency presents a threat to the legitimacy of the investment treaty regime is not unanimously shared.⁴²⁹ It is notable, however, that these objections generally perpetuate a simple truism, i.e. that inconsistency “is inherent in the system; it is part and parcel of a process of decentralised, non-hierarchical, and *ad hoc* dispute resolution, such as that of investment arbitration.”⁴³⁰ The systemic risk of inconsistency is perpetuated by the lack of effective judicial review mechanisms,⁴³¹ and the possibility of enforcement of arbitral awards despite the fact that they were already annulled at the seat of arbitration.⁴³²

3.3.4 Regulatory chill

Another strand of criticism against ISDS focuses on investment awards. The outcome of investor-state disputes are expected to reflect systemic biases and

⁴²⁵ For experience regarding the NAFTA fair and equitable treatment standard, see e.g. For experience regarding the NAFTA fair and equitable treatment standard, see e.g. *S. D. Myers, Inc. v. Government of Canada* First Partial Award of 13 December 2000, UNCITRAL; *Metalclad Corporation v. The United Mexican States* Final Award of 30 December 1996, ICSID Case No. ARB(AF)/97/1; *Pope & Talbot Inc. v. The Government of Canada* Interim Award of 26 June 2000, UNCITRAL; for a discussion and references, see Franck (2005), *op cit.*, 1578-81.

⁴²⁶ e.g. the interpretation of the umbrella clauses in the BITs between Switzerland and respectively Pakistan and The Philippines in the SGS cases (*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* Decision of the Tribunal on Jurisdiction of 6 August 2003, ICSID Case No. ARB/01/13; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, ICSID Case No. ARB/02/6).

⁴²⁷ for an illustration consider the infamous Lauder saga *Ronald S. Lauder v. The Czech Republic* UNCITRAL, Final Award, 3 September 2001; and *CME Czech Republic B.V. v. The Czech Republic* UNCITRAL, Final Award, 14 March 2003; for a comprehensive discussion of these cases, see Franck (2005), *op cit.*, 1559-68.

⁴²⁸ Dolzer and Schreuer (2012), *op cit.*, 90.

⁴²⁹ e.g. Irene M. Ten Cate, ‘International arbitration and the ends of appellate review’ (2012) 44(4) *New York University Journal of International Law and Politics* 1109-204; Alexander Orakhelashvili, ‘Principles of treaty interpretation in the NAFTA arbitral award on Canadian Cattlemen’ (2009) 26(1) *Journal of International Arbitration* 159-73, 168-69; Stanimir A. Alexandrov, ‘On the perceived inconsistency in investor-state jurisprudence’ in José E. Alvarez and Karl P. Sauvant (eds), *The evolving international investment regime: Expectations, realities, options* (Cambridge University Press: 2011) 60-69.

⁴³⁰ Tams (2009), *op cit.*, 19.

⁴³¹ Franck (2005), *op cit.*, 1547.

⁴³² Brower, Brower and Sharpe (2003), *op cit.*

incentive structures for arbitrators.⁴³³ Most problematic, however, is the restraining effect that investment awards exert on the host country's regulatory policy, a phenomenon often referred to as 'regulatory chill'.⁴³⁴ Studies, such as the one produced by Tietje and Baetens try to refute the risk for regulatory chill, arguing that empirical evidence does not support the presumption of an adverse effect of ISDS on domestic regulation that is adopted for legitimate public policy purposes.⁴³⁵

The methodological challenge to prove, empirically, the existence and extend of regulatory chill are obvious. There is, however, some evidence to support the claim that the prospect of investor-state arbitration has a chilling effect on public regulation. In December of 2018, for instance, the Australian opposition leader Bill Shorten has repeatedly advocated against governmental interference with the mining license of a major Indian investor, in spite of strong public opposition and environmental concerns surrounding the Adani mine, citing concerns over the potential financial impact of an investor-state dispute.⁴³⁶ The Australian Productivity Commission, which yields significant influence in the policy-making process, concluded that "ISDS provisions can further restrict a government's ability to undertake welfare-enhancing reforms at a later date, a problem known as 'regulatory chill'."⁴³⁷ Analysing this report, Kurtz has cautioned against rushing to conclusions over 'regulatory chill'.

"To be clear here, there may well be a prospect of regulatory chill, but this hypothesis requires a thorough assessment of the jurisprudence on key treaty obligations. And when we scratch below the superficial

⁴³³ Daniel Behn, Tarald Berge and Malcolm Langford, 'Poor states or poor governance? Explaining outcomes in investment treaty arbitration' (2018) 38(3) *Northwestern Journal of International Law & Business* 333-89; Thomas Schultz and Cédric Dupont, 'Investment arbitration: Promoting the rule of law or over-empowering Investors? A quantitative empirical study' (2014) 25(4) *European Journal of International Law* 1147-68; Gus Van Harten, 'Arbitrator behaviour in asymmetrical adjudication: An empirical study of investment treaty arbitration' (2012) 50(1) *Osgoode Hall Law Journal* 211-68.

⁴³⁴ Wilske and Raible (2009), *op cit.*, 252.

⁴³⁵ Christian Tietje and Freya Baetens, Ministry of Foreign Affairs, 'The impact of investor-state-dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (MINBUZA-2014.78850), 2014 para. 85 .

⁴³⁶ Karen Middleton, 'Shorten tested in backroom fights' *The Saturday Paper* (8-14 December 2018); Patricia Ranald, 'The legal clause which could allow Adani to sue Australia' *The Guardian* (16 December 2018) <<https://www.theguardian.com/commentisfree/2018/dec/17/the-legal-clause-which-could-allow-adani-to-sue-australia>>.

⁴³⁷ Government of Australia, Productivity Commission, 'Bilateral and regional trade agreements', 13 December 2010 accessible at <<https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>> 271.

surface [...], a very different picture is revealed, at least for certain obligations.”⁴³⁸

It is of course true that International treaties by their very nature limit the sovereignty of their Contracting Parties to the extent that they have committed themselves internationally. Dolzer and Schreuer observed in this context that a limiting impact on state sovereignty constitutes “a necessary corollary to the objective of creating an investment-friendly climate.”⁴³⁹

Yet, this cannot affect the observation that host countries are “increasingly finding themselves having to defend their laws and policies before and in the shadow of international arbitral tribunals”.⁴⁴⁰ Even though governments do not, or should not, consider their hands forced by arbitral tribunals in individual cases, ISDS is nonetheless perceived as the sword of Damocles hanging over the heads of policy makers. After all, considering that investment awards often represent a sizable portion the host country’s GDP,⁴⁴¹ it would only be prudent to factor the exposure to investment arbitration and its concomitant financial impact into deliberations over future public policy.⁴⁴²

3.3.5 *Voice and exit: reactions to the criticism*

Hirschman suggested in 1970 that when members of an organization experience dissatisfaction they can either exit, i.e. withdraw, or exercise voice, i.e. participate in processes towards improvement.⁴⁴³ While the legitimacy crisis has provoked some states to exit ICSID,⁴⁴⁴ terminate existing BITs⁴⁴⁵ or issue political statements

⁴³⁸ Jürgen Kurtz, ‘Australia’s rejection of investor–state arbitration: Causation, omission and implication’ (2012) 27(1) *ICSID Review* 65-86, 78.

⁴³⁹ Dolzer and Schreuer (2012), *op cit.*, 77.

⁴⁴⁰ Langford, Behn and Lie (2018), *op cit.*, 132.

⁴⁴¹ Sauvart (2008), *op cit.*, 14-15.

⁴⁴² Giorgetti (2013), *op cit.*, 435-36.

⁴⁴³ The concept of ‘exit’ and ‘voice’ where first established by Hirschman, see Albert O. Hirschman, *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states* (Cambridge, Mass.: Harvard Univ. Press: 1970); for an application of these concepts in the context of investment arbitration, see e.g. Anthea Roberts, ‘Power and persuasion in investment treaty interpretation: The dual role of states’ (2010) 104(2) *The American Journal of International Law* 179-225, 191-93.

⁴⁴⁴ Bolivia, Ecuador and Venezuela denounced the ICSID Convention in accordance with Article 71 of the Convention respectively in 2007, 2009 and 2012; for a discussion see Christoph Schreuer, ‘Denunciation of the ICSID Convention and consent to arbitration’ in Michael Waibel, *et al.* (eds), *The backlash against investment arbitration* (Wolters Kluwer: 2010) 353-68.

⁴⁴⁵ In 2017 the number of terminations exceeded the number of newly concluded IIAs, see UNCTAD, ‘World investment report’ (2018), *op cit.*, 88; for an overview over terminations, see also Catharine Titi, ‘Most-favoured-nation treatment: Survival clauses and reform of international investment law’ (2016b) 33(5) *Journal of International Arbitration* 425-40, 434-35.

vowing no longer to negotiate investment agreements with ISDS provisions,⁴⁴⁶ many states have in recent years actively engaged in attempts to improve the status quo.⁴⁴⁷ In scholarship these political reactions have been embraced under the metaphor of a 'backlash' against investor-state arbitration.⁴⁴⁸ Alvarez, for instance, observed that a reflection of such backlash is that "states may change their minds and attempt to take back powers that they have previously delegated away."⁴⁴⁹ There is a great variety of strategies and tactics that states can avail themselves of to regain control over the IIAs.⁴⁵⁰ Outlining some of these tactics, Langford, Behn and Fauchald differentiate between the role of the state as principals and litigant.⁴⁵¹

As principals, states can above all change their policy objectives with view to existing and future agreements through termination and renegotiation;⁴⁵² adjust their negotiating strategies by re-designing or excluding ISDS from the scope of future agreements; and withdraw from arbitration institutions such as ICSID. Indeed, faced with the prospects of becoming a respondent to investment disputes, host states—above all Western governments in the aftermath of the first NAFTA disputes against the US and Canada in the late 1990s—have realigned their policy preferences to protect their economic and regulatory self-interest.⁴⁵³ States have furthermore adopted national legislation to exercise greater control over investment activity. Whereas a majority of domestic measures tends to be directed at investment

⁴⁴⁶ In April of 2011 the Australian Government published the "Gillard Government Trade Policy Statement: Trading our Way to More Jobs and Prosperity" vowing no longer to include ISDS provisions in their FTAs and IIAs, the statement is no longer available on the government, for a discussion see Ashique Rahman and Chester Brown, 'Regional economic integration in Southeast Asia' in Christoph Herrmann, Markus Krajewski and Jörg Philipp Terhechte (eds), *European yearbook of international economic law 2013* (Springer Berlin Heidelberg: 2013) 353-68, 365-67; for a more comprehensive account, see Kurtz (2012), *op cit*.

⁴⁴⁷ M. Sornarajah, 'The retreat of neo-liberalism in investment treaty arbitration' in Catherine A. Rogers and Roger P. Alford (eds), *The future of investment arbitration* (Oxford University Press: 2009) 273-96; for an overview over the actions undertaken, see UNCTAD, 'World investment report' (2018), *op cit.*, 96-102.

⁴⁴⁸ For a more than comprehensive account consider the contributions to Michael Waibel, *The backlash against investment arbitration* (Wolters Kluwers: 2010).

⁴⁴⁹ José E. Alvarez, 'State sovereignty is not withering away: A few lessons for the future' in Antonio Cassese (ed), *Realizing utopia: The future of international law* (Oxford University Press: 2012) 26-37, 31.

⁴⁵⁰ Lise Johnson and Merim Razbaeva, 'State control over interpretation of investment treaties', VALE Columbia Center on Sustainable International Investment accessible at <http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf>.

⁴⁵¹ Malcom Langford, Daniel Behn and Ole Kristian Fauchald, 'Backlash and state strategies in international investment law' in Thomas Gammeltoft-Hansen and Tanja E. Aalberts (eds), *The changing practices of international law: Sovereignty, law and politics in a globalising world* (Cambridge University Press: 2018) 70-102, 5.

⁴⁵² Haftel and Thompson (2018), *op cit.*, 30, for discussion see 37 *et seq*.

⁴⁵³ Waibelet *al.* (2010), *op cit.*, xxxix; Alvarez (2012), *op cit.*, 32.

liberalization, there has been a steady number of restricting measures that are being adopted each year.⁴⁵⁴ Notable from an EU perspective are in this respect the Commission's efforts towards a Union-wide investment screening framework.⁴⁵⁵

As litigant, states may attempt to influence the outcome of particular disputes by issuing authoritative interpretations binding on the tribunal, aggressively challenge the arbitrators and the jurisdiction of the tribunal, delay the progress of proceedings, exchange diplomatic notes, intervene as *amicus curiae*, and resist the enforcement of final awards. A particular approach to exercise control over the tribunal's interpretation is the establishment of treaty-cantered commissions such as the NAFTA Free Trade Commission.⁴⁵⁶

What the above political responses have in common is that they focus on the State as a main actor of the investment regime that adapt to developments in order to protect their regulatory interests. As Alvarez aptly describes it:

“The number of states engaged in ‘re-calibrating’ their model investment protection agreements, attempting to renegotiate old agreements, or reviewing their investment policies—all with the intent of providing host states with greater latitude to take measures to protect health, safety, and the environment, respond (sometimes in a ‘self-judging’ fashion) to their ‘essential security’ interests, or otherwise pursue their notions of the public interest—has become a flood”⁴⁵⁷

Scholarship has labelled these developments as ‘reassertion of state control’,⁴⁵⁸ or ‘resistance and change’.⁴⁵⁹ This is further exacerbated by a sense of democratic accountability, i.e. a Government's predisposition to respond to political pressure from its constituencies. This becomes even more relevant considering that the dominant legitimating community of ISDS has broadened to include the general (voting) public. Notable in the EU context is the Walloon Accord that reserved to the Belgian parliament a right to refer CETA to the CJEU over concerns of the incompatibility of its investment chapter with the Treaties.⁴⁶⁰

⁴⁵⁴ UNCTAD, 'World investment report' (2018), *op cit.*, 80-81, particularly Table III.1.

⁴⁵⁵ European Commission, 'Commission welcomes European Parliament's support for investment screening framework', 14 February 2019 accessed at <http://europa.eu/rapid/press-release_IP-19-1052_en.htm>.

⁴⁵⁶ Franck (2005), *op cit.*, 1604.

⁴⁵⁷ Alvarez (2012), *op cit.*, 32.

⁴⁵⁸ Andreas Kulick (ed), *Reassertion of control over the investment treaty regime* (Cambridge University Press: 2016).

⁴⁵⁹ M. Sornarajah, *Resistance and Change in the Law on Foreign Investment* (Cambridge University Press: 2015).

⁴⁶⁰ For more on this, see Chapter 8.1.4.

3.4 Interim conclusion

This section introduced institutional and procedural features of investor-state arbitration and emphasized some important difference between ICSID and non-ICSID arbitration. The most important variation between these two available systems is the delocalized character of ICSID arbitration. Whereas domestic courts retain a role in *ad hoc* investment arbitration, they are largely excluded from ICSID arbitrations. Another crucial feature is private party autonomy, which is a fundamental principle of investment arbitration. It is precisely the power of both disputing parties to influence several aspects of the dispute settlement process, such as the composition of the panel, the place of arbitration and the applicable law, that renders arbitration more advantageous over litigation in domestic courts in the eyes of foreign investors.

What is important to take from this Chapter is a realization that the modern investment treaty regime has created important institutions and procedures that essentially remove investment disputes from the domestic realm. It is particular in the context of ICSID that domestic courts and legislators becomes a facilitator of effective dispute settlement and enforcement without the possibility to exercise oversight, review or control over the arbitration process. This informs the dominant position of ICSID on the arbitration market. As a body of the World Bank it also reflects the institutionalization of neo-liberalism in international economic governance, as it proceduralises the internationalization of capital and its detachment from domestic policy restrictions.

The criticism against investor-state arbitration focuses in particular on the neutrality of the arbitrator, the level of transparency, the consistency of awards, and the potential for constraints on the formation of public policy. With its ICS initiative the Union has chosen to exercise voice, i.e. to engage in an ISDS reform process. Chapter 4.3 will elaborate in greater detail on the ongoing work in UNCITRAL. It is enough to note for present purposes that this process, as well as the work done in UNCTAD reflect the concerns set out in this Chapter. It is, therefore, prudent to assume that structural ISDS reform will have to address the prevailing criticism, and it therefore that it constitutes an external element that influences the formation of the Union's policy preferences as a reform actor. Indeed, subsequent chapter will not only clarify that the ICS is primarily a vehicle for Union participation in multilateral ISDS reform,⁴⁶¹ but that the Union's policy preferences are guided by a desire to exercise greater control over the process of dispute settlement.⁴⁶²

⁴⁶¹ See *infra* Chapter 4.4.

⁴⁶² See *infra* Chapter 8.2.7.

4 THE INVESTMENT COURT SYSTEM

The present Chapter explores procedural and institutional features of the ICS in order to highlight similarities and differences across the various ICS formations. Four post-Lisbon IIAs are discussed in detail, i.e. CETA, the EU-Singapore IPA, the EU-Vietnam IPA and the proposed EU-Mexico FTA. A comparison of these agreements reveals developments in the institutional design of the ICS since it was first proposed in the context of the TTIP negotiations. As the drafting becomes more sophisticated, some common design choices start to sediment and allow a glimpse at the Commission's policy preferences for structural ISDS reform. Moreover, this chapter argues that the ICS emerged as a response to the rising criticism against investor-state arbitration in EU IIAs. As the Union will have to meet the expectations of civil society at a legitimate and more democratically accountable dispute settlement mechanism, the criticism against investor-state arbitration that was identified in previous Chapters⁴⁶³ will serve as an external factor determining the Commission's policy choices.⁴⁶⁴ Likewise, the internal factors identified in Chapters 6 and 7 also imprint on the institutional design of the ICS. The common procedural and institutional features set out in this Chapter, therefore, provide a foundation for the evaluation of the ICS in Chapter 8.2 and 8.2.

The present Chapter starts with an outline of the developments that led to the adoption of the ICS (Section 4.1). The remainder of this Chapter identifies and compares institutional (Section 4.2) as well as procedural features of the various ICS formations (Section 4.3). Central to the ICS is a commitment to multilateral ISDS reform. Section 4.4 studies variances in these multilateralization clauses and contextualizes the effects of these provisions in light of the Union's active engagement in ongoing multilateral reform processes at UNCITRAL. This particular section is building up towards the argument that the Union's role in multilateral ISDS reform is constrained by predetermined policy choices, which is substantiated later in Chapter 8.4. It should be observed that despite deviations in

⁴⁶³ See *supra* Chapter 3.3.

⁴⁶⁴ See *infra* Chapter 8.2 and 8.3.

terminology the system is here, and throughout this study, referred to as ICS.⁴⁶⁵ It is furthermore noteworthy that, unlike the early TTIP negotiating proposal, neither CETA nor the IPAs with Singapore or Vietnam in their current version refer to Members of the ICS as ‘judges’.⁴⁶⁶

4.1 Preliminary remarks: The path to reform

The Commission’s proposal to incorporate investor-state arbitration in the Union’s trade and investment agreement with the US triggered a wave of vociferous opposition from scholars and civil society. The large number of responses to its public consultation on the issue, and the clear rejection of investor-state arbitration paved the way for an extensive EU-led ISDS reform. Shortly after the results to the public consultation were made public, on 8 June 2015, the EP adopted its resolution urging the Commission to replace its ISDS provision in TTIP with “a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny [...]”.⁴⁶⁷ Though non-binding in character, the need to ensure the EP’s consent prompted the Commission to adopt significant policy adjustments.⁴⁶⁸

Within a matter of months, the Union published its first proposal of the ICS in November 2015⁴⁶⁹ as part of a broader transparency initiative for the TTIP negotiations.⁴⁷⁰ Notably, by then the idea of a standing court for an EU-US IIA was already floated by Markus Krajewski within the framework of a study for the German Federal Ministry for Economic Affairs and Energy, dated May 2015.⁴⁷¹ As

⁴⁶⁵ Notably, the EU-Vietnam IPA designates the chapter on investor-State dispute settlement as ‘investment tribunal system’, Chapter 3, Section A, sub-section 4 of the EU-Vietnam IPA.

⁴⁶⁶ Notably, whereas Art. 9 of the textual proposal for the Chapter on Trade in Services, Investment and E-Commerce in TTIP of November 12, 2015, Section 3, Sub-Section 5 refers to Judges of the Tribunal, Art. 10 on the Appeal Tribunal refers to Members of the Appeal Tribunal.

⁴⁶⁷ Parliament, ‘Resolution containing the European Parliament’s recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)’ (2015), *op cit.*, Art. 2(c)(xv), for a full quote see the *supra* introduction to Chapter 1.

⁴⁶⁸ Cecilia Malmström, ‘Proposing an Investment Court System’, 16 September 2015 accessed at <https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en>.

⁴⁶⁹ An informal text was already available on 16 September 2015, but was later revised; the proposal is available at trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

⁴⁷⁰ European Commission, ‘European Commission publishes TTIP legal texts as part of transparency initiative’, 7 January 2015 accessed at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231>>.

⁴⁷¹ Markus Krajewski, German Federal Ministry for Economic Affairs and Energy, ‘Modell-Investitionsschutzvertrag mit investor-staat-schiedsverfahren für industriestaaten unter berücksichtigung der USA’, 4 May 2015 accessible at <<https://www.bmwi.de/Redaktion/DE>

the Commission intensified efforts to reform ISDS mechanisms in EU trade and investment agreements,⁴⁷² the ICS was swiftly integrated into CETA,⁴⁷³ and the EU-Vietnam FTA.⁴⁷⁴ The EU-Singapore FTA, which until recently was the subject of legal proceedings before the CJEU, recently followed suit.⁴⁷⁵

The Commission's initiative is best understood as a response to the ISDS legitimacy crisis that informs the public condemnation of investor-state arbitration also in the context of Union investment agreements.⁴⁷⁶ This view is supported by the Joint Interpretive Declaration issued by the Union and Canada, claiming the "CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems".⁴⁷⁷

4.2 Institutional features

Although some structural and procedural variations will emerge from the ensuing discussion the various ICS formations, the permanent institutional two-tier set-up

/Downloads/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten.pdf?__blob=publicationFile&v=1> .

⁴⁷² European Commission, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations', 16 September 2015 accessed at <http://europa.eu/rapid/press-release_IP-15-5651_en.htm>.

⁴⁷³ The ICS was introduced during legal scrubbing, the CETA negotiations were initially finalized with a more traditional ISDS mechanism, see European Commission, 'CETA: EU and Canada agree on new approach on investment in trade agreement', 29 February 2016 accessed at <trade.ec.europa.eu/doclib/press/index.cfm?id=1468&title=CETA-EU-and-Canada-agree-on-new-approach-on-investment-in-trade-agreement>.

⁴⁷⁴ 'Press Statement by the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Viet Nam Nguyen Tan Dung', 2 December 2015 accessed at <europa.eu/rapid/press-release_IP-15-5467_en.htm>.

⁴⁷⁵ European Commission, 'Key elements of the EU-Singapore trade and investment agreements', 18 April 2018 accessed at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1827>>.

⁴⁷⁶ Naboth van Den Broek and Danielle Morris, 'The EU's proposed investment court and WTO dispute settlement: A comparison and lessons learned' (2017) 2(1) *European Investment Law and Arbitration Review* 35-89, 49; for a comprehensive discussion of the Union's ICS initiative, see also Catharine Titi, 'The European Union's proposal for an international investment court: Significance, innovations and challenges ahead' (2016a) *Transnational Dispute Management* 1; Elsa Sardinha, 'Party-appointed arbitrators no more' (2018) 17(1) *The Law & Practice of International Courts and Tribunals* 117-34; and Luca Pantaleo, 'Lights and shadows of the TTIP investment court system' (2016a), Luca Pantaleo, Wybe Douma and Tamara Takács, 'Tiptoeing to TTIP: What kind of agreement for what kind of partnership?' (CLEER Papers 2016/1), 77-92; for an assessment of the ICS system from a Union law perspective, see Szilárd Gáspár-Szilágyi, 'A standing investment court under TTIP from the perspective of the Court of Justice of the European Union' (2016) 17(5) *The Journal of World Investment & Trade* 701-42.

⁴⁷⁷ OJ L11/3, 14 January 2017, Joint Interpretive Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, pt. 6(a).

comprising a Tribunal of First Instance (the Tribunal) and an Appeal Tribunal has emerged as a perennial characteristic of the ICS. The number of Tribunal members and Appeal Tribunal members varies in ICS formations under CETA, the EU-Singapore IPA and the EU-Vietnam IPA. Accordingly, CETA features 15 Tribunal members but makes no specific stipulation regarding the size of the Appeal Tribunal.⁴⁷⁸ The EU-Vietnam IPA and the proposed EU-Mexico FTA establish a nine-member strong Tribunal⁴⁷⁹ whereas the EU-Singapore IPA provides for as little as six Tribunal members⁴⁸⁰ These three agreements all cater for six Appeal Tribunal members.⁴⁸¹

4.2.1 *Tribunal and Appeal Tribunal members*

The objectivity and impartiality of the adjudicator is central to the legitimacy of investor-state arbitration. The ICS takes a new approach to adjudicator selection and their representation on the ICS (Section 4.2.1.1), and imposes strict professional requirements (Section 4.2.1.2) and ethical standards (Section 4.2.1.3).

4.2.1.1 Members and their affiliation

Tribunal and Appeal Tribunal members generally represent three different fractions. Two thirds of Tribunal and Appeal Tribunal members are referred to as ‘national’ members, whereas the remaining members are characterized as ‘third country national’ members.⁴⁸² This denomination is somewhat misleading in as far as it implies a particular nationality requirement. In a footnote to the relevant provisions, all three agreements clarify that this is a matter of affiliation rather than nationality,⁴⁸³ and, indeed, the EU-Singapore IPA no longer makes any reference to nationality, other than including a requirement that ‘third country national’ members may not have the nationality of either Contracting Party.⁴⁸⁴

Broadly speaking, therefore, members that were nominated by one of the Contracting Parties are affiliated to that Contracting Party and, thus, ‘national’ members of that Contracting Party within the framework of the ICS. Using CETA

⁴⁷⁸ Articles 8.27(2) and 8.28(7) CETA.

⁴⁷⁹ Article 3.38(2) EU-Vietnam IPA; Article 11(2) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁸⁰ Article 39(2) EU-Singapore IPA.

⁴⁸¹ Article 3.10(2) of the EU-Singapore IPA; Article 3.39(2) of the EU-Vietnam IPA; Article 12(2) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁸² Article 8.27(2) CETA; Articles 3.9(2) and 3.10(2) of the EU-Singapore IPA; Articles 3.38(2) and 3.39(2) of the EU-Vietnam IPA; Articles 11(2) and 12(2) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁸³ Footnote 11 to Article 8.27(2) CETA; and footnotes to Articles 3.38(2) and 3.38(2) of the EU-Vietnam IPA; note that the proposed EU-Mexico FTA (Investment Dispute Settlement) makes no such stipulation.

⁴⁸⁴ Articles 3.9(2)(c) and 3.10(2)(c) of the EU-Singapore IPA.

as an example to illustrate this set-up, five Tribunal members are nominated by the EU and, thus, affiliated to the EU irrespective of whether or not all the five candidates carry the nationality of one of the Member States. Similarly, five Members are ‘national’ members of Canada, for no other reason than that they were nominated by Canada. The wording nonetheless suggests that nationals of either Contracting Party are precluded from serving as ‘third country national’ members. Notably, CETA makes no explicit stipulations on the Appeals Tribunal but leaves its number and composition to be decided by the CETA Joint Committee at a later time.⁴⁸⁵

The Tribunal and Appeal Tribunal both have a President and a Vice-President, who is not a national of either Contracting Party. The EU-Singapore IPA refers explicitly to the fraction of members that were appointed to the ICS as ‘third country national’ members.⁴⁸⁶ In contrast, CETA and the agreements with Vietnam and Mexico stipulate more generally that the President and Vice-President shall be drawn from among the members that who are third country nationals.⁴⁸⁷ Considering that not all members affiliated to one of the Contracting Parties are necessarily of that Contracting State’s nationality, this drafting raises the question whether even ‘national’ members with the nationality of a third country are eligible for the positions of President or Vice-President. This would, however, stand in stark contrast with the overall spirit of the ICS initiative and it is for these reasons suggested that the drafting in CETA and the EU-Vietnam IPA is merely inaccurate. It is also notable that the proposed agreement with Mexico does not envisage a Vice-President, not does the draft stipulate a nationality requirement for the President of the Appeal Tribunal.⁴⁸⁸

4.2.1.2 Professional requirements

CETA and the agreements with Vietnam and Mexico require Tribunal members to have “expertise” in public international law,⁴⁸⁹ whereas the EU-Singapore IPA requires, more specifically, “specialised knowledge of, or experience in” public international law.⁴⁹⁰ With respect to Appeal Tribunal members CETA remains silent as this issue, much like any other detail regarding the Appeal Tribunal and the appeals process, is to be decided by the CETA Joint Committee at a later time.⁴⁹¹ The agreements with Vietnam and Mexico does not differentiate between Tribunal

⁴⁸⁵ Article 8.28(7)(f) CETA.

⁴⁸⁶ Articles 3.9(6) and 3.10(6) of the EU-Singapore IPA.

⁴⁸⁷ Article 8.27(8) CETA; Articles 3.38(8) and 3.39(6) of the EU-Vietnam IPA; Article 11(9) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁸⁸ Article 12(9) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁸⁹ Article 8.27(4) CETA; Article 3.38(4) of the EU-Vietnam IPA; Article 11(4) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁹⁰ Article 3.9(4) of the EU-Singapore IPA.

⁴⁹¹ Article 8.28(7) CETA.

and Appeal Tribunal members in this respect.⁴⁹² Notably, the agreement with Singapore requires that Appeal Tribunal members have “specialised knowledge of, or *expertise* in” public international law.⁴⁹³ The differentiation between ‘expertise’ and ‘experience’ could refer to equivalent professional characteristics. If, however, expertise is meant to generally imply practical experience, the pool of potential candidates for members of the CETA, EU-Vietnam and EU-Mexico ICS formations would be significantly limited. It is, furthermore, “desirable”—but not required—that members possess expertise in the fields of international investment law or international trade law, or dispute resolution arising under international investment or international trade agreements. Knowledge in public international law is, thus, prioritized over expertise in investment treaty law and arbitration.

All ICS members shall be eligible for appointment to judicial office in their respective countries, or, alternatively, be jurists of recognised competence.⁴⁹⁴ The drafting, thus, differentiates between, on the one hand, candidates that are eligible for judicial office, and, on the other hand, jurists that are not eligible for judicial office but nevertheless possess the knowledge and expertise required. The category of ‘jurists of recognised competence’ can be understood in a variety of ways. It could, for instance, be understood to cater for variations in the organization of the national judicial system, and consequently in the process and prerequisites for the appointment of domestic judges. Legal professionals that are not eligible for judicial office due to certain formal requirements can, thus, still be appointed as members to the ICS.

It can, however, also be understood as drawing a distinction between entry thresholds for legal professionals (including practitioners and sitting national judges), from legal scholars and retired judges. Indeed, all ICS formations further clarify that members of the Appeal Tribunal shall be eligible for the ‘highest’ judicial office in their respective countries, whereas there is no equivalent threshold requirement for jurists of recognized competence to be appointed to the Appeals Tribunal.⁴⁹⁵

There would be little relevance to explicitly make this distinction considering that candidates, which are eligible for judicial office (including the highest judicial office) in their respective countries, will in most cases also be of recognised competence. It is questionable therefore whether candidates that are eligible for judicial office, but

⁴⁹² Article 3.39(7) of the EU-Vietnam IPA; Article 12(7) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁹³ Article 3.10(4) of the EU-Singapore IPA, emphasis added.

⁴⁹⁴ Article 8.27(4) CETA; Articles 3.9(4) and 3.10(4) of the EU-Singapore IPA; Articles 3.38(4) and 3.39(7) of the EU-Vietnam IPA; Articles 11(4) and 12(7) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁹⁵ Article 3.10(4) of the EU-Singapore IPA; Article 3.39(7) of the EU-Vietnam IPA; Article 12(7) EU-Mexico FTA (Investment Dispute Settlement); CETA makes no stipulations as to the professional qualifications of Appeal Tribunal members.

not the highest judicial office, may still possess the requisite credentials to serve as members of the Appeal Tribunal as long as they are of recognized competence. If not, members of the ICS are drawn from a pool of candidates that favours legal academics and retired judges, over legal professionals and judges that are still potentially subject to appointments in the national judicial system. This view is also supported by the prioritization of expertise in public international law, over experience in investment law and investment treaty arbitration. The practical effect of these professional qualifications, therefore, is that it tips the scale in favour of legal academics and retired national judges to compete with career adjudicators and legal professionals over appointments to the ICS.

4.2.1.3 Ethics

Members of the ICS are furthermore subject to high ethical standards, which is ultimately having an impact on the pool of potential candidates.⁴⁹⁶ Whereas CETA merely stipulates that member shall be independent, the agreements with Singapore, Vietnam and Mexico require that the independence of ICS members is “beyond doubt”. More specifically, members shall not be affiliated with any government, although this does not generally exclude persons receiving an income from the government.⁴⁹⁷ It is interesting to note in this respect that university scholars in many countries act as public servants and, thus, receive remuneration from the government. Unlike diplomats or government employees that act under direction from the government, academic staff at universities is not usually perceived to be affiliated with any government. Additionally, retired judges and diplomats may receive a pension from the government, which should not be perceived as standing in the way for their appointment to the ICS.⁴⁹⁸ This suggests that the pool of potential candidates caters specifically for legal scholars and retired judges. This view is confirmed by the EU-Mexico FTA that reads “the mere fact that a person is employed by a public university, or that a former government employee is receiving a pension from the government [...] is not itself a reason to be considered as affiliated with a government”.⁴⁹⁹

The agreements with Singapore and Vietnam also address the appointment of persons that have formerly been employed by the government, including former diplomats into the ranks of ICS members.⁵⁰⁰ This bears resemblance to experiences

⁴⁹⁶ Article 8.30(1) CETA; Article 3.11(1) of the EU-Singapore IPA; Article 3.40(1) of the EU-Vietnam IPA; Article 13(1) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁹⁷ Footnote 12 to Article 8.30(1) CETA; Footnote 6 to Article 3.11(1) of the EU-Singapore IPA; Footnote to Article 3.40(1) of the EU-Vietnam IPA; footnote 4 to Article 13(1) EU-Mexico FTA (Investment Dispute Settlement).

⁴⁹⁸ Howse (2017), *op cit.*, 229.

⁴⁹⁹ Footnote 4 to Article 13(1) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁰⁰ Footnote 6 to Article 3.11(1) of the EU-Singapore IPA; Footnote to Article 3.40(1) of the EU-Vietnam IPA.

from the WTO dispute settlement system where diplomats with extensive experience in international trade often as panellists in trade disputes within the context of the WTO dispute settlement system.⁵⁰¹ Former WTO panellist, subject to the professional requirements discussed above, are therefore potential Tribunal and Appeal Tribunal member, irrespective of whether or not they were formerly employed as diplomats. On the contrary, considering that there is no such specific exception in CETA, the strict ethical standards could have the effect of excluding this category of people from the pool of potential candidates.

The independence of Tribunal and Appeal Tribunal members also requires that they cannot receive instructions from any organization or government regarding matters relating to the dispute, and refrain from participating in disputes that create a direct or indirect conflict of interests. Whereas CETA requires in this respect compliance with the IBA Guidelines on Conflicts of Interests in International Arbitration, the later agreements all provide their own Code of Conduct.⁵⁰² More importantly, ICS members are prevented from acting as counsel, party-appointed expert or witness in any other investment treaty dispute, including proceeding under domestic law.⁵⁰³ It is true that these ethical standards are relatively high. However, they do not preclude ICS members from acting as adjudicator in parallel investment disputes, which in theory paves the way for members to be appointed to more than one ICS.

4.2.1.4 Availability and retainer

Members of the ICS must ensure their availability⁵⁰⁴ and are to that end paid a monthly retainer fee.⁵⁰⁵ Neither CETA, the EU-Singapore IPA nor the EU-Vietnam IPA currently specify a retainer fee, but leave this issue to be decided by their respective trade committees. However, in the TTIP negotiating proposals the

⁵⁰¹ Article 8.8 DSU reads that WTO Members “shall undertake, as a general rule, to permit their officials to serve as panellists”; with respect to the independence of panellists, Article 8.9 DSU requires that they “shall serve in their individual capacities and not as government representatives or as representatives of any organization”.

⁵⁰² Annex 7 to the EU-Singapore IPA; Annex 11 to the EU-Vietnam IPA; Annex [I] to the footnote 4 to Article 13(1) EU-Mexico FTA (Investment Dispute Settlement); note that CETA charges the Committee on Services and Investment with the task of drawing up a code of conduct that will supplement or replace the IBA Guidelines, and which shall be adopted no later than two years after the coming into force of the agreement.

⁵⁰³ Notably, Article 3.11(1) of the EU-Singapore IPA refers specifically to party-appointed witnesses.

⁵⁰⁴ Article 8.27(11) CETA; Articles 3.9(11) and 3.10(10) of the EU-Singapore IPA; Articles 3.38(13) and 3.39(13) of the EU-Vietnam IPA; Articles 11(11) and 12(11) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁰⁵ Article 8.27(12) CETA; Articles 3.9(12) and 3.10(11) of the EU-Singapore IPA; Articles 3.38(14) and 3.39(14) of the EU-Vietnam IPA; Articles 11(12) and 12(12) EU-Mexico FTA (Investment Dispute Settlement).

Commission initially suggested 7.000 EUR as retainer fee for AB members,⁵⁰⁶ which is reminiscent of the retainer fee paid to WTO AB members.⁵⁰⁷ Tribunal members would be paid one-third of the WTO retainer fee, i.e. 2.000 EUR per month.⁵⁰⁸ The agreements with Singapore and Vietnam are more detailed on this issue than CETA. Consequently, the President and Vice-President of the Tribunal under the EU-Singapore and EU-Vietnam agreements are paid daily fees for each day working in the fulfilment of these organizational functions, equivalent to the daily fees paid to the President and Vice-President of the Appeal Tribunal. CETA does not explicitly provide for a daily fee for Presidents and Vice-Presidents of the Tribunal and Appeals Tribunal members in addition to the monthly retainer fee, although this may well fall within the decision-making authority of the CETA Joint Committee.

This being said, all Tribunal members that are assigned to a case are paid daily fees and expenses in accordance to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention.⁵⁰⁹ This is not, however, the case for Appeal Tribunal members where the daily fees are to be freely determined by the respective trade committees.⁵¹⁰ As a consequence the remuneration of ICS members is likely to vary depending not only on whether they are serving on the Tribunal or Appeals Tribunal, but also on whether or not they are eligible for the nomination as President or Vice-President of either tribunal, and, most importantly between the different bilateral formations of the Appeal Tribunal.

The potential caseload of various ICS formations is impossible to predict. It is sensible, therefore, to appoint ICS members on a part-time basis,⁵¹¹ although the rules are restrictive and undoubtedly shape the pool of available candidates. In addition to ethical constraints, career arbitrators and legal practitioners might find it difficult to combine their availability as ICS members with conflicting commitments outside of the ICS. The provisions of the EU-Vietnam IPA and the proposed EU-Mexico FTA are particularly restrictive, stipulating that Tribunal and Appeal Tribunal members “shall be available at all times and at short notice, and shall stay

⁵⁰⁶ Article 10(12) of the Commission draft text TTIP - investment, ‘Transatlantic Trade and Investment Partnership, Trade in Services, investment and e-commerce, Chapter II - Investment’, September 2015, accessible at <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> .

⁵⁰⁷ In 2004 the retainer fee of AB members was adjusted to 7.000 CHF (approx. 6.200 EUR), and the daily fee to 600 CHF (approx. 530 EUR), see WTO, Committee on Budget Finance and Administration, ‘Appellate Body Members’, 25 June 2004 (WT/BFA/W/118).

⁵⁰⁸ Article 9(12), TTIP negotiating proposal of September 2012, *op cit*.

⁵⁰⁹ Article 8.27(14) CETA; Article 3.9(14) of the EU-Singapore IPA; Article 3.38(16) of the EU-Vietnam IPA; Article 11(14) EU-Mexico FTA (Investment Dispute Settlement).

⁵¹⁰ Article 3.10(11) of the EU-Singapore IPA; Article 3.39(14) of the EU-Vietnam IPA; Article 12(12) EU-Mexico FTA (Investment Dispute Settlement).

⁵¹¹ Ruth Mackenzie and Philippe Sands, ‘International courts and tribunals and the independence of the international judge’ (2003) 44(1) *Harvard International Law Journal* 271-85, 283.

abreast of dispute settlement activities under this Agreement”.⁵¹² In order to attract these types of candidates as potential ICS members, the retainer fee would have to provide a significant economic incentive for them to leave private practice and abdicate income from potential future nominations as investment arbitrator under more flexible frameworks. This could be achieved if the ICS fee structure would allow retainer fees to be negotiated individually which ICS members, although such a solution is not uncommon in commercial—or indeed investor-state arbitration—it conflicts profoundly with the underlying spirit to create a court-like structure. In comparison, retired judges and academics are less constraint and will find it easier to combine their regular employment with their functions as ICS members. Moreover, the financial incentive for these types of candidates is arguably lower than what would appear attractive to legal practitioners and career arbitrators.

The respective trade committees furthermore have the authority to transform appointments into full-time employment and, consequently, the fee structure into a regular salary. Members of the ICS are in such a scenario precluded from engaging in any other occupation, gainful or otherwise, unless an exemption is granted by the President of the respective Tribunal or Appeal Tribunal.⁵¹³ CETA is silent on this but acknowledges that in taking such a decision, the CETA Joint Committee has authority to determine the modalities and conditions for full-time employment.⁵¹⁴ This represents a step towards establishing a permanent and court-like structure, but would aggravate the situation where appointments to the ICS stand in direct competition to legal practice, appointments as investment arbitrator and judicial positions in the respective domestic legal systems.

4.2.2 *Tribunal and Appeal Tribunal divisions: the composition and selection process*

The Tribunal and Appeal Tribunal hears cases in a division of three, including two members with affiliations to the respective Contracting Parties and one third country national member who chairs the division.⁵¹⁵ CETA, which lacks detail with respect to the Appeals Tribunal, refers only to “three randomly appointed Members of the Appeals Tribunal”.⁵¹⁶ Although the particulars of the composition and the selection process must first be laid down by the CETA Joint Committee, it is unlikely

⁵¹² Articles 3.38(13) and 3.39(13) of the EU-Vietnam IPA; Articles 11(11) and 12(11) EU-Mexico FTA (Investment Dispute Settlement).

⁵¹³ Article 3.9(15) and 3.10(13) of the EU-Singapore IPA; Articles 3.38(17) and 3.39(17) of the EU-Vietnam IPA; Articles 11(15) and 12(14) EU-Mexico FTA (Investment Dispute Settlement).

⁵¹⁴ Articles 8.27(15) CETA.

⁵¹⁵ Article 8.27(6) CETA; Articles 3.9(7) and 3.10(7) EU-Singapore IPA; Articles 3.38(6) and 3.39(8) EU-Vietnam IPA; Articles 11(6) and 12(8) EU-Mexico FTA (Investment Dispute Settlement).

⁵¹⁶ Art. 8.28, para. 5, CETA.

to deviate significantly from the approach adopted in the other agreements, which faithfully reflect the overall tripartite composition of the ICS.

Members are selected to Tribunal and Appeal Tribunal divisions by the President of the respective ICS tribunal “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members to serve”.⁵¹⁷ The selection process, which in this respect deviates significantly from traditional investor-state arbitration practice,⁵¹⁸ appears to be directly inspired by the WTO AB.⁵¹⁹

4.2.3 *Terms of service*

Under CETA and the EU-Mexico FTA proposal Tribunal members are appointed for a term of five years with the possibility of renewal once.⁵²⁰ Unlike the agreement with Mexico,⁵²¹ however, CETA makes no stipulations regarding the term of service of Appeal Tribunal members. The EU-Vietnam IPA provides for four-year term with the possibility of a one-time renewal for the Tribunal as well as Appeal Tribunal members.⁵²² These two approaches stand in stark contrast to the EU-Singapore IPA, which provides that Tribunal and Appeal Tribunal members shall be appointed for an initial term of eight years, and places no explicit limitations on the renewal of appointments.⁵²³ All ICS formations, however, provide that a portion of the inaugural appointments serve for a period longer than the regular term of service.

Accordingly, CETA provides that seven out of the 15 Tribunal members serve six instead of five years, three out of the six initially appointed EU-Singapore ICS Tribunal and Appeal Tribunal members shall serve twelve instead of eight years, in the case of the EU-Vietnam ICS five out of the nine Tribunal members and three out of the six Appeal Tribunal members shall serve an additional two years, and the FTA proposal with Mexico envisages that four out of nine Tribunal members and three out of the six Appeal Tribunal members serve an extended seven-year term.⁵²⁴ This prevents entire Tribunal and Appeal Tribunal formations from being substituted with new members at once. Especially considering that Tribunal and Appeal Tribunal members are appointed at the same time with identical terms of service this would lead to the replacement of the entire body of ICS members,

⁵¹⁷ Article 8.27(7) CETA; Articles 3.9(8) and 3.10(8) of the EU-Singapore IPA; Articles 3.38(7) and 3.39(8) of the EU-Vietnam IPA; Articles 11(8) and 12(9) EU-Mexico FTA (Investment Dispute Settlement).

⁵¹⁸ This is discussed in more detail *infra* in Chapter 8.2.2.

⁵¹⁹ Article 6(2), WTO Appellate Body, ‘Working procedures for appellate review’, 16 August 2010, (WT/AB/WP/6)

⁵²⁰ Article 8.27(5) CETA; Article 11(5) EU-Mexico FTA (Investment Dispute Settlement).

⁵²¹ Article 12(5) EU-Mexico FTA (Investment Dispute Settlement).

⁵²² Articles 3.38(5) and 3.39(5) EU-Vietnam IPA.

⁵²³ Articles 3.9(5) and 3.10(5) EU-Singapore IPA.

⁵²⁴ Articles 11(5) and 12(5) EU-Mexico FTA (Investment Dispute Settlement).

raising potentially insurmountable practical issues for the continuity of ICS tribunals. More importantly, however, the gradual replacement of members allows for some degree of institutional consistency and the establishment of an institutional memory.

Two more issues are worth mentioning in this respect. First, vacancies on the ICS are filled as they arise. However, members who fill such an irregular vacancy merely replace the member that discontinued his or her service, for the remainder of his or her term. The new member is not, therefore, a fully appointed ICS member. It is unclear from the text of the agreements whether members joining the ICS on this basis are equally subject to renewal, in so far as the regular term allows. It is also questionable whether a person replacing a member who leaves the ICS before the end of his or her term, may subsequently be appointed as a full ICS member for a full term of services. Arguably, continuity and the establishment could have more easily be achieved if vacancies were filled as they arise with new appointments as full ICS members.

Second, members serving on a division when their term ends generally continue their service until the proceedings are closed. With the exception of CETA, this requires the authorization of the President of the Tribunal.⁵²⁵ Depending on the workload of the individual ICS formation, it appears that the number of active members is likely to exceed the total number of appointed members. This is likely to affect smaller ICS formations more profoundly than, for instance, the CETA ICS that comprises fifteen members. Indeed, a small number of initial members reduces the possibilities to take account of the end of a member's term in the establishment of divisions. This is aggravated by the fact that the term of half of all members terminates at the same time. Furthermore, the appeals process, which is discussed in more detail below, allows in certain circumstances that disputes are referred back to the Tribunal. It appears, thus, that the Tribunal members whose term ended remain active members until the award has become final.

Under ideal circumstances these two institutional features could perpetuate the establishment of an institutional memory in as far as it facilitates informal interactions and deliberations between 'old' and 'new' members. However, it also raises a number of practical issues, not least with respect to the nature of employment—especially for the duration of the appeals process—where ICS positions have previously been turned into full-time positions subject to a regular salary. It should also be mentioned that only the two most recent ICS formations, i.e. under the EU-Singapore IPA and EU-Mexico FTA, provide for a similar rule *vis-à-vis* members of the Appeal Tribunal.⁵²⁶

⁵²⁵ Article 8.27(5) CETA; Article 3.9(5) EU-Singapore IPA; Article 3.38(5) EU-Vietnam IPA; Article 11(5) EU-Mexico FTA (Investment Dispute Settlement).

⁵²⁶ Article 3.10(5) EU-Singapore IPA; Article 12(5) EU-Mexico FTA (Investment Dispute Settlement).

4.2.4 *Institutional support*

Another notable feature of the ICS is that it institutionally leans on the ICSID Secretariat, which acts as Secretariat for the Tribunal and Appeals Tribunal under all of the three current ICS formations.⁵²⁷ This is perhaps unsurprising. After all, ICSID is the primary forum for the resolution of investor-state disputes, and the ICSID Secretariat has extensive experience in the administration of non-ICSID awards.⁵²⁸ Without going into any detail into the role and functions of the ICSID Secretariat it is important to acknowledge that it is less involved in the dispute settlement process than, for instance, the Secretariat of the WTO AB.⁵²⁹ The impact this is likely to have on the coherence of dispute settlement under the ICS is discussed in more detail below. Suffice it to emphasize for present purposes that the lack of a permanent secretariat stands somewhat in contrast to the overall ambition of creating a permanent and court-like structure.

4.2.5 *The role of bilateral committees*

The trade committee plays an important role for the functioning of the ICS. It presents primarily a platform for the Contacting Parties to review and develop their bilateral investment relations. However, it also provides the Contracting Parties with important flexibility to shape the particulars of these arrangements throughout the life time of the agreement. This subsection provides an overview of the functions of trade committees established under CETA, the EU-Singapore IPA and the EU-Vietnam IPA, as well as their composition and decision-making process. The general institutional characteristics as well as overarching operational principles and functions of the respective trade committees with respect to the ICS are regulated throughout the relevant chapters of the agreement, but are also comprehensively itemized in the administrative and final provisions.⁵³⁰

It should be pointed out at this stage that the CETA Joint Committee and the EU-Mexico Joint Council are supported by the Sub-Committee on Services and Investment (the CETA sub-committee and Mexico sub-committee). Similar arrangements were initially also envisaged in the EU-Vietnam FTA, but were

⁵²⁷ Article 8.27(16) CETA; Articles 8.9(16) and 8.10(14) EU-Singapore IPA; Articles 3.38(18) 3.39(18) EU-Vietnam IPA; Articles 11(17) and 12(15) EU-Mexico FTA (Investment Dispute Settlement).

⁵²⁸ In 2018 a total of 20 non-ICSID cases were administered by the ICSID Secretariate, of which 15 were initiated on the basis of the UNCITRAL Arbitration Rules, see ICSID, 'The ICSID caseload - statistics' (Issue 2019-1) 24.

⁵²⁹ Donald McRae, 'The WTO Appellate Body: A model for an ICSID appeals facility?' (2010) 1(2) *Journal of International Dispute Settlement* 371–87, 387; for an overview over the functions of the ICSID Secretariat, see Antonio R. Parra, 'The role of the ICSID secretariat in the administration of arbitration proceedings under the ICSID convention' (1998) 13(1) *ICSID Review* 85-100.

⁵³⁰ Article 26.1 CETA; Article 4.1 EU-Singapore IPA; Article 4.1 EU-Vietnam IPA; no details are yet available on the EU-Mexico Joint Council.

subsequently dropped with the recent restructuring. Neither the EU-Singapore IPA nor the EU-Vietnam IPA currently provide for a specialized sub-committee.

4.2.5.1 Functions of trade committees

Generally speaking, the trade committee is responsible for the implementation and application of the agreement,⁵³¹ and generally ensures that it operates properly.⁵³² The trade committee is, to that end, empowered to take decisions and adopt recommendations.⁵³³ Its functions can be classified broadly as political, treaty-making and executive. As the highest-level representative body, the political functions of the trade committees are largely aimed at the assessment and development of investment relations,⁵³⁴ and examine any other matter of interest relating to an area covered by the agreement.⁵³⁵ It is also notable that CETA and the agreement with Vietnam empower their respective trade committee to engage in civil society dialogue.⁵³⁶ These functions underline the role of the trade committee as a political forum.

The trade committee exercises political functions also with respect to dispute settlement. Most importantly the EU-Singapore and EU-Vietnam trade committees review the functioning of the ICS taking into account developments in investor-state arbitration more generally.⁵³⁷ However, political functions are also visible with respect to the powers of the trade committee to integrate the bilateral ICS formations with potential multilateral ISDS reforms—a highly politicized topic.⁵³⁸ Under the EU-Vietnam IPA the trade committee may even decide to adopt a decision to extend the transitional period suspending the automatic enforcement of investment awards issued in cases where Vietnam is the respondent,⁵³⁹ and determines the scope of application of the UNCITRAL Transparency Rules.⁵⁴⁰

⁵³¹ Article 26.1(4)(a) CETA; Article 4.1(3)(b) of the EU-Singapore IPA; Article 4.1(3)(b) of the EU-Vietnam IPA.

⁵³² Article 4.1(3)(a) of the EU-Singapore IPA; Article 4.1(3)(a) of the EU-Vietnam IPA.

⁵³³ Articles 26.3(1) and (2) CETA; Articles 4.2(1) and (2) of the EU-Singapore IPA; Articles 4.2(1) and (2) of the EU-Vietnam IPA.

⁵³⁴ Article 26.1(5)(f) CETA; Article 4.1(3)(c) EU-Singapore IPA.

⁵³⁵ Article 26.1(4)(f) CETA; Article 4.1(3)(g) EU-Singapore IPA; Article 4.1(3)(i) EU-Vietnam IPA.

⁵³⁶ Article 26.1(5)(b) CETA; Article 4.1(4)(a) EU-Vietnam IPA.

⁵³⁷ Article 4.1(3)(e) EU-Singapore IPA; Articles 4.1(3)(d) and (e) EU-Vietnam IPA.

⁵³⁸ Article 8.29 CETA; Article 3.12 EU-Singapore IPA; Article 3.41 EU-Vietnam IPA; Article 14(2) EU-Mexico FTA.

⁵³⁹ Article 3.57(4) of the EU-Vietnam IPA.

⁵⁴⁰ Article 3.46(6) of the EU-Vietnam IPA.

Treaty-making functions include above all powers of the trade committee to consider and adopt amendments,⁵⁴¹ or make recommendations for amendments to the agreement.⁵⁴²

Executive functions describe the decision-making authority of the trade committee over operational details. With respect to the ICS executive functions include substantive, structural and procedural matters. Thus, the trade committee has influence over the substance of the agreement by, on the one hand, issuing amendments to, or recommendations to amend, the FET standard of protection,⁵⁴³ and, on the other hand, through the power to adopt authoritative interpretations of the agreement.⁵⁴⁴ Notably, under CETA and the EU-Mexico FTA the power to initiate such amendments and interpretations is situated with the relevant sub-committee.⁵⁴⁵

With respect to structural aspects of the ICS the trade committee carries out executive functions above all by appointing members of the Tribunal and Appeal Tribunal,⁵⁴⁶ renews their terms of service⁵⁴⁷ and removes members for the violation ethical standards.⁵⁴⁸ The trade committee may furthermore adopt a decision to increase or decrease the total number of ICS members,⁵⁴⁹ selects the President and Vice-President of both tribunals, determines the monthly retainer and daily fees, and has the power to turn appointments into full-time positions.⁵⁵⁰

⁵⁴¹ Article 26.1(5)(c) CETA; Article 4.3(2) EU-Singapore IPA; Article 4.3(2) EU-Vietnam IPA.

⁵⁴² Article 4.1(4)(b) EU-Vietnam IPA.

⁵⁴³ Article 8.10(3) CETA; Article 2.4(4) EU-Singapore IPA; Article 2.5(4) EU-Vietnam IPA; Article 15(7) EU-Mexico FTA (Investment).

⁵⁴⁴ Article 8.31(3) in conjunction with 26.1(5)(e) CETA; Article 3.13(3) in conjunction with Article 4.1(4)(f) EU-Singapore IPA; Article 3.42(5) in conjunction with Article 4.1(4)(c) EU-Vietnam IPA; Article 15(5) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁴⁵ Respectively, Articles 8.10(3) in combination with Articles 26.1(5)(c) and 8.44(3)(e), and Article 8.31(3) in combination with Articles 26.1(5)(c) and 8.44(3)(a) CETA; Article 15(7) EU-Mexico FTA (Investment), note further that authoritative interpretations of the EU-Mexico FTA are adopted upon recommendation of either Party, which does not exclude involvement of the sub-committee.

⁵⁴⁶ Articles 8.27(2) and 8.28(3) CETA; Articles 3.9(2) and 3.10(2) EU-Singapore IPA; Articles 3.38(3) and 3.39(3) EU-Vietnam IPA; Articles 11(2) and 12(2) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁴⁷ Articles 8.27(2) and 8.28(3) CETA; Articles 3.9(2) and 3.10(2) EU-Singapore IPA; Articles 3.38(3) and 3.39(2) EU-Vietnam IPA; Articles 11(2) and 12(3) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁴⁸ Article 8.30(4) CETA; Article 3.11(5) EU-Singapore IPA; Article 3.40(5) EU-Vietnam IPA; Articles 13(5) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁴⁹ Articles 8.27(3) and 8.28(8) CETA; Articles 3.9(3) and 3.10(3) EU-Singapore IPA; Articles 3.38(4) and 3.39(3) EU-Vietnam IPA; Articles 11(3) and 12(4) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁵⁰ Articles 8.27(15) CETA; Articles 3.9(15) and 3.10(13) EU-Singapore IPA; Articles 3.38(17) and 3.39(17) EU-Vietnam IPA; Articles 11(15) and 12(14) EU-Mexico FTA (Investment Dispute Settlement).

In as far as procedural matters are concerned trade committees are empowered to adopt specific rules on costs,⁵⁵¹ as well as rules supplementing the applicable arbitration rules.⁵⁵² Under CETA, much of the procedural functions are exercised through the CETA sub-committee that is tasked to of drawing up a code of conduct that may either supplement or replace the IBA Guidelines, rules on transparency and rules supplementing the applicable arbitration rules. It is further notable that the EU-Vietnam Committee adopts the working procedures of the Tribunal and the Appeal Tribunal.⁵⁵³

Lastly, it should also be reiterated at this point that CETA is particularly vague on its Appeals Tribunal. As a consequence, Article 8.28(7) CETA provides the CETA Joint Committee with extensive powers to determine virtually all rules governing the structure of its Appellate Tribunal as well the appeals process. Notable is in this respect that the CETA Joint Committee shall adopt a decision on the administrative support of the CETA Appellate Tribunal, catering potentially for the establishment of a permanent secretariat. It is furthermore important to observe that the specialized sub-committee reviews the performance of the CETA Appellate Tribunal and recommend that the CETA Joint Committee revise its decision pursuant to Article 8.28(7) CETA, if necessary.

4.2.5.2 Composition and decision-making

The trade committee is comprised of representatives Contracting Parties and co-chaired by the responsible representative at ministerial level, on the one hand, and the EU Trade Commissioner,⁵⁵⁴ on the other. Decisions are generally taken by mutual consent.⁵⁵⁵ This has a particular effect on the appointment of ICS members. It is the trade committee that adopts a decision to appoint Tribunal and Appeal Tribunal members in all ICS formations, with the exception of the EU-Singapore ICS, which furnishes the contracting parties with powers to nominate their national members directly.⁵⁵⁶ The ICS formations in CETA, the EU-Vietnam FTA and the proposed agreements with Mexico are subject to a politically brokered compromise. This important difference is reiterated in the relevant footnotes to the agreements in CETA and the EU-Vietnam IPA, which allow the Contracting Parties to

⁵⁵¹ Article 3.39(6) CETA; Article 4.1(5)(d) in conjunction with Article 3.21(4) EU-Singapore IPA; Article 3.53(5) EU-Vietnam IPA; Article 29(6) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁵² Article 8.44(3)(b) in conjunction with Article 8.23(6) CETA; Article 4.1(4)(g) EU-Singapore IPA; Article 4.1(5)(b) in conjunction with Article 3.33(4) EU-Vietnam IPA; Article 7(5) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁵³ Articles 3.38(10) and 3.39(10) EU-Vietnam IPA.

⁵⁵⁴ Article 26.1(1) CETA; Article 4.1(2) EU-Singapore IPA; Article 4.1(2) of the EU-Vietnam IPA; no information on the composition of the EU-Mexico Joint Council is yet available.

⁵⁵⁵ Article 26.3(3) CETA; Article 4.2(1) EU-Singapore IPA; Article 4.2(3) of the EU-Vietnam IPA.

⁵⁵⁶ Articles 3.9(2) and 3.10(2) of the EU-Singapore IPA.

“propose” those members of the Tribunal and Appeals Tribunal that are affiliated to them.⁵⁵⁷

4.3 Procedural features

In addition to these institutional features, the ICS also introduces a number of procedural innovations. This Section addresses in particular the procedural requirements for submission of claims (Section 4.3.2), the applicable arbitration rules (Section 4.3.2), the applicable law clause (Section 4.3.3), the appeal procedure (Section 4.3.4), and other procedural aspects including safeguards against the initiation of frivolous claims, the cost of proceedings and the transparency (Section 4.3.5).

4.3.1 *Procedural requirements for the submission of claims*

There are a number of procedural requirements for the initiation of investment disputes under the ICS.⁵⁵⁸ These include *inter alia* a cooling off period, the written consent of the investors, a mandatory consultation, and formal requirements concerning the submission of the claim, as well as other jurisdictional requirements arising out of the applicable arbitration rules. Three requirements shall be discussed in more detail in this section, i.e. the requirement to have the proper respondent determined by the Union,⁵⁵⁹ the fork-in-the-road clause,⁵⁶⁰ and the waiver of challenges to the ICS award.

4.3.1.1 Determining the respondent to disputes

With the notice of intent, foreign investors shall request a determination of the respondent before initiating a dispute against the Union or one of its Member States.⁵⁶¹ The ICS relieves foreign investors from the difficult task to delineate areas of the agreement for which the Union is internationally responsible from those for which responsibility lies with the Member States. Accordingly, this determination is

⁵⁵⁷ Footnote 11 to Article 8.27(2) CETA; and footnotes to Articles 3.38(2) and 3.38(2) of the EU-Vietnam IPA.

⁵⁵⁸ Article 8.22 CETA; Article 3.7 of the EU-Singapore IPA; Article 3.35 of the EU-Vietnam IPA; Article 6 EU-Mexico FTA (Investment Dispute Settlement).

⁵⁵⁹ Articles 8.22(1)(c) and 8.21(1) CETA; Articles 3.7(1)(c) and 3.5(2) of the EU-Singapore IPA; Articles 3.35(1)(c) and 3.32(2) of the EU-Vietnam IPA; Articles 6(1)(b) and 5(1) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶⁰ Articles 8.22(1)(f) and (g) CETA; Articles 3.7(i) and (ii) of the EU-Singapore IPA; Articles 3.35(1)(f) and 3.34(4) of the EU-Vietnam IPA; Articles 6(1)(f) and (g) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶¹ Article 8.21(1) CETA; Article 3.5(2) of the EU-Singapore IPA; Article 3.32(2) of the EU-Vietnam IPA; Article 5(1) EU-Mexico FTA (Investment Dispute Settlement).

carried out internally, leaving the Union responsible to inform the investor of its decision within a certain period of time (i.e. 50 days under CETA, two month under the EU-Singapore IPA and 60 days under the EU-Vietnam IPA and the proposed agreement with Mexico).⁵⁶² Only where the Union fails to make a determination is the investor entitled to decide herself—in accordance with the guidelines provided for in the agreements—whether to initiate a dispute against the Union or its Member State.⁵⁶³

Although the ICS model deviates significantly from the more traditional approach of issuing declarations of competences, it is not entirely novel. In fact, a comparable mechanism operates in a similar context within the framework of the ECT.⁵⁶⁴ Unique to the ICS is nonetheless that the mechanism presents a procedural prerequisite for the submission of claims. It should also be mentioned that once a determination is made, the Union and its Member States are prevented from asserting the inadmissibility of the claim, object to the jurisdiction of the panel, or otherwise contest the award arguing that an improper respondent was determined.⁵⁶⁵

4.3.1.2 Fork-in-the-road

Fork-in-the-road provisions in IIAs require foreign investors to choose a procedural avenue for their investment dispute. The submission of a claim to the ICS is in this respect conditioned on the investor withdrawing any case over the same contested measure that is pending before a domestic court or an international court or tribunal.⁵⁶⁶ Foreign investors also have to waive their procedural rights to initiate such disputes in the future.⁵⁶⁷ More specifically, before an investors is able to initiate a dispute before the ICS, all potential claimants (including private investors, locally established enterprises, as well as persons with ownership interest in such enterprises or that are controlled by such enterprises) have to withdraw all pending disputes concerning the contested measure.⁵⁶⁸ Similar fork-in-the-road provisions were included in recent BITs concluded by Canada.⁵⁶⁹ Like these BITs, the ICS thus

⁵⁶² Article 8.21(1) CETA; Article 3.5(2) of the EU-Singapore IPA; Article 3.32(2) of the EU-Vietnam IPA; Article 5(3) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶³ Article 8.21(4) CETA; Article 3.5(3) of the EU-Singapore IPA; Article 3.32(3) of the EU-Vietnam IPA; Article 5(4) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶⁴ For a discussion see *infra* Chapter 8.3.4.

⁵⁶⁵ Article 8.21(6) CETA; Article 3.5(4) of the EU-Singapore IPA; Article 3.32(5) of the EU-Vietnam IPA; Article 5(6) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶⁶ Article 8.22(1)(f) CETA; Article 3.7(1)(f)(i) of the EU-Singapore IPA; Article 3.34(4)(i) of the EU-Vietnam IPA; Article 6(1)(f) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶⁷ Article 8.22(1)(g) CETA; Article 3.7(1)(ii) of the EU-Singapore IPA; Article 3.34(4)(ii) of the EU-Vietnam IPA; Article 6(1)(g) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶⁸ Article 8.22(2) CETA; Article 3.7(2) of the EU-Singapore IP; Articles 3.34(1) through (3) of the EU-Vietnam IPA; Article 6(2) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁶⁹ e.g. Article 21 of the Canada-Cameroon BIT of 2016.

purports to prevent a situation where both a natural and juridical person initiate investment disputes contesting the same measure. The proposed EU-Mexico FTA is particularly explicit in this respect.⁵⁷⁰

It appears somewhat contradictory that in light of these strict conditions CETA and the agreements with Vietnam and Mexico additionally require that the ICS tribunals shall take account of concurrent proceedings and awards rendered under other international agreements regarding the same dispute.⁵⁷¹ Two observations should be made in this respect. First the scope *ratio materiae* of fork-in-the-road provisions does not purport to exclude claims from being submitted to the ICS concerning measures that have previously been the subject of domestic or international proceedings.

Second, fork-in-the-road clauses of the ICS do not restrict the jurisdiction of domestic courts or international courts and tribunals. It does not, therefore, prevent these courts and tribunals from assuming jurisdiction in accordance with their own procedural framework. Provisions on concurrent proceedings cater for the event that a dispute is lodged in another forum once proceedings before the ICS have already commenced. Indeed, a failure to fulfil any of the procedural requirements for the submission of a claim to the ICS, including the choice of procedural avenue, can only prompt the Tribunal to decline jurisdiction.⁵⁷² The agreements with Canada, Vietnam and Mexico, thus, complement their fork-in-the-road clause, planning for the event that an investment dispute is initiated under another international agreement at a point in time when the proceedings before the ICS have already progressed to an advanced stage. Whereas the CETA and EU-Mexico Tribunal is required to take account of all disputes that are likely to have an impact on the resolution of the proceedings before the ICS, or would lead to the investor being compensated for the same loss twice,⁵⁷³ the EU-Vietnam IPA refers explicitly to disputes over the same contested measure.⁵⁷⁴

⁵⁷⁰ Article 6(2) EU-Mexico FTA (Investment Dispute Settlement) reads: “The requirement to withdraw or discontinue existing proceedings [...] shall also apply to:

- where the claim is submitted by an investor acting on its own
- behalf, all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor; or
- where the claim is submitted by an investor acting on behalf of a locally established company, all persons who, directly or indirectly, have an ownership interest in or are controlled by the locally established company, and claim to have suffered the same loss or damage as the claimant or locally established company.”

⁵⁷¹ Article 8.24 CETA; Article 3.34(8) of the EU-Vietnam IPA; Article 8 EU-Mexico FTA (Investment Dispute Settlement).

⁵⁷² Article 8.22(4) CETA; Article 3.7(3) of the EU-Singapore IPA; Article 6(4) EU-Mexico FTA (Investment Dispute Settlement); the EU-Vietnam IPA makes no stipulation as to the legal consequences of a lack of procedural requirements.

⁵⁷³ Article 8.24 CETA; Article 8 EU-Mexico FTA (Investment Dispute Settlement).

⁵⁷⁴ Article 3.34(8) of the EU-Vietnam IPA.

4.3.1.3 Waiving the right to challenge the award

Generally speaking, foreign investors cannot enforce ICS awards before they have become final, and may not seek to appeal, review, set aside, annul, revise or initiate any other similar procedure against an ICS award before court or tribunal other than the ICS. It is interesting, however, that all four agreements adopt different approaches in this respect. Whereas, CETA addresses this issue in the relevant provisions on the Appeals Tribunal,⁵⁷⁵ the agreements with Singapore, Vietnam and Mexico introduce it as a procedural prerequisite for the submission of a claim.

Under the EU-Singapore IPA and the EU-Mexico FTA an investor has to submit a declaration, which will accompany other procedural requirements discussed in the preceding sub-section.⁵⁷⁶ It is unclear whether the violation of any such declaration would automatically prompt the discontinuance of proceedings. Instead, it would probably raise questions over the admissibility of a challenge to an ICS award or the finality of the award for the purpose of its enforcement. Considering that these aspects are regulated elsewhere in the agreement,⁵⁷⁷ a declaration made in the context of procedural requirements for the submission of a claim will be of limited value. The EU-Vietnam IPA, on the other hand, limits the consent of the disputing parties to dispute settlement that produces awards that can only be challenged once they have become final, and that may not be challenged outside of the ICS.⁵⁷⁸ Other than the agreement with Singapore, therefore, it creates a direct link between its relevance as a prerequisite for the initiation of disputes before the ICS, and its external value for domestic courts and international tribunals when assessing the admissibility of a concrete challenge. Even though it raises the question of whether or not consent can in all circumstances be effectively modified, this approach specifically complements the provisions governing the enforcement of awards.⁵⁷⁹

4.3.2 *Applicable procedural rules*

Although that the ICS purports to establish an institutional alternative to traditional investor-state arbitration, it is comfortably couched within the constraints of existing arbitration rules. All post-Lisbon IIAs allow for disputes to be submitted under ICSID, the ICSID Additional Facility, the UNCITRAL arbitration rules, or any

⁵⁷⁵ Articles 8.28(9)(b) and (c) CETA.

⁵⁷⁶ Article 3.7(1)(f)(iii) of the EU-Singapore IPA; Article 6(1)(h) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁷⁷ Article 3.22(1) of the EU-Singapore IPA; Article 31(1) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁷⁸ Article 3.36(3) of the EU-Vietnam IPA.

⁵⁷⁹ Article 3.57(1)(b) of the EU-Vietnam IPA.

other rules on agreement by the disputing parties.⁵⁸⁰ This dependency on existing arbitration rules is problematic as it fosters commonalities with the very regime from which the ICS purports to part,⁵⁸¹ but also raises a number of concrete questions.⁵⁸² The establishment of an appeals facility, for instance, constitutes a modification of the ICSID Convention that does not otherwise produce awards that are subject to appeal. It is contested to what extent this might affect the enforceability of ICS awards.⁵⁸³ Moreover, neither the Union nor all of its Member States are currently members of the ICSID Convention, and ICSID is not, therefore, available in disputes involving the Union or Poland as respondent party.

The UNCITRAL arbitration rules, which are specifically designed for the involvement of domestic courts in the process of arbitration, raise issues over the seat of arbitration. There are currently only few domestic arbitration laws that enable the disputing parties to waive their rights to challenge an UNCITRAL award before the domestic courts at the seat of arbitration by mutual agreement.⁵⁸⁴ Furthermore, an investment tribunal cannot hear a claim submitted under the UNCITRAL rules without having determined a seat of arbitration. This stands in stark contrast with the general ambition of the ICS to establish a decentralized system, but may become particularly problematic where the seat of arbitration is situated outside of the

⁵⁸⁰ Article 8.23(2) CETA; Article 3.6(1) of the EU-Singapore IPA; Article 3.33(2) of the EU-Vietnam IPA; Article 7(2) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁸¹ Titi (2016a), *op cit.*, 22-25.

⁵⁸² The author developed on these aspects in more detail elsewhere, see Hannes Lenk, 'Something borrowed, something new: The TTIP investment court: How to fit old procedures into new institutional design' in Elaine Fahey (ed), *Institutionalisation beyond the Nation State* (Springer International: 2018a) 129-47, 141-43.

⁵⁸³ On the modification of the ICSID convention and its effects on the enforcement of ICS awards, see 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(4) *Journal of International Economic Law* 761-86, in particular 779-80.

⁵⁸⁴ With respect to the UNCITRAL arbitration rules, under post-Lisbon Union IIAs the appellate review is mandatory, imposing an obligation on the disputing parties not to submit the dispute to any other kind of review, setting aside procedure, or other challenges (e.g. Articles 8.27(9)(b) and (e) in combination with Art. 8.41(3) CETA), whereas the UNCITRAL rules are specifically tailored for the involvement of the domestic courts and for that purpose require the determination of a seat of arbitration (Articles 3(3)(g) and 18 of the UNCITRAL Arbitration Rules), see Joel Dahlquist, 'Place of arbitration in the proposed "Investment Court" scenario: An overlooked issue?', *Kluwer Arbitration Blog*, 23 March 2017 <accessed at <http://kluwerarbitrationblog.com/2017/03/23/joel-booked/>>; notably, only few domestic arbitration laws allow for the right to post-award challenges to be waived by the parties (e.g. Belgium (Article 1717(4) of the Belgian Judicial Code), France (Article 1522 of the French Code of Civil Procedure), Sweden (Article 51 of the Swedish Arbitration Act), Switzerland (Article 192(1) of the Swiss Private International Law Act), for a discussion see Daniella Stirk, 'Growing number of countries allowing exclusion agreements with respect to annulment warrants greater scrutiny of arbitration clauses', *Kluwer Arbitration Blog*, 11 January 2012 <accessed at <http://arbitrationblog.kluwerarbitration.com/2012/01/11/growing-number-of-countries-allowing-exclusion-agreements-with-respect-to-annulment-warrants-greater-scrutiny-of-arbitration-clauses/>>.

territory of one of its Member States. It is not necessary to enter into a detailed discussion over potential conflicts of the ICS with international law for the purpose of this chapter. Suffice it to acknowledge that the ICS tribunals are operating under the same established arbitration rules that are traditionally applied in the context of investor-state arbitration.

4.3.3 *Applicable law and rules of interpretation*

In its adjudicative function, the ICS tribunals shall apply the IIA and other rules and principles of international law that are applicable between the Contracting Parties.⁵⁸⁵ The agreement is to be interpreted in accordance with the rules of the VCLT, subject to authoritative interpretations adopted by the respective trade committee.⁵⁸⁶ Domestic law is, in as far as it becomes relevant, to be considered as a matter of fact, and is determined in accordance with established interpretations of domestic courts. The ICS tribunals shall furthermore have no jurisdiction to determine the legality of domestic laws and regulations, and their interpretations are therefore not binding on domestic courts.⁵⁸⁷ In the absence of any specific stipulation, and recalling that the Treaties are not binding on third countries, EU law is presumed to be relevant to investment disputes only as domestic law and, consequently, as a matter of fact. The ICS tribunals are consequently bound to follow interpretations of the CJEU wherever Union law becomes relevant to a dispute.

4.3.4 *The appeal procedure*

The certainly most relevant institutional innovation of the ICS is its appeals mechanism. Whereas CETA in many respects lacks detail on the appeal process,⁵⁸⁸ the agreements with Singapore, Vietnam and Mexico include more elaborate provisions.⁵⁸⁹ Accordingly, either disputing party is entitled to appeal a provisional award within 90 days of it being issued by the Tribunal.⁵⁹⁰ The grounds for appeal include errors in the interpretation and application of the applicable law, as well as manifest errors in the appreciation of facts, including the appreciation of relevant

⁵⁸⁵ Article 8.31(1) CETA; Article 3.13(2) of the EU-Singapore IPA; Article 3.42(2) of the EU-Vietnam IPA; Article 15(2) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁸⁶ Articles 8.31(1) and (3) CETA; Article 3.13(3) of the EU-Singapore IPA; Articles 3.42(4) and (5) of the EU-Vietnam IPA; Articles 15(1) and (5) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁸⁷ Article 8.31(2) CETA; Footnote 7 to Article 3.13(2) of the EU-Singapore IPA; Article 3.42(3) of the EU-Vietnam IPA; Articles 15(3) and (4) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁸⁸ Article 8.28(7)(b) CETA.

⁵⁸⁹ Article 3.19 EU-Singapore IPA; Article 3.54 of the EU-Vietnam IPA; Article 30 EU-Mexico FTA (Investment Dispute Settlement).

⁵⁹⁰ Notably, CETA does not specify whether both parties are eligible to submit appeals.

domestic law.⁵⁹¹ Additionally they also include, by reference to Article 52 of ICSID Convention, the reasons for annulment under ICSID in as far as they are not falling under the remaining grounds for appeal.⁵⁹² The Appeals Tribunal may, thus, also inquire whether the Tribunal division was properly constituted, whether it manifestly exceeded its powers, whether members on the Tribunal division were corrupted, whether a serious departure from a fundamental rule of procedure occurred, and whether the provisional award stated reasons for the Tribunal's decision. It remains to be seen how the 'manifest'-threshold will be applied by the Appeal Tribunals, and whether it is given the same meaning for an error in the appreciation of facts as for the excess of power in the context of Article 52 of the ICSID Convention. The same accounts for the standard of 'serious'.⁵⁹³

The UNCITRAL arbitration rules in particular allow for separate decisions on *inter alia* jurisdiction to be adopted by the tribunal throughout the proceedings. Although nothing in the agreements currently prevents the Tribunal from adopting a similar practice, the appeal procedure does not address whether separate decisions would equally become subject to review.⁵⁹⁴ Only the proposed agreement with Mexico explicitly accounts for the possibility of procedural bifurcation, and tasks the trade committee with adopting appropriate rules on how to address this issue upon appeal.⁵⁹⁵

The Appeal Tribunal may uphold, modify or reverse the award.⁵⁹⁶ The EU-Singapore IPA Appeal Tribunal shall refer all cases back to the Tribunal, which must revise the provisional award accordingly.⁵⁹⁷ The EU-Vietnam Appeal Tribunal, on the other hand, is furnished with extensive powers to conclude the legal analysis, and may refer cases back to the Tribunal only if the facts established by the Tribunal are insufficient to apply its own legal findings.⁵⁹⁸ The EU-Mexico FTA does not address the Appeal Tribunal's power to remand. It follows that the final awards

⁵⁹¹ Articles 8.28(2)(a) and (b) CETA; Articles 3.19(1)(a) and (b) of the EU-Singapore IPA; Articles 3.54(1)(a) and (b) of the EU-Vietnam IPA; Articles 30(1)(a) and (b) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁹² Article 8.28(2)(c) CETA; Article 3.19(1)(c) of the EU-Singapore IPA; Article 3.54(1)(c) of the EU-Vietnam IPA; Article 30(1)(c) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁹³ For a detailed discussion of variances in the interpretation and application of 'manifest' in the context of the ICSID annulment rules, see Laurens J. E. Timmer, 'Manifest excess of powers as a ground for the annulment of ICSID awards' (2013) 14(5) *The Journal of World Investment & Trade* 775-803, 785 *et seq.*, particularly 789-90.

⁵⁹⁴ Sardinha points out that it is unclear from the drafting of the ICS whether separate decisions on *inter alia* jurisdiction are also subject to review, see Elsa Sardinha, 'Towards a new horizon in investor-state dispute settlement? Reflections on the investment tribunal system in the Comprehensive Economic Trade Agreement (CETA)' (2017) 54 *The Canadian Yearbook of International Law* 311-65.

⁵⁹⁵ Article 30(6) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁹⁶ Article 8.28(2) CETA; Article 3.19(3) of the EU-Singapore IPA; Article 3.54(3) of the EU-Vietnam IPA; Article 30(2) EU-Mexico FTA (Investment Dispute Settlement).

⁵⁹⁷ Article 3.19(3) of the EU-Singapore IPA.

⁵⁹⁸ Article 3.54(4) EU-Vietnam IPA.

under the EU-Singapore ICS formation are always adopted by the Tribunal, whereas the finality of the award can arise directly out of the Appeal Tribunals' decision under the agreements with Vietnam and Mexico. Although the Appeal Tribunal's decision is binding on the Tribunal, the power to remand indicates some flexibility in the decision-making process. It remains unclear, however, whether a second application to the Appeal Tribunal is possible where the disputing parties feel that the final award does not adequately reflect the findings of the Appeal Tribunal.⁵⁹⁹

4.3.5 *Other procedural aspects: costs of proceedings, frivolous claims and transparency*

Regarding the costs of proceedings, the ICS adopts as general rule the 'loser-pays' principle, i.e. the losing party will bear the cost of proceedings,⁶⁰⁰ whereas the costs of the ICS are funded jointly by the Contracting Parties.⁶⁰¹ The details and ramifications of this are discussed in more detail below.⁶⁰² Moreover, the ICS Tribunal has the power to reject claims that are manifestly without legal merit,⁶⁰³ and claims unfounded as a matter of law.⁶⁰⁴ In combination with the 'loser-pays' principle, this attempts to insulate the respondent party from incurring costs arising out of frivolous claims.⁶⁰⁵ Lastly it should be noted that the ICS incorporates a high standard of transparency, that endorses the UNCITRAL Transparency Rules and complements these with an extended list of documents to be published.⁶⁰⁶

4.4 The multilateral reform agenda

The ICS initiative was from the outset tailored to addresses some of the most often voiced criticism against traditional investor-state arbitration through a progressive

⁵⁹⁹ Freya Baetens, 'Judicial review of international adjudicatory decisions: A cross-regime comparison of annulment and appellate mechanisms' (2017) 8(3) *Journal of International Dispute Settlement* 432-59, 442.

⁶⁰⁰ Article 8.39(5) CETA; Articles 3.21(1) and (2) EU-Singapore IPA; Article 3.53(4) EU-Vietnam IPA; Article 29(5) EU-Mexico FTA (Investment Dispute Settlement).

⁶⁰¹ Titi (2016a), *op cit.*, 11.

⁶⁰² See *infra* Chapter 8.2.5.

⁶⁰³ Article 8.32 CETA; Article 3.14 EU-Singapore IPA; Article 3.44(1) EU-Vietnam IPA; Article 17 EU-Mexico FTA (Investment Dispute Settlement).

⁶⁰⁴ Article 8.33 CETA; Article 3.15 EU-Singapore IPA; Article 3.45 EU-Vietnam IPA; Article 18 EU-Mexico FTA (Investment Dispute Settlement).

⁶⁰⁵ See *infra* Chapter 8.2.6.

⁶⁰⁶ Articles 8.36(1) and (4) CETA; Articles 3.46(1), (2) and (4) EU-Vietnam IPA; Article 19(10) EU-Mexico FTA (Investment Dispute Settlement); notably the EU-Singapore makes no reference to the UNCITRAL Mauritius Convention although the UNCITRAL Secretariat is to act as repository for all documents, see Article 5 of Annex 8 to the EU-Singapore IPA.

institutionalization of investor-state adjudication.⁶⁰⁷ Yet, the establishment of bilateral investment courts was not an aim in itself, but merely a vehicle for gradual and progressive multilateral ISDS reform.⁶⁰⁸ The Commission is committed to the creation of a multilateral investment court that, in time, would replace all bilateral ICS.⁶⁰⁹ Recently, work on a multilateral investment court has picked up pace in UNCITRAL,⁶¹⁰ and the Commission, on mandate from the Council,⁶¹¹ has played an important role in this process.⁶¹² The present section briefly explores similarities and differences in the multilateralization clauses of the various ICS formations, and discusses the two paths leading to a multilateral investment court, i.e. the merging of existing bilateral ICS formations and the separate and parallel negotiation of such a permanent body.

4.4.1 *Multilateralization clauses*

The ICS incorporates firm commitment to multilateral ISDS reform. The inclusion of declaratory treaty language to address shortcomings of investor-state arbitration is no novel policy instrument. In the aftermath of the early NAFTA disputes the US Trade Promotion Authority Act of 2002 provided political impetus for the search of an appeals mechanism in investment treaty arbitration.⁶¹³ Programmatic treaty language committing to the establishment of a treaty-centred appeals mechanism

⁶⁰⁷ European Commission, Staff Working Document, 'Impact assessment on multilateral reform of investment dispute resolution accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes' (SWD(2017) 302 final), 13 September 2017 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN>> 10.

⁶⁰⁸ European Commission, 'Concept Paper on investment in TTIP and beyond – the path for reform', 5 May 2015 accessible at <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> 11.

⁶⁰⁹ Commission, 'Impact assessment on multilateral reform of investment dispute resolution' (2017), *op cit.*, 58.

⁶¹⁰ UN, General Assembly, 'Report of the United Nations Commission on International Trade Law, fiftieth session, 3-21 July 2017' (Seventy-second session, Supplement No. 17, A/72/17) paras. 263-64.

⁶¹¹ Council of the European Union, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (12981/17 ADD 1), 1 March 2018 accessible at <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> .

⁶¹² e.g. European Commission, 'Submission of the European Union and its Member States to UNCITRAL Working Group III - Establishing a standing mechanism for the settlement of international investment disputes', 18 January 2019 accessible at <http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf> for a discussion on the Union's role in the multilateralisation process see *infra* section 5.3.3.

⁶¹³ The Act effectively inserted as a principal trade negotiating objective, to provide for “an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements”, see Trade Promotion Authority Act of 2002, P.L. 107-210, sec 2102(b)(3)(g)(iv), 19 U.S.C § 3802(b)(3)(G)(iv).

started to appear in the US Model BITs of 2004 and 2012, and all US FTAs and investment agreements adopted on this model.⁶¹⁴ A concrete example is the Dominican Republic-Central America-United States FTA (CAFTA-DR), which promised the formation of a negotiating group within three months of entry into force of the agreement that charged with the task to develop an internal appeals mechanism for investor-state disputes.⁶¹⁵ Similar commitments have since frequently been included in bilateral,⁶¹⁶ and regional agreements.⁶¹⁷ However, the desire for further institutionalization of investment relations proved to be short-lived in light of the fading enthusiasm to push for an appeals facility during the 2006 ICSID reforms.⁶¹⁸

This raises an important question. Are the multilateralization clauses merely expressions of political intention, or firm and concrete commitments to engage in multilateral ISDS reform? The treaty language included in the various ICS formations varies slightly and warrants a more detailed discussion. CETA, for instance, reads:

“The Parties *shall* pursue with other trading partners the establishment of a multilateral investment tribunal *and* appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee *shall* adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.”⁶¹⁹ (emphasis added)

CETA, thus, commits Canada and the Union to support each other’s ambitions and to actively engage with other trading partners in the establishment of a multilateral investment court and appellate mechanism. Although a decision of the CETA Joint Committee is formally required, the creation of a multilateral mechanism would inevitably lead to a transition of investment dispute resolution from the CETA ICS to the multilateral investment court.

The EU-Singapore IPA likewise establishes a binding commitment to engage with other trading partners in the establishment of such a permanent body. Unlike the CETA ICS, however, the EU-Singapore trade committee merely has to “*consider*

⁶¹⁴ See, for instance, Singapore-US FTA of 2003, Art.15.19(10); Chile-US FTA of 2004, Art. 10.19(10); Uruguay-US BIT of 2005, Art. 28(10); US Model BIT of 2004, Art. 28(10); US Model BIT of 2012, Art. 28(10).

⁶¹⁵ Dominican Republic-Central America-United States FTA of 2004, Art. 10.20(10).

⁶¹⁶ See, for instance, Canada-Korea FTA of 2014, Annex 8-E; Australia-China FTA of 2014, Art. 9.23; Australia-Korea BIT of 2014, Art. 11.20.13 and Annex 11-E; Korea-New Zealand FTA of 2015, Art. 10.26.9.

⁶¹⁷ See, for instance, Trans-Pacific Partnership Agreement, Article 9.22(11).

⁶¹⁸ Parra (2014), *op cit.*, 9.

⁶¹⁹ Article 8.29 CETA.

adopting a decision to provide that investment disputes under this Section will be resolved pursuant to that multilateral mechanism [...].”⁶²⁰ The EU-Vietnam IPA demonstrates even more significant variations.

“The Parties *shall enter into negotiations* for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement. The Parties *may consequently agree on the non-application of relevant parts of this Section*. The Trade Committee *may adopt* a decision specifying any necessary transitional arrangement.”⁶²¹ (emphasis added)

Whereas the binding commitment to establish a multilateral investment court is much more concrete, it does not require that a permanent body, thus created, necessarily entails two instances. Even more problematic, a literal reading of the provision reveals that the negotiation of a multilateral appeals mechanism alone would not fulfil the requirements of the EU-Vietnam multilateralization clause. Nor is the disapplication of the ICS an inevitable consequence of the creation of a multilateral investment court. Rather once created the Union and Vietnam are at liberty to consider using the multilateral investment court instead of the ICS.

The proposed EU-Mexico FTA provides for an equally vague commitment that merely encourages the Union and Mexico to cooperate on finding a multilateral solution—a purely political declaration of intent.

“The Parties *should cooperate* for the establishment of a multilateral mechanism for the resolution of investment disputes.

Upon the entry into force between the contracting parties of an international agreement providing for such multilateral mechanism applicable to disputes under this Agreement, the relevant parts of this Section *shall be suspended* and the Joint Council *may adopt* a decision specifying any transitional arrangement.”⁶²² (emphasis added)

Although all of these clauses entail a legally binding commitment on the Union to pursue, jointly with its trading partners, negotiations over a multilateral investment court, the commitments vary significantly across the individual ICS formations.

4.4.2 ‘Creeping’ multilateralization

The 2015 concept paper of the Commission conveys the view that a future multilateral investment court should rest on the foundation of ICS. In essence, the ICS should become a standard feature of IIAs concluded by the Union and gradually

⁶²⁰ Article 3.12 EU-Singapore IPA, emphasis added.

⁶²¹ Article 3.41 EU-Vietnam IPA.

⁶²² Article 14 EU-Mexico FTA (Investment Dispute Settlement).

transform into a single permanent body with a reach over multiple agreements and trading partners.⁶²³ This has given room for the proposition that the ICS is essentially a blueprint for a prospective multilateral investment court, which would be achieved through gradually merging all existing ICS formations.⁶²⁴ Such an approach requires the effective cross-utilization of resources, and particularly adjudicators. Instead of assigning nine to fifteen new Tribunal members with every bilateral EU trade and investment agreement this approach would ultimately require that a single pool of ICS members was to be established from which adjudicators are assigned flexibly to various bilateral ICS formations. The lack of strict nationality requirements for national-affiliated ICS members could facilitate such an approach if it would allow members to serve as national as well as non-national members on various ICS formations. Instead of merging the various bilateral investment courts into one multilateral structure, it has alternatively been suggested to integrate ICS formations as permanent divisions or chambers of an international investment tribunal.⁶²⁵

The step-by-step approach would, however, present insurmountable organizational challenges. Depending on the number of ICS formation already in operation before such a process is being initiated, an emergent multilateral investment court would likely inherit the costly and administratively complex institutional set-up of the ICS. Consider only that the WTO AB operates efficiently with only 7 members, whereas a ‘creeping’ multilateralization would potentially morph hundreds of adjudicators into a single body. The ICSID proposal for an Appeals Facility envisaged 15 members. That is less than the three currently envisaged ICS appeals mechanisms combined. The Commission has, indeed, recognized the high costs of operating multiple ICS, appreciating the cost of every individual ICS with one case before the Tribunal and one case on appeal at a total of 1,5m EUR per year.⁶²⁶

More importantly, the initiative would lack true multilateral character as it would be owned entirely by the Union and powerful trade allies.⁶²⁷ Even if it were designed as an opt-in convention, allowing application beyond the Union’s own investment

⁶²³ Commission, ‘Concept Paper on investment in TTIP and beyond – the path for reform’ (2015), *op cit.*, 11.

⁶²⁴ Titi (2016a), *op cit.*, 27.

⁶²⁵ Rob Howse, ‘Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes’ (2015) accessible at <https://cdn-media.web-view.net/i/fj3t288ah/Courting_the_Criticsdraft1.pdf>.

⁶²⁶ Commission, ‘Impact assessment on multilateral reform of investment dispute resolution’ (2017), *op cit.*

⁶²⁷ Stephan W. Schill, ‘Das TTIP-Gericht: Keimzelle oder Stolperstein für echte Multilateralisierung des internationalen Investitionsrechts?’, *Verfassungsblog*, 25 November 2015 <accessed at <https://verfassungsblog.de/das-ttip-gericht-keimzelle-oder-stolperstein-fuer-echte-multilateralisierung-des-internationalen-investitionsrechts/>>.

relations, it is ignorant of developing countries' interests that would not be able to meaningfully participate in such a process.⁶²⁸ Notably, previous chapters have already alluded to the fact that the underrepresentation of developing countries constituted one of the factors contributing to the failure of the MAI initiative. Even more importantly, the selection of adjudicators would represent the preferences of the Union and its trading partners. Alvarez Zárte observed that "institutional legitimacy is a by-product of the usage of democratic procedures throughout their creation."⁶²⁹ Unless a multilateral investment court reflects a multilateral consensus, it would likely be rejected as lacking institutional legitimacy.

In light of these considerations it would be unwise to place too much weight on the prospect of a future multilateralization of the ICS. Indeed, the Commission's active participation in the UNCITRAL process is tantamount of a policy that pursues the multilateral investment court in parallel to—and separate of—the ICS.⁶³⁰

4.4.3 *The UNCITRAL reform process*

Previous chapters of the present study have already elaborated upon a range of multilateral reform attempts of the investment treaty regime in *inter alia* the WTO, the OECD and ICSID. The issue resurfaced more recently in UNCTAD⁶³¹ where the need for reform was unequivocally embraced in its World Investment Report of 2015,⁶³² as well as the 2015 UNCTAD Policy Framework for Sustainable Development.⁶³³ The UNCTAD road map for reform of IIAs was thus developed as a baseline for improvement.⁶³⁴ The creation of a permanent adjudicative body

⁶²⁸ Alvarez Zárte argues that a multilateral investment court established on the foundations of the ICS would almost certainly disadvantage small and medium size economies, see José M Alvarez Zárte, 'Legitimacy concerns of the proposed multilateral investment court: Is democracy possible?' (2018) 59(8) *Boston College Law Review* 2765-90, 2769.

⁶²⁹ Alvarez Zárte (2018), *op cit.*, 2773.

⁶³⁰ The EU-Canada joint discussion paper already singled out UNCITRAL as an appropriate negotiating forum in 2016, see European Commission and Government of Canada, 'Discussion paper: Establishment of a multilateral investment dispute settlement system', 13 and 14 December 2016 accessible at <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf> 7-8.

⁶³¹ UNCTAD, 'Reform of investor-state dispute settlement: in search of a roadmap' (2013), *op cit.*

⁶³² UNCTAD, 'World investment report' (2015), *op cit.*, 152.

⁶³³ UNCTAD, 'Investment policy framework for sustainable development' (UNCTAD/DIAE/PCB/2015/5) accessible at <<https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1437>> 79 and 107-08.

⁶³⁴ UNCTAD, 'World investment report 2016: Investor nationality: Policy challenges' (UNCTAD/WIR/2016) accessible at <https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> 108-16; UNCTAD, 'World Investment Report 2017: Investment and the digital economy'

and/or appellate mechanism was flagged as one of the available policy choices, that also found some appeal amongst scholars and practitioners.⁶³⁵ Work on structural ISDS reform suddenly accelerated when the UNCITRAL Working Group III was in early 2017 endowed with a mandate to explore alternative approaches to ISDS reform.⁶³⁶

The endowment of external competence over FDI has situated the Union at the core of this re-emergent multilateral reform initiative. The deteriorating public trust in ISDS was, thus, not only reflected in the Union's public consultation and concomitant ICS initiative. Together with Canada the Union presented co-sponsored discussion papers as early as July 2016 at the UNCTAD World Investment Forum in Nairobi⁶³⁷ and more recently at the World Economic Forum in Davos.⁶³⁸ Through its active role in these developments, the Union emerged as a principal reform actor. Alvarez Zárte suggests in particular that the Union used its economic and political weight to impose its conviction for structural ISDS reform on the wider world.⁶³⁹ In this light the ICS emerges as an instrument to set the multilateral reform agenda, and influence a global consensus on ISDS reform.⁶⁴⁰ An evolving body of literature exploring the desirable features of a multilateral investment court has since emerged.⁶⁴¹ This is not, however, the subject of the present study. This section is limited to a short review of the developments in UNCITRAL in the context of the Union's ICS initiative.

On its forty-ninth session in June and July 2016, the UNCITRAL Secretariat presented a research paper that it had commissioned from the Centre for International Dispute Resolution (CIDS)—a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva

(UNCTAD/WIR/2016) accessible at <https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf> 119 *et seq.*

⁶³⁵ Rainer Geiger, 'Multilateral approaches to investment: The way forward' in José E. Alvarez and Karl P. Sauvart (eds), *The evolving international investment regime: Expectations, realities, options* (Cambridge University Press: 2011) 153-73, 168; Michael Goldhaber, 'Wanted: A world investment court' (2004) 1(3) *Transnational Dispute Management* 1-4; David M. Howard, 'Creating consistency through a world investment court' (2017) 41(1) *Fordham International Law Journal* 1-52, 54-57.

⁶³⁶ UN, (2017), *op cit.*, paras. 263-64.

⁶³⁷ European Commission and Government of Canada, Co-sponsored non-paper, 'Reforming investment dispute settlement: Considerations on the way towards a multilateral investment dispute settlement mechanism', 17-21 July 2016 accessible at <[http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20\(rev2\)\(clean\).pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20(rev2)(clean).pdf)> .

⁶³⁸ European Commission and Government of Canada, 'The case for creating a multilateral investment dispute settlement mechanism', 20 January 2017 accessible at <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf> .

⁶³⁹ Alvarez Zárte (2018), *op cit.*, 2774.

⁶⁴⁰ Titi (2016b), *op cit.*, 5.

⁶⁴¹ Howse (2017), *op cit.*, 220-24; Howard (2017), *op cit.*, 44-51.

Law School.⁶⁴² The study explores the possibilities for the establishment of an International Tribunal for Investment ITI and an appeals mechanism, modelled on the design of the Mauritius Convention. The inherent advantage of the Mauritius Convention, which was adopted in 2014 in order to extend the 2013 UNCITRAL transparency rules to existing investment agreements, is its opt-in character. Its most defining feature, perhaps, its consent-giving characteristic by virtue of which investors can take advantage of the transparency rules even in situations where the host, but not the home country is privy to the Mauritius Convention. It imports the UNCITRAL transparency rules “into the fragmented treaty-by-treaty regime by way of one single multilateral instrument.”⁶⁴³ In brief, the research paper proposes three steps, the creation of the ITI, the establishment of an appeals mechanism, and the negotiation of a multilateral opt-in convention that regulates access to these institutions. Suffice it to note that the Commission has likewise emphasized the use of an opt-in convention for the creation of a permanent multilateral body for the adjudication of investment disputes.⁶⁴⁴

With respect to the institutional features of the ITI and appeals mechanism the paper proposes to retain an arbitration-based model with consensual—non-mandatory—jurisdiction, as opposed to a more court-like structure.⁶⁴⁵ With this, the authors of the CIDS study attempt to guarantee the recognition and enforcements of awards.⁶⁴⁶ Similar to the decentral approach taken in ICSID, awards of the ITI would escape challenges before domestic courts. The paper furthermore suggests a built-in control system, but favours consultation and preliminary references over an appellate mechanism.⁶⁴⁷ The election of members to the ITI is best achieved through a body that reflects a multilateral consensus (e.g. the UN General Assembly), but is wary of the political element involved in those structures. In terms of the constitution of individual panels or divisions, the authors propose a minimum involvement of investors who are empowered to select arbitrators from a semi-permanent roster.⁶⁴⁸ The paper also discusses a number of conflict-of-interest arrangements and nationality restrictions, and discusses international legal aspects

⁶⁴² UNCITRAL, 'Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement' (Forty-ninth session, 2016, A/CN.9/890) .

⁶⁴³ 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' (2016), Center for International Dispute Settlement, p. 30.

⁶⁴⁴ Commission, 'Impact assessment on multilateral reform of investment dispute resolution' (2017), *op cit.*, 50.

⁶⁴⁵ Kaufmann-Kohler and Potestà (2016), *op cit.*, 34 and 52 *et seq.*

⁶⁴⁶ *Ibid.*, pp. 48-51.

⁶⁴⁷ Preliminary references as an alternative for appeals mechanisms in investment arbitration was already discussed in the context of the MAI, see *Ibid.*, 106-07

⁶⁴⁸ Geiger (2002), *op cit.*, p. 62.

on the relationship of an ITI and appeals mechanism in great detail. Suffice it to say that the structure of the appeals mechanism follows in large part that of the ITI, although both instances are envisaged as two separate international legal institutions.

The institutional set-up of the ITI is quite different from the ICS initiative. Whereas the ITI is comfortably rooted in arbitration, the ICS represents a fundamental move towards judicial features in investor-state adjudication. The appellate mechanism, a *condition sine qua non* for the ICS, represents the less-favoured alternative for multilateral reform. Considering that not all nationalities could be represented amongst the adjudicators, the proposed system for the election of members through outside bodies such as the International Court of Justice guarantees in this respect an effective and impartial selection process that is more adequate for a multilateral setting.

On the basis of the CIDS paper, the UNCITRAL Working Group III focused in its 34th and 35th session on identifying areas that a multilateral ISDS reform initiative would necessarily have to address,⁶⁴⁹ including procedural aspects (i.e. duration and costs, transparency, and frivolous and non-meritorious claims), the coherence and consistency of outcomes including the establishment of an appeals mechanism, and the independence of adjudicators.⁶⁵⁰ During its 36th session the UNCITRAL Working Group III ultimately decided that reform was desirable, and to advance on its mandate in April of 2019 with developing a work plan.⁶⁵¹ It should be noted that the Union in its submissions reflected the general tenor of deliberations in UNCITRAL Working Group III regarding the inherent concerns with investor-state arbitration.⁶⁵² However, although work in UNCITRAL has not

⁶⁴⁹ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, Vienna, 27 November - 1 December 2017' (Fifty-first session, New York, 25 June–13 July 2018, A/CN.9/930/Rev.1) accessible at <<https://undocs.org/en/A/CN.9/930/Rev.1>> ; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, New York, 23–27 April 2018' (Fifty-first session, New York, 25 June–13 July 2018, A/CN.9/935) accessible at <<https://undocs.org/en/A/CN.9/930/Rev.1>> .

⁶⁵⁰ UNCITRAL, 'Possible reform of ISDS', *op cit*.

⁶⁵¹ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, Vienna, 29 October – 2 November 2018' (Fifty-second session, Vienna, 8–26 July 2019, A/CN.9/964) accessible at <<https://undocs.org/en/A/CN.9/964>> paras. 135 and 139.

⁶⁵² UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union' (Thirty-fifth session, New York 23-27 April 2018, A/CN.9/WG.III/WP.145) accessible at <<https://undocs.org/en/A/CN.9/WG.III/WP.145>> ; UNCITRAL, 'EU submission to UNCITRAL WG III (37th session)', *op cit*.

yet progressed to the stage of considering concrete policy options, the Commission has consistently advocated for the establishment of a permanent body.⁶⁵³

In preparation of the April 2019 meeting, the Union submitted more concrete views on the establishment of a standing mechanism for the adjudication of investment disputes. Accordingly, the Union proposed the establishment of a two-tier judicial body, with institutional and procedural features that bear close resemblance to the ICS initiative, including the Appeal Tribunal's power to remand, the manifest error in the appreciation of fact (including domestic law) as a ground for appeal, and security for cost as a procedural requirement for the initiation of appeals.⁶⁵⁴ Furthermore, judges on the multilateral investment court should be eligible to the highest judicial office in their respective countries or jurists of recognized competence.⁶⁵⁵ A standing multilateral court should not stand in the way for the Contracting Parties to an IIA to adopt an authoritative interpretation.⁶⁵⁶ The most notable divergence from its ICS proposal, the Union proposes the appointment of judges for a non-renewable term of nine years, and favours the election of members through an external authority.⁶⁵⁷ It should be reiterated at this point that it still remains to be seen whether the creation of a standing mechanism for the adjudication of investment disputes will emerge by multilateral consensus as the favoured policy option for ISDS reform.

4.5 Interim conclusion

It emerges from this study of the four ICS formations that the Commission's reform proposal incorporates a number of unique institutional and procedural features that deviate from traditional investor-state arbitration. With respect to the method of appointment of arbitrators and their independence, but also regarding the consistency of awards, the costs of proceedings and other relevant procedural aspects including restrictions on parallel proceedings, frivolous claims and the transparency of the proceedings, the ICS addresses claims made against the legitimacy of investor-state arbitration. Chapter 8.2 will evaluate the ICS in light of these factors in more detail. Other features, such as the identification of respondent states, the applicable law clause, the exclusion of direct effect and the carve-out of state aid measures appears to regulate the ICS tribunals' approach to EU law, and the EU legal order. These issues are analysed in more detail in Chapters 8.3 and 8.4.

⁶⁵³ UNCITRAL, 'EU submission to UNCITRAL WG III (35th session)', *op cit.*, paras. 7-11 and 37; UNCITRAL, 'EU submission to UNCITRAL WG III (37th session)', *op cit.*, para. 11

⁶⁵⁴ *Ibid.*, paras. 13-15.

⁶⁵⁵ *Ibid.*, para. 20.

⁶⁵⁶ *Ibid.*, para. 26.

⁶⁵⁷ *Ibid.*, para. 19.

This Chapter also illustrated that the drafting of ICS has gradually improved from CETA, one of the first ICS proposals, through to the recent EU-Singapore IPA. The EU-Vietnam IPA, though updated with the separation of the investment chapter from the previous EU-Vietnam trade and investment agreement, has not materially changed and continues to resemble many of the initial policy choices. The EU-Mexico ICS proposal likewise reflects some of the less developed drafting of CETA, although the lack of detail and remaining inaccuracies could be ascribed to the early stage of the proposal that merely represents an agreement in principle. This supports the initial assumption that the ICS was a primarily a response to rising pressure from civil society and the EP, rather than a well-developed policy choice.⁶⁵⁸ Nonetheless, the significant overlaps in the institutional design across all four ICS formations likewise suggests that the Commission's policy preferences *vis-à-vis* structural ISDS reform have largely settled. In an overall appraisal of the ICS as a reform initiative, inaccuracies in the drafting of the ICS in CETA and the EU-Vietnam IPA, or the proposed EU-Mexico FTA, should therefore be taken with a pinch of salt, and considered in light of the more developed provisions of the EU-Singapore IPA.

Lastly, this Chapter investigated the multilateralization clauses that, as a central design feature of all ICS formations, establishes platforms for the Union to cooperate with its trading partners towards multilateral ISDS reform. At the same time, the Union is very active in the UNCITRAL reform process where it has proposed reforms that broadly resemble the ICS. Being a brain child of the Commission, the ICS reflects intentions to dominate the multilateral reform process by imposing pre-established policy preferences through, on the one hand, direct participation in the multilateral reform process, and, on the other hand, locking trade partners into the ICS paradigm by virtue of concluding individual IPAs. Consequently, the Union's role in the multilateral reform process and the ICS must be understood as mutually reinforcing, and mutually limiting policy developments. The success of the ICS is, thus, tied to the multilateral reform agenda, an issue that is discussed in more detail in Chapter 8.4.

⁶⁵⁸ See *supra* introduction to this Chapter.

PART III
THE CONSTITUTIONAL FRAMEWORK

5 TREATY-MAKING COMPETENCE

This Chapter explores the legal framework determining the division of treaty-making competences between the EU and its Member States, and discusses its implications for the conclusion of EU IIAs including ISDS provisions. This has a direct bearing on the Union's capacity to conclude IIAs featuring the ICS, for the Union must be endowed with the requisite treaty-making competence *ratio materiae* over foreign investment, and more specifically over the resolution of investor-state disputes. The CJEU recently concluded that the EU lacked exclusive treaty-making competences for the conclusion of the EU-Singapore Free Trade Agreement. Discussing the Court's reasoning, this Chapter argues that although the legal framework does not dictate that future IIAs with the ISDS provisions must be concluded jointly with the Member States, it exposes EU foreign investment policy to diverging policy preferences in the Member States. In other words, the present Chapter lays the groundwork for Chapter 8.1 that addresses the concrete implications that the incomplete treaty-making competence carries for the ICS.

This Chapter begins with a brief overview over the emergence of the EU foreign investment policy as a logical continuation in the evolution of the CCP (Section 5.1). Subsequently, Section 5.2 provides some preliminary remarks on the Union's international legal personality, the principle of conferral and the requirement to identify an appropriate legal basis for legal activity. These concepts are fundamental to understand the existence and nature of the Union's external trade and investment competences. The remainder of this Chapter elaborates in more detail on the Union's treaty-making competence under the CCP, distinguishing between the existence of external competence (section 6.3) and the nature of such competence (section 6.4). It transpires from the discussions in these sections that the division of competences over foreign investment activity is strictly divided along an otherwise nebulous line that separates direct investment from other forms of investment, and offers some clarification on the definition of FDI in Union law (section 6.5). Lastly, Section 5.6 introduces the concept of 'mixture'.

5.1 Preliminary remarks on the EU foreign investment policy

The present Chapter discusses in detail the nature of the Union's treaty-making competences over IIAs with ISDS provisions, and demonstrates that the Union's foreign investment policy is fundamentally characterized by a disassociation of 'direct' from other forms of investment. This section provides a brief overview of the developments that have led to the inclusion of FDI into the CCP, and which are sown into the context that inevitably informs our understanding of the Union as an actor in ISDS reform. More importantly, it illustrates how developments under the umbrella of the CCP are inseparable from the historical, political and ideological underpinnings of the modern investment treaty regime that have been discussed in detail in Chapter Two.

5.1.1 *A brief history of the common commercial policy*

The primary economic policy objective behind European integration was undoubtedly the creation of a single market. This, however, logically necessitated concerted external trade action, such as the creation of a common customs tariff.⁶⁵⁹ It is not surprising, therefore, that the Treaty of Rome already endowed the Union with treaty-making competence in commercial matters⁶⁶⁰—one of the very few external policy fields for which competence was explicitly recognized in the founding Treaty.⁶⁶¹ Since its inception the CCP has undergone significant developments spurred by an active CJEU and gradually consolidated through a number of Treaty amendments. External competence over FDI was included into the CCP with the Treaty of Lisbon. Article 207(1) TFEU now reads:

“The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.” (emphasis added)

The meaning of treaty-making competence over FDI requires an understanding of the evolution of the CCP.

⁶⁵⁹ Article 9(1) EEC Treaty.

⁶⁶⁰ Article 113(3) EEC Treaty.

⁶⁶¹ Koutrakos (2015), *op cit.*, 17.

5.1.1.1 Towards an independent policy field

The founding Treaties tied the establishment of a customs union to the CCP as “Siamese twins”.⁶⁶² This view finds support in the drafting of Article 3(b) EEC, but is also reflected in case law of the CJEU in the early 1970’s. The CJEU in *Bock*,⁶⁶³ for instance, observed that following the expiry of the transitional period the provisions of commercial policy now had to be “interpreted within the general framework of the Treaty”.⁶⁶⁴ More concretely, this meant that the implementation of the CCP was intimately linked to the operation of the internal market.⁶⁶⁵ Commercial policy was, in other words, perceived of as an external dimension of the internal market.⁶⁶⁶

Subsequent cases drew equally on the link between commercial policy and the common market. This was particularly pronounced in *Donckerwolcke*⁶⁶⁷ and *Bulk Oil*⁶⁶⁸ where the CJEU demonstrated willingness to grant significant flexibility to the Member States in the implementation of import and export policy with an eye on achieving the internal market.⁶⁶⁹

Internationally the development of the CCP took place within the context of an emergent multilateral trade regime under GATT.⁶⁷⁰ This was already recognized by the founding Treaties. Article 110 EEC, thus, referred explicitly to “the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers”. The CJEU in its seminal

⁶⁶² Robert Schütze, *From dual to cooperative federalism: The changing structure of European law* (Oxford University Press: 2009b) 167; Henri de Waele, *Layered global player: Legal dynamics of EU external relations* (Springer: 2011) 64.

⁶⁶³ Case 62/70 *Werner A. Bock v Commission* [1971], EU:C:1971:108.

⁶⁶⁴ Case 62/70 *Bock op cit.*, para. 15.

⁶⁶⁵ Case 62/70 *Bock op cit.*, para. 14.

⁶⁶⁶ Angelos Dimopoulos, ‘The effects of the Lisbon Treaty on the principles and objectives of the common commercial policy’ (2010) 15(2) *European foreign affairs review* 153-70, 154; Christopher Ohler, ‘Die Umsetzung der Gemeinsamen Handelspolitik nach dem Vertrag von Lissabon’ in Thomas Eilmansberger, Stefan Griller and Walter Obwexer (eds), *Rechtsfragen der Implementierung des Vertrags von Lissabon* (Springer: 2011) 307-340, 408.

⁶⁶⁷ Case 41/76 *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976], EU:C:1976:182.

⁶⁶⁸ Case C-174/84 *Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company* [1986], EU:C:1986:60.

⁶⁶⁹ for a discussion of the incomplete character of the commercial policy by the early 1990’s, see Marise Cremona, ‘The completion of the internal market and the incomplete commercial policy of the European Union’ (1990) 15(4) *European Law Review* 283-97; Koutrakos (2015), *op cit.*, 25-26; Dimopoulos argues that uniformity was relevant primarily in areas of the internal market that were fully harmonized, see Dimopoulos (2010), *op cit.*, 155.

⁶⁷⁰ Pieter Jan Kuijper and Frank Hoffmeister, ‘WTO influence on EU Law: Too close for comfort?’ in Ramses A. Wessel and Steven Blockmans (eds), *Between autonomy and dependence: The EU legal order under the influence of international organisations* (T. M. C. Asser Press: 2013) 131-58, 137-39.

*International Fruit*⁶⁷¹ judgement reasoned that this provision “seeks the adherence of the Community to the same aims as those sought by the General Agreement”.⁶⁷² With the expiry of the transitional period in 1968 the Union superseded Member States in multilateral trade negotiations.⁶⁷³ Until then, the CCP was a forum for Member States to coordinate their commercial relations with third countries. As of January 1970 decision-making over CCP was exercised by qualified majority based on uniform principles, positioning the Union as an international trade policy actor independent of the policy preferences of an individual Member State.⁶⁷⁴ Historically, therefore, the development of the common commercial policy is framed by an era that was characterised by the emergence of neo-liberalism as the dominant ideology underlying international economic governance, its institutionalization with the international financial institutions, the WTO, and its judicialization through the proliferation of international courts and tribunals (and there amongst ICSID).⁶⁷⁵ The integration of the common market into the world trading system was not, therefore, a neutral process but served, as Thym aptly observed, at least partly to protect “the economic relations with (former) colonies”.⁶⁷⁶

This became more pronounced as the CCP developed to become an independent field of Union policy. The CJEU in Opinion 1/78 acknowledged that while the liberalization of trade in goods was perhaps the dominant underpinning of the multilateral trading system at the time the Treaty of Rome was drafted, this alone could not lead to an interpretation that would lock the scope of the CCP to a particular point in time.

“[I]t would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down [...] an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms [...]. A ‘commercial

⁶⁷¹ Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972], EU:C:1972:115.

⁶⁷² Joined Cases 21 to 24/72 *International Fruit Company op cit.*, para. 13.

⁶⁷³ Joined Cases 21 to 24/72 *International Fruit Company op cit.*, paras. 14-18; Joined cases 267, 268 and 269/81 *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983], EU:C:1983:78, para. 17.

⁶⁷⁴ Articles 111(3) and 113(4) EEC; note that this is largely symbolic as the Council continues to prefer acting by consensus rather than a formal vote.

⁶⁷⁵ For a discussion, see *supra* Chapter X.

⁶⁷⁶ Daniel Thym, 'Foreign affairs' in Armin von Bogandy and Jürgen Bast (eds), *Principles of European constitutional law*, 2nd edn (Hart Publishing: 2009) 309-44, 316.

policy' understood in that sense would be destined to be nugatory in the course of time."⁶⁷⁷

The Court, thus, moved away from the narrow conception of the CCP it had espoused in *Bock*,⁶⁷⁸ establishing that commercial policy reaches beyond the traditional aspects of international trade such as customs tariffs and quantitative restrictions.⁶⁷⁹ The judgment certainly positioned the Union as an international actor with extensive powers to adopt international trade policies.⁶⁸⁰ This distancing from historical interpretation notwithstanding, the CJEU was unwilling to rid itself of the close link between the CCP and the internal market. In fact, the Court's conclusions in Opinion 1/78 were supported by the risk that a restrictive interpretation of the CCP would pose to intra-Union trade "by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries".⁶⁸¹ Hence, the CCP grew incrementally into a common policy with its own objectives and uniform principles,⁶⁸² albeit intrinsically linked to the establishment and development of the internal market.

5.1.1.2 Towards an integrated policy field

The realities of international commercial relations with emerging links between international trade and related policy areas became tangible for the Union in the adoption of a system of generalized tariff preferences. Charged with the question how commercial policy related to development policy in the context of the Treaties, the CJEU observed that a link between these policy areas that had already been recognized by UNCTAD and in the context of GATT also extend to the CCP.⁶⁸³ In spite of embracing a dynamic conception of commercial policy that was not ignorant of the realities of international commerce, the Union's external competence under the CCP was not, however, unlimited. This is aptly demonstrated by the Union's attempt to conclude the WTO agreements. The 1980's experienced a significant expansion of the services sector, exceeding even trade in goods. This was reflected in the Uruguay Round GATT negotiations, which resulted in the adoption of the WTO Agreements that integrated *inter alia* trade in services and trade-related aspects of intellectual property rights into the multilateral trading system.⁶⁸⁴ In its

⁶⁷⁷ Opinion 1/78 *International Agreement on Natural Rubber* [1979], EU:C:1979:224, para. 44.

⁶⁷⁸ Case 62/70 *Bock*, *op cit.*

⁶⁷⁹ Opinion 1/78 *International Agreement on Natural Rubber* *op cit.*, para. 45.

⁶⁸⁰ Schütze (2009b), *op cit.*, 169.

⁶⁸¹ Opinion 1/78 *International Agreement on Natural Rubber* *op cit.*, para. 45.

⁶⁸² Koutrakos (2015), *op cit.*, 30.

⁶⁸³ Case 45/86 *Commission of the European Communities v Council of the European Communities (General Tariff Preferences)* [1987], EU:C:1987:163, paras. 17-19.

⁶⁸⁴ de Waele (2011), *op cit.*, 69.

WTO opinion⁶⁸⁵ the CJEU concluded that teleological interpretive methods alone could not bridge the substantive scope of coverage between the CCP and the multilateral trading system, which by that time included intellectual property and services trade under the banner of the *WTO*.⁶⁸⁶

The judgment was path-breaking in that it fundamentally defined subsequent Treaty amendments.⁶⁸⁷ It was, thus, in the aftermath of the *WTO* opinion that the Treaty of Amsterdam added a provision authorizing the Commission to enter into international negotiations on services and intellectual property, albeit subject to unanimity in the Council.⁶⁸⁸ The Treaty of Nice refined the substantive scope of CCP, referring to “trade in services” and “commercial aspects of intellectual property rights”, but maintained the caveat of unanimous voting in the Council.⁶⁸⁹ It is notable that this drafting reflected the terminology adopted in the *WTO*, where the relevant agreements are the General Agreement on Trade in Services and the Agreement on Trade-related Aspects of Intellectual Property Rights.

The Constitutional Treaty would not only have removed the caveat of unanimity to fully integrate trade in services and commercial aspects of intellectual property rights into the CCP,⁶⁹⁰ but also added FDI to the Union’s express external competence in commercial matters.⁶⁹¹ Although the Constitutional Treaty was never ratified, the Treaty of Lisbon later took over that drafting *in verbatim*. It is important to emphasize at this point that describing the evolution of the CCP in terms of the Union acquiring external competences is misleading. This is discussed in more detail in subsequent chapters but warrants a few preliminary remarks.

The CJEU pronounced the exclusive nature of CCP already in the 1970’s.⁶⁹² With the Treaty of Lisbon this position was cemented into the EU’s constitutional framework.⁶⁹³ The substantive broadening of the CCP was not, therefore, so much an affirmation of Union treaty-making competence as a confirmation of its exclusivity over relevant aspects of trade policy. In its *WTO* opinion, for instance, the CJEU did not contest that the Union had requisite treaty-making competence, which could be implied from the internal market provisions, but only that this

⁶⁸⁵ Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (WTO Agreements)* [1994], EU:C:1994:384.

⁶⁸⁶ Opinion 1/94 *WTO Agreements op cit.*, paras. 41-47.

⁶⁸⁷ For a comprehensive discussion, see Jacques H. J. Bourgeois, ‘The EC in the WTO and Advisory Opinion 1/94: An Echnernach procession’ (1995) 32(3) *Common Market Law Review* 763-87.

⁶⁸⁸ Article 133(5) EC as amended by Article 2(20) of the Treaty of Amsterdam.

⁶⁸⁹ Article 133(5) EC as amended by Article 2(8) of the Treaty of Nice.

⁶⁹⁰ Markus Krajewski, ‘Of modes and sectors: External relations, internal debates and the special case of (trade in) services’ in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press: 2008) 172-215, 192-94.

⁶⁹¹ Article III-315(1) of the draft Constitutional Treaty, for a discussion see Ceysens (2005), *op cit*; Eilmansberger (2009), *op cit*.

⁶⁹² Opinion 1/75 *OECD Understanding on a Local Cost Standard* [1975], EU:C:1975:145, ECR 1364

⁶⁹³ Article 3(1)(e) TFEU.

competence could not be exclusive.⁶⁹⁴ Similarly, the Union has long engaged in investment-related negotiations, for which shared competence could be derived from the internal market provisions on the free movement of capital.⁶⁹⁵ However, since the CCP is *a priori* exclusive, a substantive extension of external competences for commercial policy strengthened the relative power of the Union to act as an independent actor international trade negotiations. The broadening of the CCP has, in other words, a direct impact on the legislative autonomy of the Member States.

Indeed, this view is supported by recent developments. On the one hand, the CJEU confirmed that the GATS and TRIPs now fall broadly within the framework of exclusive treaty-making competence under Article 207 TFEU.⁶⁹⁶ On the other hand, the recent *EUSFTA* opinion illustrated that the Union now enjoys extensive competence for the negotiation of trade agreements, both under the CCP and an extensive interpretation of implied competence for *inter alia* transport and non-commercial aspects of IP.⁶⁹⁷ The CCP is developing into a horizontal competence, reaching into a large number of related policy fields such as environmental policy,⁶⁹⁸ which is further supported by the establishment of general principles and objectives for external action in Article 21 TEU.⁶⁹⁹ While this holds true for trade-related aspects of the CCP, subsequent chapters demonstrate that the Court has adopted a restrictive reading of the Union's treaty-making competence with respect to investment, and in particular ISDS.

5.1.2 *A comprehensive Union foreign investment policy?*

Since the *WTO* opinion, Treaty amendments have fed into a desire to furnish the Union with international trade competence necessary to act comprehensively within

⁶⁹⁴ Opinion 1/94 *WTO Agreements op cit.*, paras. 98 and 105; for a discussion, see Panos Koutrakos, 'The interpretation of mixed agreements under the preliminary reference procedure' (2002) 7(1) *European foreign affairs review* 25-52, 27; Christiaan Timmermans, 'Organizing joint participation of EC and Member States' in Alan Dashwood and Christophe Hillion (eds), *The general law of EC external relations* (Sweet & Maxwell: 2000) 239-47, 240; Bourgeois (1995), *op cit.*

⁶⁹⁵ Joachim Karl, 'The competence for foreign direct investment: New powers for the European Union?' (2004) 5(3) *The Journal of World Investment & Trade* 413-48.

⁶⁹⁶ See respectively Opinion 1/08 *GATS Schedules* [2009], EU:C:2009:739; Case C-414/11 *Daiichi Sankyo Co. Ltd. v. DEMO* [2013], EU:C:2013:520.

⁶⁹⁷ Opinion 2/15 *EUSFTA op cit.*, paras. 128-30 (IP), 193 (maritime transport), 202 (rail transport), 211 (road transport), and 216-17 (maritime transport).

⁶⁹⁸ For a discussion, see Bart Kerremans and Jan Orbie, 'The social dimension of European Union trade policies' (2009) 14(4) *European foreign affairs review* 629-41; note, however, that the exclusion of transport from the scope of the CCP does not follow this logical development, see Marise Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations* (CUP: 2008) 34-69, 48.

⁶⁹⁹ Dimopoulos (2010), *op cit.*, 169; Markus Krajewski, 'The Reform of the Common Commercial Policy' in Andrea Biondi, Piet Eeckhou and Stefanie Ripley (eds), *EU Law After Lisbon* (Oxford University Press: 2012) 292-311, 297; Ohler (2011), *op cit.*

the framework of the WTO.⁷⁰⁰ This parallelism between CCP and the multilateral trading system was already tangible in the Constitutional Treaty,⁷⁰¹ and it ought to shape our understanding of the post-Lisbon CCP. At the time the Constitutional Treaty was negotiated, the investment still featured on the negotiating agenda of the WTO Uruguay round.⁷⁰² Although the issue was dropped before the Treaty of Lisbon was negotiated, the existence of FDI as a Union competence under the CCP can be explained by the fact that it would have been politically undesirable to reopen negotiations on an issue on which consensus was already obtained.⁷⁰³ It is in this context helpful to recall that the inclusion of FDI was a controversial issue throughout the drafting of the Constitutional Treaty, and was vehemently rejected by Member State representatives.⁷⁰⁴

The extension of the substantive scope of CCP into investments in the productive industries is, therefore, a logical step. The gradual expansion into services, transport and IP through treaty amendments and broad interpretations offered by the CJEU,⁷⁰⁵ reflects a common political ethos, i.e. situating the Union as a potent actor in international trade and investment relations. From the beginning, ISDS played a significant role for EU foreign investment policy under the CCP.⁷⁰⁶ Whereas, the EU-Singapore FTA, CETA and TTIP were initially drawn up with ISDS provisions based on a traditional investor-state arbitration, this approach attracted significant criticism from civil society. Responses to the public consultation that was conducted in the course of the TTIP negotiations unequivocally rejected investor-state arbitration.⁷⁰⁷ These agreements have since been amended, to incorporate the ICS. As a result, all post-Lisbon IIAs with the exception of the EU-

⁷⁰⁰ For a discussion, see Stijn Billiet, 'From GATT to the WTO: The internal struggle for external competences in the EU' (2006) 44(5) *Journal of Common Market Studies* 899-919, in particular 908-09

⁷⁰¹ Horst G. Krenzler and Christian Pitschas, 'Die Gemeinsame Handelspolitik im Verfassungsvertrag' in Christoph Herrmann, Horst G. Krenzler and Rudolf Streinz (eds), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag* (Nomos: 2006) 11-42, 40

⁷⁰² Krajewski (2012), *op cit.*, 304.

⁷⁰³ Christian Tietje, 'Die gemeinsame Handelspolitik der EU im System des Welthandelsrechts: Ein Spannungsverhältnis zwischen fortschreitender Liberalisierung und zunehmendem Protektionismus' in Eckhard Pache and Frank Schorkopf (eds), *Die Europäische Union nach Lissabon* (Nomos: 2009) 33-57, 49.

⁷⁰⁴ See proposal for amendment by Peter Hain accessed on 7 January 2019 at <<http://european-convention.europa.eu/Docs/Treaty/pdf/866/global866.pdf>>.

⁷⁰⁵ Pieter Jan Kuijper et al., *The Law of EU External Relations: Cases, Materials and Commentary on the EU as an International Legal Actor*, 2nd edn (Oxford University Press: 2015) 419.

⁷⁰⁶ Commission, 'Towards a comprehensive European international investment policy' (2010), *op cit.*

⁷⁰⁷ European Commission, Commission Staff Working Document, 'Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement' (SWD(2015) 3 final), in particular see pt. 3.1.

Japan EPA now contain a treaty-centred investment court.⁷⁰⁸ The reformist approach that is advocated by the Commission, however, faces a number of challenges in light of strict constitutional requirements arising out of the Treaties. All the while, the CJEU has recently taken the opportunity to confirm the far-reaching exclusive competences of trade aspects of the CCP, it was reluctant to adopt a similarly extensive approach in as far as treaty-making competences for foreign investment is concerned.

5.1.3 *The EUSFTA Opinion*

In accordance with Article 218(11) TFEU the CJEU, upon request of a Union institution or Member State, review international agreements before they become legally effective, thereby apprehending the incompatibility of these agreements under EU law, which, if determined *ex post* ratification, conflicts with their validity in international law.⁷⁰⁹ The Court's jurisdiction under this provision has played a central role in the evolution of the CCP, both in defining the scope of treaty-making competence and the development of constitutional principles that constrain the Union's external action. With respect to the former, the Court's recent ruling on the EU-Singapore FTA has had some significance.

⁷⁰⁸ Note that the EU-Japan EPA does not include investment protection or ISDS, partly because the Parties could not agree to the ICS, Agreement between the European Union and Japan for an Economic Partnership ; the negotiation of FTAs with Australia and New Zealand were also proposed without investment protection and ISDS, see European Commission, 'Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia' (COM(2017) 472 final), 13 September 2017 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:472:FIN>>; European Commission, 'Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with New Zealand' (COM(2017) 469 final), 13 September 2017 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:469:FIN>>; note, however, that the impact assessments on Australia and New Zealand emphasized the need for a uniform system of investment protection and a modernization of ISDS, see European Commission, Staff Working Document, 'Impact assessment accompanying the document recommendation for a Council Decision authorising the opening of negotiations for a Free Trade agreement with Australia' (SWD(2017) 293 final), 13 September 2017 accessible at <<https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-293-F1-EN-MAIN-PART-1.PDF>> 7 and 10; European Commission, Staff Working Document, 'Impact assessment accompanying the document recommendation for a Council Decision authorising the opening of negotiations for a Free Trade agreement with New Zealand' (SWD(2017) 289 final), 13 September 2017 accessible at <<http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-289-F1-EN-MAIN-PART-1.PDF>> 7 and 10.

⁷⁰⁹ Opinion 1/78 *International Agreement on Natural Rubber op cit.*, para. 35: "Indeed, when a question of powers is to be determined it is clearly in the interests of all the states concerned, including non-Member countries, for such a question to be clarified as soon as any particular negotiations are commenced."

In late 2015, the Commission requested an opinion from the CJEU, in accordance with, on the allocation of competences between the Union and its Member States for the conclusion of the EU-Singapore FTA.⁷¹⁰ The EU-Singapore FTA was envisaged to be the first of a ‘new generation’ of deep and comprehensive free trade agreements, facilitated by the substantive broadening of the CCP with the Treaty of Lisbon. Characteristic of this type of agreements is the ambitious scope, covering trade in goods and services, public procurement, transport, intellectual property, regulation, competition as well as other public policy provisions relating, *inter alia*, to sustainable development vis-à-vis labour and environmental protection. As the Union is now endowed with external competence over FDI, the EU-Singapore would also have been the first Union agreement to include a comprehensive chapter on investment, featuring provisions on market access, investment protection and ISDS. The judgment was eagerly awaited as its implications were expected to be a defining moment in the evolution of the CCP, similar to the *WTO* opinion in its time.⁷¹¹

The CJEU concluded that the EUSFTA is largely covered by exclusive external competence of the Union, with the exception of provisions relating to non-direct investment, and ISDS as well as transparency, state-to-state dispute settlement, and the termination of existing BITs between Member States and Singapore in as far as these concerns non-direct investment.⁷¹² The decision confirms the view that the EU is endowed with far reaching competences to conclude deep and comprehensive trade agreements without the participation of the Member States. At the same time, it drives a wedge between trade and investment competences under the banner of the CCP. This Chapter explores the rather inconsistent approach in determining the Union’s substantive treaty-making competence in as far as it concerns ISDS. It is important to acknowledge already at this early point in the analysis that the *EUSFTA* opinion bears on the direction in which EU foreign investment policy is moving. The opinion effectively shifted the intellectual focus in the academic community away from attempts to delineate the Union’s treaty-making competence in the area of foreign investment, and towards an evaluation of the effects shared

⁷¹⁰ OJ C363/18, 3 November 2015, Opinion 2/15 *Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (EU-Singapore FTA)* [2015].

⁷¹¹ David Kleimann, ‘Reading Opinion 2/15: Standards of analysis, the Court’s discretion, and the legal view of the Advocate General’ (2017), EU Working Papers, RSCAS 2017/23; Joris Larik, ‘Trade and Sustainable Development: Opinion 2/15 and the EU’s Foreign Policy Objectives’, *Europe and the World: A law review*, 1 June 2017 <accessed at <http://blogs.ucl.ac.uk/europe-and-the-world-journal/2017/opinion215-trade-sustainable-development/>>; For a discussion of the case, see Hannes Lenk, ‘More trade and less investment for future EU trade and investment policy’ (2018b) 19(2) *Journal of World Investment and Trade* 305-19; Daniel Thym, ‘Mixity after Opinion 2/15: Judicial Confusion over Shared Competences’, *Verfassungsblog*, 31 May 2017 <accessed at <http://verfassungsblog.de/mixity-after-opinion-215-judicial-confusion-over-shared-competences/>>.

⁷¹² Opinion 2/15 *EUSFTA op cit.*, para. 305.

competence on future policy proposals.⁷¹³ If, indeed, the Union lacks exclusive competence to conclude comprehensive investment agreements alone, the Commission must engage more intently with the Member States to find a compromise over a politically charged policy area.⁷¹⁴

5.1.4 *Interim conclusion*

Article 206 TFEU not only follows its predecessor in integrating the CCP into the development of world trade and investment, it also emphasizes that the objective of liberalizing trade is no longer an “aspirational objective” but is, indeed, of mandatory character.⁷¹⁵ “[T]he Union shall contribute”, so the provision now reads, “[...] to the harmonious development of world trade, [and] the progressive abolition of restrictions on international trade and on foreign direct investment”. The endowment with competence over FDI is no sudden occurrence. Indeed, it follows logically the incremental development of the CCP within the context of an emergent multilateral trading system.

This brief excursion into the evolution of the CCP illustrated that the Court’s case law confirms the intimate ties that the CCP shares not only with developments within the context of the WTO, but above all with the internal market. Already from its early days commercial policy, relating to customs tariffs and quantitative restrictions as it was understood in those days, was perceived as instrumental to realize the internal market; a necessity to prevent the deflection of trade and the distortion of competition. The practical effect of the Treaty of Lisbon was expected to be that mixed trade agreements were a matter of the past.⁷¹⁶ The *EUSFTA* opinion now confirms that the Union enjoys extensive trade competences that allow the conclusion of future trade agreements without the participation of the Member States. Investment competences, on the other hand, are less enthusiastically received. The CJEU does not limit its interpretation of FDI to trade-related aspects of investment. The CCP reaches beyond the limited achievements on investment regulation in the WTO, including *inter alia* investment protection. It quickly transpires, however, that the Union is not endowed with comprehensive external competence to displace Member State BITs with third countries. The legal and political implications of shared competence over the negotiation of investment agreements, in particular with respect to ICS are discussed in Chapter 8.1.

⁷¹³ The opinion immediately provoked a range of initial reactions, see e. g. Laurens Ankersmit, ‘Opinion 2/15 and the future of mixity and ISDS’, *European Law Blog*, 18 May 2017 <accessed at <http://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/>>; Kleimann (2017), *op cit*; Larik (1 June 2017), *op cit*; Thym (31 May 2017), *op cit*.

⁷¹⁴ For a discussion, see *infra* Chapter 8.2.

⁷¹⁵ Dimopoulos (2010), *op cit.*, 160-61.

⁷¹⁶ de Waele (2011), *op cit.*, 70.

What is important to acknowledge at this point is that the policy preferences, which define the Union as an actor in ISDS reform are ideologically predetermined (internally) by the close relationship of the CCP with the multilateral trading system, and (externally) by the historical and political context that gave rise to the modern investment treaty regime. This explains the prominent role of the ICS in the Commission's foreign investment policy and why ISDS were integral to the TTIP and CETA agreement. On the other hand, however, the link between the CCP and the internal market restrains the development of a comprehensive investment policy. This finds particular expression through the principles of conferred powers, autonomy, and non-discrimination. Before exploring these points in detail, the two following chapters provide a brief overview over institutional and procedural features of ISDS and an introduction to the ICS initiative.

5.2 Legal personality, conferral and the appropriate legal basis

This section provides a brief overview of three fundamental constitutional principles that are imperative for the Union's engagement with the wider world through the conclusion of international agreements. The Union's general ability to conclude international agreements, though never seriously in question, has long suffered from uncertainty. The Treaty of Lisbon resolved the Union's identity crisis as the prerequisites for its treaty-making competence were finally sown into its constitutional fabric. This chapter is dedicated to a thorough analysis of the Union's treaty-making competences and reverberates the fundamental importance of the principle of conferral. The Union can only act if—and to the extent that—Member States have authorized it to do so. But even then, legislative activity is ultimately determined by the requirements of a particular decision-making process. It is by those means that legal capacity, competence and legal basis are intimately related to the constitutionality of the Union's international activity. This section elaborates on these three aspects and enlightens the relevant context for the study of Union competences.

5.2.1 *International legal personality*

It is as well-established principle of public international law, that the legal capacity to conclude international agreements presupposes international legal personality.⁷¹⁷

⁷¹⁷ *Reparation for injuries suffered in the service of the United Nations* Advisory Opinion, 11 April 1949, 149 ICJ Reports, 174, 179; for a general discussion, see Dominic McGoldrick, 'The international legal personality of the European Community and the European Union' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing: 2009) 181-217, 183-85; Nanette A. E. M. Neuwahl, 'A partner with a troubled personality: EU treaty-making in matters of CFSP and JHA after Amsterdam' (1998) 3(2) *European foreign affairs review* 177-95.

The Treaties never explicitly endowed the Union with international legal personality, but this was generally implied from the Treaty.⁷¹⁸ As the CJEU observed as early as 1971:

“[I]n its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in [the Treaties]”⁷¹⁹

At the time, this issue was of course more contentious considering the institutional separation of the Community from the Union and the resultant “bipolarity” of Union external relations.⁷²⁰ In this environment of uncertainty, the lack of a clear reference to Union’s international legal personality undermined its evolution as a global actor.⁷²¹ The Treaty of Lisbon, however, constitutionalized the single legal personality of the Union in Article 47 TEU.⁷²² In fact, a single legal personality was already envisaged in the Constitutional Treaty in order to simplify *inter alia* the conclusion of international agreements.⁷²³ Furthermore, Article 216 TFEU, which systematically lays out the conditions under which the Union is endowed with the capacity to conclude international agreements, pays testament to the Union’s general treaty-making capacity.⁷²⁴ The complex line of cases that this provision consolidates is discussed in more detail below.

In light of the above, and considering the Union’s well-established treaty-practice, there remains little doubt that the Union is furnished with international legal personality.⁷²⁵ This is significant—both in political and legal terms—because it

⁷¹⁸ Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964], EU:C:1964:66, 593.

⁷¹⁹ Case 22/70 *Commission of the European Communities v Council of the European Communities (European Road Transport Agreement)* [1971], EU:C:1971:32, para. 14; see also Case C-327/91 *France v Commission* [1994], EU:C:1994:305, para. 24.

⁷²⁰ Alan Dashwood, ‘Article 47 TEU and the relationship between first and second pillar competences’ in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press: 2008) 70-103, 178-186; Jan Klabbers, ‘Presumptive personality: The European Union in International Law’ in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer: 1998) 231-53; Dashwood argues that the ‘bipolarity’ remains in the current treaty regime, see Alan Dashwood, ‘The Continuing Bipolarity of EU External Action’ in Inge Govaere, et al. (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff: 2014) 3-16; for a comprehensive overview over the development of legal personality, see Daniel Thym, ‘Die völkerrechtlichen Verträge der Europäischen Union’ (2006) 66 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 863-925; McGoldrick (2009), *op cit.*, 187-207; and Neuwahl (1998), *op cit.*

⁷²¹ Cremona (2008), *op cit.*, 37.

⁷²² Koutrakos (2015), *op cit.*, 14.

⁷²³ Final report of Working Group III on Legal Personality (CONV 305/03), particularly Part IV

⁷²⁴ McGoldrick (2009), *op cit.*, 211; Cremona (2008), *op cit.*, 56

⁷²⁵ Thym (2009), *op cit.*, 336; Jean-Claude Piris, *The Lisbon Treaty: a legal and political analysis* (Cambridge University Press: 2010) 86-87.

portrays the Union as an entity with *volonté distincte*, endowed with powers in relative independence of the collective authority of its Member States.⁷²⁶

5.2.2 *The principle of conferred powers*

The Union's legal capacity to exercise public authority, such as the concluding international agreements, is both, derived from, and limited by the principle of conferred powers.⁷²⁷ Article 5(2) TEU reads:

“[The] Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.”

Correspondingly, Article 4(1) TEU contains an explicit presumption for Member State competence unless, and only in so far as, such competence has been transferred.⁷²⁸

Paradoxically, whereas this suggests a “relatively stable set of rules for determining the existence and co-ordinating the exercise of the respective powers”⁷²⁹, the development of a far-reaching implied powers doctrine establishes a concurrent “objective-oriented competence paradigm” that furnishes the Union with extensive discretion to adopt binding measures for the attainment of Treaty objectives.⁷³⁰ This chapter elaborates in some detail on the Union's capacity to acquire external competences dynamically. Suffices to note at this point that the CJEU strikes a balance between legal certainty and responsiveness in order to guarantee effective application of the Treaties. Indeed, it has been argued that implied powers constitute an integral element of the principle of conferred powers as they tend to be “a tacit annex” to explicit Union competences.⁷³¹ The idea of

⁷²⁶ Article 47 TEU is likewise the basis for the Union's international responsibility, see Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press: 2016).

⁷²⁷ Sometimes referred to as the principle of attributed powers, the principle of limited authority or the principle of enumerated powers, an early reference for the Court's use of this principle under the ECSC Treaty can be found in Joined Cases C-7/56, C-3-7/57 *Dinecke Algera, Giacomo Cicconardi, Simone Couturand, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community* [1957], EU:C:1957:7.

⁷²⁸ Takis Tridimas, 'Competence after Lisbon: The elusive search for bright lines' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press: 2012) 47-77, 50; it is in this context notable that Declaration No 18 on the delimitation of competences acknowledges the possibility to repatriate competences, see Rossi (2012), *op cit.*, 94.

⁷²⁹ von Bogdandy and Bast (2009), *op cit.*, 275.

⁷³⁰ Tridimas (2012), *op cit.*

⁷³¹ Bogdandy and Bast argue that the implied powers doctrine in Union law, unlike general international institutional law, is not a counter-concept to explicitly attributed competences, see von Bogdandy and

parallelism that constitutes the intellectual pedigree for implied powers in itself suggests a connection between the internal market and external action.⁷³² It is furthermore important to note that when the principle was first introduced into the Maastricht Treaty, Article 5 EC in its original version stipulated that “the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”.⁷³³ The principle of conferred powers thus remains a fundamental constitutional constraint on the Union’s legal capacity to conclude international agreements. For the purpose of the present study it is therefore relevant to inquire if the Union is competent to conclude international investment agreements with ISDS provisions.

5.2.3 *The appropriate legal basis*

Lastly, it is a fundamental principle of the Union’s constitutional legal order that all acts must have a legal basis that is retraceable to the Treaties.⁷³⁴ Generally speaking, the lack of identifying the legal basis in a Union act will inevitably affect its validity.⁷³⁵ The CJEU observed, however, that the determination of the appropriate legal basis is not merely a formal procedural requirement, but is indeed of “constitutional significance”,⁷³⁶ because it indicates the applicable procedure, and defines the scope and nature of substantive international competence and international responsibility.⁷³⁷ Although both the lack of legal basis and the lack of competence result in the illegality of an act, the competence requirement precedes the requirement for a legal basis in an assessment of validity.⁷³⁸

The Treaties do not provide the Union with a single overarching legal basis to conclude international agreements. Instead, multiple legal bases are scattered across the Treaties, firmly embedded within their respective individual policy areas. Notably, this has not changed with the Treaty of Lisbon. On the contrary, this

Bast (2009), *op cit.*, 282; see also Cremona (2008), *op cit.*, 53; Douglas-Scott takes an opposing view and argues that the extensive development of the doctrine of parallelism undermines the constitutional ordering of competences in the Union, see Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson: 2002) 160.

⁷³² Ohler (2011), *op cit.*, 410.

⁷³³ Piet Eeckhout, *EU External Relations Law* (Oxford University Press: 2011) p. 76.

⁷³⁴ The CJEU developed this requirement to provide a legal basis on the basis of what is now Article 296(2) TFEU, see e.g. Case 45/86 *General Tariff Preferences op cit.*, para. 5.

⁷³⁵ Case C-440/05 *Commission v Council* [2006], EU:C:2007:625, para. 61; Case 45/86 *General Tariff Preferences op cit.*, para. 8.

⁷³⁶ Opinion 2/00 *Cartagena Protocol* [2001], EU:C:2001:664, para. 5.

⁷³⁷ Opinion 1/08 *GATS Schedules op cit.*, paras. 111-12; for a discussion, see Koutrakos (2015), *op cit.*, 53; Cremona has observed that the increasing politicisation this question is making it difficult to make a decision that is purely based on "objective factors which amenable for judicial review" as the case law demands, see Cremona (2008), *op cit.*, 40.

⁷³⁸ von Bogdandy and Bast (2009), *op cit.*, 278-80.

approach is further entrenched with introduction of Article 216 TFEU. In accordance to settled case-law, the choice of legal basis “must rest on objective factors amenable for judicial review”.⁷³⁹ Despite recent clarifications by the CJEU for the attribution of competence between the Union and its Member States for the conclusion of trade and investment agreements, the identification of an external competence for ISDS remains fraught with uncertainty.

One last remark is helpful in this respect. International agreements frequently cover a wide range of issues. Where a number of objectives are pursued through a single agreement, the Council Decision concluding that agreement will have to be based on multiple legal bases.⁷⁴⁰ This is undoubtedly relevant for the conclusion of modern multi-issue trade and investment agreements such as CETA or the EU-Vietnam FTA. This being said, there is a clear preference in the case law of the CJEU to conclude international agreements on the legal basis that represents the core objective of the agreements, provided that other aspects are merely incidental or extremely limited in scope.⁷⁴¹ Scholars have referred to this at times as the ‘center of gravity’ test.⁷⁴²

5.3 The existence of treaty-making competence

The Nice Treaty identified the division of competences within the Union as an area where reform was necessary.⁷⁴³ This was later taken over into the Laeken Declaration, which spelled out the remaining challenges to be addressed by the IGC in preparation of the Constitutional Treaty, including *inter alia* potential clarification of the division of competences through Treaty revision, effective conferral of powers, the prevention of ‘competence creep’, and potential reorganization of competences.⁷⁴⁴ Although the Treaty of Lisbon contributed little to the reorganization of competences,⁷⁴⁵ it certainly reflects efforts to improve clarity viz the division of competences.⁷⁴⁶

⁷³⁹ Case C-263/14 *Parliament v Commission (Tanzania)* [2016], EU:C:2016:435, para. 43.

⁷⁴⁰ Case C-263/14 *Tanzania op cit.*, para. 44; Case C-94/03 *Commission v Council (Rotterdam Convention)* [2006], EU:C:2006:2, para. 51.

⁷⁴¹ Case C-137/12 *Commission v Council (Conditional Access Services)* [2013], EU:C:2013:675, para. 76; Case C-178/03 *Commission v European Parliament* [2006], EU:C:2006:4, para. 42; Case C-281/01 *Commission v Council (Energy Star Agreement)* [2002], EU:C:2002:761, para. 43; Opinion 1/08 *GATS Schedules op cit.*, para. 166.

⁷⁴² Rossi (2012), *op cit.*, 88.

⁷⁴³ OJ C 80/1, 10 March 2001, Declaration 23 on the future of the Union, Treaty of Nice, para. 5

⁷⁴⁴ Laeken Declaration on the future of the European Union, Presidency Conclusions of the Laeken European Council, 14-15 December 2001, Annex I, 3.

⁷⁴⁵ Paul Craig, *The Lisbon Reform: Law, Politics and Treaty Reform* (OUP: 2010) 157.

⁷⁴⁶ Koutrakos (2015), *op cit.*, 76-77; Marise Cremona, 'External relations and external competence of the European Union: the emergence of an integrated policy' in Paul Craig and Gráinne de Búrca (eds),

Article 216(1) TFEU codifies when, and under what conditions, the Union enjoys external competence to enter into international agreements. Accordingly, the Union is endowed with treaty-making competence:

“[...] where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”

5.3.1 *Express treaty-making competence: the common commercial policy*

The Union has always enjoyed broad treaty-making competences over commercial matters under the umbrella of the CCP, and this remained untouched by the latest Treaty revision. Novel to the Union's post-Lisbon CCP, however, is the substantive broadening of treaty-making competence over FDI. This was already envisaged in the draft Constitutional Treaty where it reflected efforts to adapt the substantive coverage of the CCP to the WTO Doha Round negotiating mandate, where FDI was still on the agenda. With the inclusion of trade in services and commercial aspects of intellectual property rights previous treaty revisions already brought GATS⁷⁴⁷ and TRIPs⁷⁴⁸ into the ambit of the CCP.

The point was already made earlier that the inclusion of competence over FDI was a logical step that integrated direct investments in the production sector. Bilateral agreements concluded by the Union already frequently included provisions on establishment and intellectual property, which would now fall broadly within the ambit of the CCP. It was furthermore argued that the post-Lisbon CCP must be read in light of developments in the WTO at the time the Constitutional Treaty was prepared, and with consideration of the Union's practice of negotiating trade agreements with investment-related provisions. The suggestion that treaty-making competence under the CCP is limited to trade-related aspects of FDI, thus relating above all to the scope of the TRIPs agreement, is, however, untenable as an explicit qualification in this respect was reserved to intellectual property only.⁷⁴⁹ The

The Evolution of EU Law, 2 edn (OUP: 2011) 217-68; Jan Wouters, Dominic Coppens and Bart De Meester, 'The European Union's external relations after the Lisbon Treaty' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU constitutionalism without a constitutional Treaty?* (Springer: 2008) 143-203, 168; Alan Dashwood and Joni Heliskoski, 'The Classic Authorities Revisited' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell: 2000) 3-19.

⁷⁴⁷ Opinion 1/08 *GATS Schedules* *op cit.*

⁷⁴⁸ Case C-414/11 *Daiichi Sankyo* *op cit.*; for an example of intellectual property rights negotiations outside of the WTO framework, see Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v. Ministero delle Politiche Agricole e Forestali* [2005], EU:C:2005:285.

⁷⁴⁹ Tietje (2009), *op cit.*, 50.

extension of the CCP to FDI thus emerges as integral to the gradual developments towards a comprehensive trade and investment competence.

It is nonetheless important to notice that the reference to foreign *direct* investment goes beyond semantics.⁷⁵⁰ Indeed, FDI is associated with a specific types of economic activity that is generally characterized by the establishment of a lasting economic link that empowers the investor to participate in the management of, or exercise control over her investment.⁷⁵¹ However, IIAs frequently include a wide range of different types of investments, including *inter alia* establishments, various forms of equity participation⁷⁵² and other financial instruments including⁷⁵³ debt instruments,⁷⁵⁴ contractual claims,⁷⁵⁵ rights conferred under domestic law,⁷⁵⁶ intellectual property rights, as well as tangible or intangible, movable or immovable property, and related property rights.⁷⁵⁷ The India Model BIT of 2015 even includes “pre-operational expenditure relating to admission, establishment, acquisition or expansion [...] before the commencement of substantial business operations”.⁷⁵⁸ The post-Lisbon IIAs that have thus far been negotiated by the Commission likewise incorporate broad definitions of ‘investment’.⁷⁵⁹

Having regard to the development of the CCP, the explicit language of Article 207 TFEU unambiguously suggests the exclusion of non-direct investment from the scope of the CCP. As the CJEU in its *EUSFTA* opinion observed:

“The use, by the framers of the FEU Treaty, of the words ‘foreign direct investment’ in Article 207(1) TFEU is an unequivocal expression of their intention not to include other foreign investment in the common commercial policy.”⁷⁶⁰

While it is uncontested, therefore, that the CCP furnishes the Union with treaty-making competence over FDI, this alone does not enable the Union to replace Member State BITs with third countries. It is essential, therefore, to investigate

⁷⁵⁰ Christoph W. Herrmann, ‘Common commercial policy after nice: Sisyphus would Have done a better job’ (2002) 39(1) *Common Market Law Review* 7-29, 8.

⁷⁵¹ e.g. OECD, ‘Benchmark Definition of Foreign Direct Investment, 4th ed.’, 2008 accessible at <<http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>> para. 11

⁷⁵² e.g. shares and stocks.

⁷⁵³ e.g. futures, options, and other forms of derivatives.

⁷⁵⁴ e.g. bonds, debentures, and loans.

⁷⁵⁵ e.g. regarding construction, management, production, concessions, and revenue-sharing.

⁷⁵⁶ e.g. licenses, permits, and authorizations.

⁷⁵⁷ See for such a broad definition Article 1 of the US Model BIT of 2012; Article 2(2) of the draft Norway Model BIT of 2012; for a more qualified definition, see Article 1 of the Canada Model FIPA of 2004.

⁷⁵⁸ Article 1.4 of the India Model BIT of 2015.

⁷⁵⁹ Article 1.2(1) of the EU-Singapore IPA.

⁷⁶⁰ Opinion 1/08 *EUSFTA op cit.*, para. 83.

whether treaty-making competence for the conclusion of post-Lisbon IPAs can be established by other means.

5.3.2 *Implied treaty-making competence*

In addition to the express conferral of treaty-making competences, Article 216(1) TFEU also consolidates and codifies the classical judicial authorities on the doctrine of implied powers.⁷⁶¹ and, thus, contributes to improve clarity over the division of competences in the Union.⁷⁶² The continuous use of the terminology of ‘implied’ competences even after the Lisbon Reform may be put into question,⁷⁶³ considering that they are now expressly provided for in the Treaties. However, despite their legal basis in the Treaties, the existence of treaty-making competences, thus implied, remain contingent on a systemic reading of the body of Union law as a whole. Unlike express competence that can only be granted or withdrawn by formal Treaty amendment, Article 3(2) TFEU provides for flexibility in and otherwise stable notion of constitutionally conferred competence. The delineation of competences between the EU and its Member States cannot, therefore, become anything more than a momentary reflection of its constitutional structure. The traditional terminology of ‘implied’ competences is suitable to highlight this distinction.

Historically, implied treaty-making competences were developed by the CJEU as a complement to internal legislative competences along two lines of reasoning. This is aptly summarized by the CJEU in Opinion 1/03:

“The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions. The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.”⁷⁶⁴

⁷⁶¹ e.g. Working Group VII on External Action, 'Final report' (CONV 459/02), 16 December 2002 para. 18.

⁷⁶² Koutrakos (2015), *op cit.*, 76-77; Cremona (2011), *op cit.*; Wouters, Coppens and De Meester (2008), *op cit.*, 168; Dashwood and Heliskoski (2000), *op cit.*

⁷⁶³ Notably, Casteleiro refers to external competence where it is provided for in a Union legal act as express competences, see Casteleiro (2016), *op cit.*, 17.

⁷⁶⁴ Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. [2006], EU:C:2006:81, para. 114.

On the one hand, the *ERTA* approach emphasizes that the Union was necessarily endowed with treaty-making competence in as far as internal regulation already existed.⁷⁶⁵ On the other hand, *Kramer* and later Opinion 1/76 clarified that the Union could also conclude international agreements in as far as these were necessary for the attainment of an explicit Treaty objective, irrespective of whether or not the Union already exercised its competence internally. Whereas the former is based on the principle of pre-emption, the latter reflects concerns over the *effet util* of Union law.⁷⁶⁶ Both strands of reasoning, however, are rooted in an intimate relationship between internal regulatory competences and external treaty-making competences, prompting some scholars to explain these developments as an emergent parallel powers doctrine⁷⁶⁷—*in foro interno, in foro externo*.⁷⁶⁸

This observation is pivotal because implied treaty-making competences that are necessary to attain a particular Treaty objective are strictly limited to the nature and extent of that objective. Conversely, where a field is already occupied the CJEU does not appear to pay much attention to a specific Treaty objective for the purpose of establishing the existence of an external treaty-making competence—although it will transpire in due course that this is an important aspect for determining the nature of competences thus established.⁷⁶⁹

This can be illustrated at the example of Opinion 1/94 on the WTO agreement, where the Commission argued that implied treaty-making competence for the GATS agreement could be derived from the Treaty provisions on the free movement of services.⁷⁷⁰ In rejecting that argument the Court observed that these provisions serve exclusively services liberalization on the internal market and this objective could be attained without an international agreement regulating trade in services with third countries.⁷⁷¹

⁷⁶⁵ Case 22/70 *ERTA op cit.*, paras. 17-19.

⁷⁶⁶ Cremona (2008), *op cit.*, 53 and 56; Eeckhout (2011), *op cit.*, 112; for a view that *effet util* was already underlying Court's reasoning in *ERTA*, see Dashwood and Heliskoski (2000), *op cit.*, 7-9.

⁷⁶⁷ e.g. Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Kluwer Law International: 2008) 100; in the context of the Lisbon Treaty, see Eeckhout (2011), *op cit.*, 164; for a comprehensive account over the doctrine of parallel powers and the conceptualization of parallelism, see Robert Schütze, 'Parallel external powers in the European Community: From 'cubist' perspectives towards 'naturalist' constitutional principles?' (2004) 23(1) *Yearbook of European Law* 225-74, 234; this is not to be confused with the denomination of those powers that the Union and the Member States may exercise but that do not have a pre-emptive effect, see e. g. Armin Von Bogdandy and Jürgen Bast, 'The European Union's vertical order of competences: The current law and proposals for its reform' (2002) 39(2) *Common Market Law Review* 227-68, 247.

⁷⁶⁸ Pierre Pescatore, 'External relations in the case-law of the Court of Justice of the European Communities' (1979) 16(4) *Common Market Law Review* 615, 618; Dominic McGoldrick, *International relations law of the European Union* (Longman: 1997) 48.

⁷⁶⁹ See *infra* Chapter 5.4.3.

⁷⁷⁰ Opinion 1/94 *WTO Agreements op cit.*, para. 82.

⁷⁷¹ *Ibid.*, para. 86.

For the Union's foreign investment policy this is important in two respects. First, unlike the provisions on free movement of services, Article 63 TFEU explicitly includes an external dimension. Accordingly, "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited". Indeed, this was duly acknowledged by the CJEU in Opinion 2/15, the relevant paragraph of the Court's opinion reads:

"In particular, in the light of the fact that the free movement of capital and payments between Member States and third States, laid down in Article 63 TFEU, is not formally binding on third States, the conclusion of international agreements which contribute to the establishment of such free movement on a reciprocal basis may be classified as necessary in order to achieve fully such free movement, which is one of the objectives of Title IV ('Free movement of persons, services and capital') of Part Three ('Union policies and internal actions') of the FEU Treaty."⁷⁷²

Consequently, treaty-making competence for the conclusion of the investment chapter of the EU-Singapore FTA, so far as it relates to portfolio investment, can be derived from Article 216(1) TFEU in combination with Article 63 TFEU.⁷⁷³

However, it is somewhat surprising that the Court takes an equally broad view on the substantive scope of external competence over FDI and portfolio investment. In fact, in light of the *EUSFTA* opinion the substantive scope over these two dimensions of the Union's foreign investment policy appear to be identical.⁷⁷⁴ It was previously suggested that the Court's pre-Lisbon case law illustrates a tendency that requires particular consideration to be paid to the nature and scope of a Treaty objective in cases where external competence is implied without a corresponding Union legal act. This is reinforced through a threshold requirement of 'necessity'.⁷⁷⁵ In fact, the exercise of external competence must be indispensable for the attainment of that specific Treaty objective.⁷⁷⁶ Indeed, Koutrakos observed that 'necessity' prior to the Treaty of Lisbon was construed so restrictively that it was in fact only ever successful in Opinion 1/76.⁷⁷⁷ This is not reflected in the Court's nonchalant approach to this question in the *EUSFTA* opinion.

If a restrictive reading of the pre-Lisbon case law is correct, Article 63 TFEU would certainly justify treaty-making competence for the liberalization of

⁷⁷² Opinion 2/15 *EUSFTA op cit.*, para. 240.

⁷⁷³ *Ibid.*, para. 242.

⁷⁷⁴ *Ibid.*, para. 243.

⁷⁷⁵ Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977], EU:C:1977:63, para. 3.

⁷⁷⁶ Herrmann (2002), *op cit.*, 9.

⁷⁷⁷ Koutrakos (2015), *op cit.*, 126.

international capital movements and, thus, portfolio investment. It is not, however, equally obvious that the regulation of post-admission investment protection of portfolio investment through international agreement are strictly necessary to achieve the liberalization capital movements.⁷⁷⁸ It remains to be seen whether this approach is representative of a less restrictive approach to implied competences under Article 216 TFEU.

Second, pre-Lisbon case law required that specific powers were created internally in order to attain a specific treaty objective.⁷⁷⁹ This does no longer appear to be the case. Instead, implied treaty-making competence in accordance with Article 216(1) TFEU can be established merely by identifying a Treaty objective.⁷⁸⁰ The Treaty of Lisbon introduced with Article 21 TEU a number of overarching objectives for Union external action. These include *inter alia* safeguarding its values;⁷⁸¹ consolidate and support democracy, the rule of law, human rights and the principles of international law;⁷⁸² foster the sustainable economic, social and environmental development of developing countries;⁷⁸³ and encourage the integration of all countries into the world economy.⁷⁸⁴

All of these objectives are adequately achieved through the conclusion of international agreements.⁷⁸⁵ More importantly, the evolution of investment treaty law illustrates that the very notion of international investment protection, and ISDS more particularly, are deeply embedded in an ideology that elevates the importance of foreign investment for economic development, and the role of investment arbitration as an objective and neutral forum for the resolution of investment disputes as universally accepted features of international law. A broad reading of Article 216(1) TFEU, which this study proposes, would certainly bolster the Commission's claim to a comprehensive foreign investment policy. The implications of this reading for the establishment of treaty-making competence for ISDS provisions, is discussed in more detail below.

This would enable the Union legislator with powers to circumvent the procedural and institutional safeguards of the Union's constitutional order, including the principle of conferred powers.⁷⁸⁶ Koutrakos remarks in this respect that

⁷⁷⁸ Compare with the Court's reasoning in Opinion 1/94 *WTO Agreements op cit.*, paras. 85-86.

⁷⁷⁹ Opinion 1/76 *Inland Waterways op cit.*, para. 4; Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993], EU:C:1993:106, para. 17.

⁷⁸⁰ Robert Schütze, *European constitutional law* (Cambridge University Press: 2012) 196.

⁷⁸¹ Article 21(2)(a) TEU.

⁷⁸² Article 21(2)(b) TEU.

⁷⁸³ Article 21(2)(d) TEU.

⁷⁸⁴ Article 21(2)(e) TEU.

⁷⁸⁵ Cremona (2011), *op cit.*, 225.

⁷⁸⁶ Cremona (2011), *op cit.*, 222; Cremona (2008), *op cit.*, 57; Koutrakos (2015), *op cit.*, 127; Angelika Hable, 'The European constitution: Changes in the reform of competences with a particular focus on the external dimension' (2005), Europainstitut Wirtschaftsuniversität Wien, Working Paper No 67 22.

“[a] literal interpretation of Articles 216(1) and 3(2) TFEU, independently from the Court's case-law so far, and the ensuing broadening up of the Union's external competences would be inconsistent with the intentions of the drafters of the Treaties [...]. Therefore, it is unlikely.”⁷⁸⁷

With this being said, the Court has thus far demonstrated little intention to develop implied treaty-making competences in isolation of its historical pedigree.⁷⁸⁸ Indeed, what Dashwood and Heliskoski already observed a decade prior to the coming into force of the Treaty of Lisbon still holds true today:

“[...] the conceptual framework of [Union] external relations law, erected by the Court in the 1970's to organise and complement the meagre provision of the original EEC Treaty, endures in its essential: WTO and subsequent decisions have merely confirmed lessons which ought to have been learned earlier [...].”⁷⁸⁹

Article 216(1) TFEU also provides for the existence of treaty-making competence in cases where concurrent Member State action is “likely to affect common rules or alter their scope”.⁷⁹⁰ Traditionally, this wording in the case law of the CJEU was limited to the nature of competences, rather than the existence.⁷⁹¹ Although it can rightly be criticised for confusing the separation of these questions,⁷⁹² it illustrates that that external competence necessarily exists where the field is already occupied.

For the purpose of providing a complete picture over the Union's treaty-making competences it should also be mentioned that Article 352 TFEU provides the EU with residual competence where international action is necessary, for the attainment of one of the objectives under the Treaties but the requisite competence cannot be derived expressly or impliedly from the Treaty. The article is designed to fill gaps in the Treaty and may not, therefore, be used to extend the general framework of the Treaty⁷⁹³ or extend existing EU competences.⁷⁹⁴ Although the Treaty of Lisbon textually broadens the flexibility clause, its application is procedurally and institutionally limited.⁷⁹⁵

⁷⁸⁷ Koutrakos (2015), *op cit.*, 129.

⁷⁸⁸ Case C-114/12 *Commission v Council* [2014], EU:C:2014:2151, paras. 66-67; Opinion 1/13 *Convention on the civil aspects of international child abduction* [2014], EU:C:2014:2303, 67 and 70-73.

⁷⁸⁹ Dashwood and Heliskoski (2000), *op cit.*, 4.

⁷⁹⁰ Wouters, Coppens and De Meester (2008), *op cit.*, 168.

⁷⁹¹ Opinion 1/13 *The Hague Convention op cit.*, paras. 70-74.

⁷⁹² Cremona (2008), *op cit.*, 58-59; Koutrakos (2015), *op cit.*, 129.

⁷⁹³ Case C-2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996], EU:C:1996:140, para. 30.

⁷⁹⁴ Eeckhout (2011), *op cit.*, 98-100.

⁷⁹⁵ Rossi (2012), *op cit.*, 103-05.

What is important to take from this discussion is that the Union enjoys broad treaty-making competences over foreign investment that is based on a double footing. In as far as future IPAs concern FDI, competence is derived explicitly from Article 207 TFEU. Competence to enter IIAs covering portfolio investment, on the other hand, is implied from the necessity to utilize treaty-making competences in order to achieve the liberalization of capital movements between the Union and third countries.

5.3.3 *The scope of the Union's treaty-making competence*

Prior to the *EUSFTA* opinion it was debated whether the substantive scope of treaty-making competence over FDI under the CCP extends beyond investment liberalization. According to a narrow view in the literature, all post-admission standards of investment protection would be excluded from the Union's exclusive competence.⁷⁹⁶ A broad view would in contrast subsume both investment liberalization and investment protection under the substantive scope of Article 207 TFEU. Given these conflicting views, it is remarkable that in spite of the inevitably abstract and general nature of investment protection standards, this aspect was somewhat nonchalantly included by the CJEU into the substantive framework of the CCP.⁷⁹⁷

5.3.3.1 Competence over institutional provisions

The CJEU has consistently reiterated that the relevant test for determining whether a provision of an international agreement falls within the ambit of the under the CCP is whether or not that provision has “direct and immediate effects on trade”.⁷⁹⁸ Indeed, the CJEU confirmed that this covers “any EU act, facilitating or governing participation [...] in the management or control of a company carrying out an economic activity”.⁷⁹⁹ It is the effect of provisions on trade between the Union and third countries, its specific link with trade, that differentiates FDI from other forms of investment, and ultimately determines the substantive scope of Union competence.

Indeed, it is the ‘direct and immediate effects on trade’ test that paves the way for the inclusion of investment protection into the substantive scope of the post-

⁷⁹⁶ Ceyssens (2005), *op cit.*, 177; Krajewski (2012), *op cit.*, 303-04; Leczykiewicz (2005), *op cit.*, 1678.

⁷⁹⁷ Opinion 2/15 *EUSFTA op cit.*; for a discussion of this point prior to Opinion 2/15, see Ohler (2011), *op cit.*, 432; Tietje (2009), *op cit.*, 50.

⁷⁹⁸ Opinion 2/15 *EUSFTA op cit.*, para. 36; Case C-414/11 *Daiichi Sankyo op cit.*, para. 51; Case C-137/12 *Conditional Access Services op cit.*, para. 56; Opinion 3/15 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* [2017], EU:C:2017:114, para. 61.

⁷⁹⁹ Opinion 2/15 *EUSFTA op cit.*, para. 84.

Lisbon CCP. This point was contested both by Member States and in scholarship, advocating that FDI within the meaning of Article 207 TFEU should not extend beyond investment liberalization and, thus, exclude post-admission treatment of investors. Considering the development of CCP and motivations for the inclusion of FDI, this reasoning has some weight. The CJEU, however, dismisses these concerns and concludes that investment protection “is intended to promote, facilitate and govern trade”⁸⁰⁰ between the Union and third countries, and, in as far as it concerns FDI these provisions “are such as to have direct and immediate effects on that trade”,⁸⁰¹

Institutional aspects, such as provisions on transparency,⁸⁰² state-to-state dispute settlement,⁸⁰³ and mediation are of an ancillary nature.⁸⁰⁴ These provisions merely support substantive commitments in the agreement and, thus, follow the division of competence of those substantive provisions. In other words, the Union only derives competence from Article 207 TFEU in as far as any of these provisions concern FDI.⁸⁰⁵

In as far as non-direct forms of investment are concerned, the Court simply treats the establishment of implied competence on the basis of Article 63 TFEU over institutional provisions as a practical consequence of their exclusion from Article 207 TFEU.⁸⁰⁶ The preceding section raised the point that implied competences, which are derived from the necessity of attaining one of the Treaty objectives, cannot exceed the limits of that specific Treaty objective. Article 63 TFEU requires the liberalization of capital movements, i.e. the removal of restrictions on the flow of capital into and out of the Union. international agreements are, in this respect, an efficient means to achieve that objective. Post-admission treatment is not, however, necessary to liberalize foreign portfolio investment. In fact, once capital has entered the market it is subject to the free movement of capital, which provides sufficient protection. Substantive standards of investment protection viz portfolio investment is consequently not part of the Treaty objective that is spelled out in Article 63 TFEU, which cannot, therefore, be constitute the basis the Union’s treaty-making competence in this respect.

Of course, similar arguments can be made with respect to FDI. Yet, the ‘direct and immediate effects on trade’ test is more extensive than the considerations that are taken into account for the establishment of implied competences. Indeed, Cremona rightfully observed that:

⁸⁰⁰ Opinion 2/15 *EUSFTA op cit.*, para. 94.

⁸⁰¹ Opinion 2/15 *EUSFTA op cit.*, para. 95.

⁸⁰² *Ibid.*, para. 282.

⁸⁰³ *Ibid.*, para. 303.

⁸⁰⁴ *Ibid.*, para. 276.

⁸⁰⁵ *Ibid.*, paras. 278, 283 and 304.

⁸⁰⁶ *Ibid.*, paras. 227 and 243.

“[I]mplied external powers are inherently (and properly) limited and cannot provide the basis for developing an external policy independent of the needs and functioning of the internal regime.”⁸⁰⁷

Of course, the substantive protection of portfolio investment shares the same specific link with trade and investment that characterizes FDI. In essence, therefore, by applying the same standard to portfolio investment and FDI the court implicitly extends the ‘direct effects on trade test’ to the realm of implied competences derived from Article 63 TFEU. The preceding section argued that this is inconsistent with the Court’s pre-Lisbon case law and might herald a new approach to the division of competences under Article 216 TFEU.

For present purposes, however, this observation carries other relevance. The institutional provisions that were included in the EU-Singapore FTA, including state-to-state dispute settlement, were accepted as supporting substantive commitments on *inter alia* investment protection. Recognizing the Unions implied competence over investment protection also viz portfolio investment, the Court incidentally acknowledges that the Union is endowed with external competence over institutional provisions in as far as these relate to portfolio investment. This approach has direct implications on the existence of the Union’s treaty-making competence for ISDS provisions. Before delving into an assessment, however, a brief intermediate point should be made regarding Union competence over existing BITs concluded by Member States with third countries.

5.3.3.2 Competence over existing Bilateral Investment Treaties between Member States and third countries

Secondly, the Court’s reasoning on EUSFTA Article 9.10 is another example of the inherent disconnect between EU external relations law and public international law. From the perspective of EU law Member States have, in principle, lost the competence to act internationally in respect to foreign direct investment the moment the Treaty of Lisbon took effect. The termination of existing BITs constitutes, in this respect, just as much an international act as the negotiation of BITs between a Member State and a third country. Unlike the latter, however, termination is not addressed by Regulation 1219/2012 on the grandfathering of existing BITs,⁸⁰⁸ which merely requires the Commission to be notified by a Member State that “intends to enter into negotiations with a third country in order to amend or conclude a bilateral investment agreement”.⁸⁰⁹ As a matter of EU law, therefore, it is only the EU that is competent to decide on the termination of existing agreements. The reason why this part of the judgment is likely to be met with

⁸⁰⁷ Cremona (2011), *op cit.*, 222.

⁸⁰⁸ Regulation 1219/2012.

⁸⁰⁹ Article 8(1) Regulation 1219/2012.

bewilderment is that in accordance with the Article 59 of the Vienna Convention on the Law of Treaties these agreements can only be terminated by the contracting parties, in other words the respective Member State and Singapore.⁸¹⁰ The Union might have succeeded Member States in their competence to conclude new investment agreements, but cannot be considered to have succeeded Member States as contracting party to existing agreements in a manner binding on the third state.

Rather than having the effect of terminating the BITs in question, Article 9.10 of the EUSFTA amounts to little more than a declaration of intent. It is now for the Member States to keep up the Union's end of the bargain.⁸¹¹ Indeed, the primacy of EU law and the principle of sincere cooperation oblige Member States to do so as swiftly and effectively as possible. The CJEU, therefore, does nothing more than turning a point of EU external relations into an internal issue on the relationship between the EU and its Member States; a point of international negotiation into a point of implementation. The CJEU is thus not concerned with the effects of Article 9.10 of the EUSFTA in international law, but merely with the technical point of competence (under EU law) to include said provision into the agreement.

5.3.4 *Implications for investor-state dispute settlement provisions*

The Union's treaty-making competence in the field of foreign investment, thus, rests on a double footing of express and implied competence that draws a sharp dividing line between FDI and portfolio investment. It also transpires from the foregoing discussion that this differentiation is facilitated by the Court's broad approach to both the determination of implied competences and their substantive scope. It is somewhat surprising, therefore, that this is not reflected in the Court's assessment of ISDS provisions in the EU-Singapore FTA.

In a summary fashion, the CJEU finds that ISDS provisions "cannot be of a purely ancillary nature" in the same manner as the other institutional provision referred to above.⁸¹² In other words, ISDS provisions do not inherit competence through substantive provisions of the agreement. The CJEU nevertheless concludes that the ISDS provisions of the EU-Singapore FTA fell within the ambit of shared competences,⁸¹³ and thereby acknowledges that the Union does enjoy competence in over this matter. The legal basis for that competence remains, however, unarticulated.

⁸¹⁰ Article 59(1)(a) Vienna Convention on the Law of Treaties (1555 UN Treaty Series 331), "[...] all the parties to [the agreement] conclude a later treaty relating to the same subject matter and [...] intend that the matter should be governed by that treaty".

⁸¹¹ The Court of Justice notes that this is mere formality (para. 254). Indeed, Article 9.10 of the EUSFTA is evidence of Singapore's intent to consider the existing agreements as terminated.

⁸¹² Opinion 2/15 *EUSFTA op cit.*, para. 292.

⁸¹³ Opinion 2/15 *EUSFTA op cit.*, para. 305.

Indeed, the Court's reasoning is not satisfying. With respect to the institutional provisions of the EU-Singapore FTA, including state-to-state dispute settlement and mediation, the CJEU observed that they "are intended to ensure the effectiveness of the substantive provisions". Ultimately, ISDS safeguards that investors have direct access to the substantive benefit of the agreement and thereby ensures its effective implementation. This view was in fact endorsed by Advocate General Sharpston who was assigned to the *EUSFTA* opinion. Advocating against a differentiation between ISDS, state-to-state dispute settlement and mediation, she concludes:

"Because dispute settlement and mediation mechanisms are ancillary in nature, the allocation of competences between the European Union and the Member States for such mechanisms is necessarily the same as for the substantive provisions to which they relate."⁸¹⁴

In light of these observations it is remarkable that the CJEU has not further substantiated its reasoning.

Notably, the exclusion of ISDS provisions from the above line of reasoning is not based on point of principle. The Court instead emphasizes that ISDS has the effect of withdrawing certain disputes from the jurisdiction of domestic courts. Put differently, in concluding that ISDS is different from other institutional features of the ICS for the purpose of determining the existence of competence the CJEU leans exclusively on the fork-in-the-road clause of the *EUSFTA*.⁸¹⁵ Mrs Sharpston, on the other hand, observed that procedural features of the ISDS concern "the *manner* in which external competence is exercised rather than the existence and nature of that external competence."⁸¹⁶ Rather, this is an issue of compatibility, i.e. a question of whether the specific institutional and procedural design of particular ISDS provisions is compatible with the Treaties. Considering that the Court explicitly reiterates in its reasoning that the issue of compatibility is outside of the scope of assessment of the *EUSFTA* opinion" its conclusion on this point is incoherent and untenable in light of existing case law.

5.4 The nature of treaty-making competence

The bifurcation of competence over foreign investment into FDI and portfolio investment plays out strongly with respect to the nature of the Union's treaty-making competences. Whereas competence over FDI is *prima facie* exclusive, this is

⁸¹⁴ Opinion of Advocate General Sharpston, Opinion 2/15 *Free Trade Agreement between the European Union and Singapore* [2017], EU:C:2017:174, para. 529.

⁸¹⁵ Opinion 2/15 *EUSFTA op cit.*, paras. 292 and 303.

⁸¹⁶ Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, para. 526.

not the case for portfolio investment. It is therefore that the concept of FDI in Union law is particular importance. Where the line between FDI and portfolio investment is drawn ultimately determines whether a particular economic activity falls under *prima facie* exclusive or shared competence. This section elaborates on the concepts of exclusive and shared competences, defines the concept of FDI and emphasizes its implications for the Union's treaty-making competence over ISDS provisions.

5.4.1 *The Union's exclusive competence over foreign direct investment*

Prior to the Treaty of Lisbon, the nature of external competences was primarily determined by the CJEU on a case-by-case basis. The Court took a particularly expansive approach to this questions in 1970's,⁸¹⁷ starting with its seminal *ERTA* judgment.⁸¹⁸ The exclusive nature of the CCP, for instance, was initially established in Opinion 1/75 on the OECD Understanding on Local Cost Standards,⁸¹⁹ and this was not questioned in later cases.⁸²⁰ Taking into consideration the potentially profound impact that the exercise of Member States' autonomous treaty-making powers might have on the establishment of the internal market, the Court observed in its assessment of, what is now, Article 207 TFEU:

“Such a policy is conceived in that Article in the context of the operation of the common market, for the defence of the common interest of the Community, within which the particular interests of the Member States must endeavour to adapt to each other.

Quite clearly, however, this conception is incompatible within the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.

[...] The provisions [on common commercial policy] show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible.”⁸²¹

This is not to be confused with implied exclusivity over a field that has been occupied by the Union. The exclusivity of the CCP cannot, therefore, be seen as an external expression of the pre-emptive effect of the exercise of shared competences and should be treated distinctly. Shared competences are discussed in more detail

⁸¹⁷ Thym (2009), *op cit.*

⁸¹⁸ Case 22/70 *ERTA op cit.*

⁸¹⁹ Opinion 1/75 *OECD Local Cost Standards op cit.*, ECR 1364.

⁸²⁰ Opinion 1/78 *International Agreement on Natural Rubber op cit.*, para. 38.

⁸²¹ Opinion 1/75 *OECD Local Cost Standards op cit.*, pt. 2.

below. It is important to recognize, however, that the external competence for CCP has never been shared. Its exclusivity is derived directly from the Treaties.

Be that as it may, the Treaty of Lisbon has significantly clarified the nature of competences over international commercial matters. Article 3(1)(e) TFEU now stipulates explicitly that Union competence in the area of CCP is exclusive.⁸²² Member States are, thus, precluded from autonomous treaty-making in the area of FDI.

5.4.2 *The Union's shared competence over portfolio investment*

Shared competences between the Union and its Member States is the constitutional norm in the Union legal order.⁸²³ That is to say, unless the Treaties provide for exclusive external competence, Member States remain free to act internationally. This is limited only by the effect of pre-emption. In circumstances where, and to the extent that the Union has already exercised a shared competence Member States are prevented from acting autonomously.⁸²⁴ This general principle is complemented in external relations by the *ERTA* doctrine that stipulates that Member States are prevented from taking autonomous international action in any field that is covered “to a large extent” by Union measures.⁸²⁵

Broad scholarly interest in this topic emerged only with the rapid extension of QMV in the Maastricht Treaty.⁸²⁶ Over time, scholars started to differentiate concurrent, parallel and non-regulatory competences within the broader category of shared competences.⁸²⁷ The enumeration of competences with the Treaty of Lisbon constitutionally recognized a qualitative differentiation between these various categories of shared competences.⁸²⁸ Important for the present context is that by virtue of Article 4(2)(a) TFEU, competence over the internal market—including the capital movement provisions—fall within the ambit of shared competences.

⁸²² For an extensive historical account of the case law on exclusivity of CCP competence, see Koutrakos (2015), *op cit.*, 19-30.

⁸²³ Prior to Article 4(1) TFEU the Court implied this presumption from the Treaties, for a discussion see Takis Tridimas and Piet Eeckhout, ‘The external competence of the Community and the case-law of the Court of Justice: Principle versus pragmatism’ (1994) 14(1) *Yearbook of European Law* 143-77, 154-55.

⁸²⁴ For a discussion of concurrent competences, see von Bogdandy and Bast (2009), *op cit.*, 290-94

⁸²⁵ this broad view on the external pre-emptive effect of internal Union legislative activity was affirmed in Opinion 1/03 *Lugano Convention op cit.*

⁸²⁶ Tridimas (2012), *op cit.*, 47-48.

⁸²⁷ von Bogdandy and Bast (2009), *op cit.*, 290; this terminology is not always used consistently, parallel competences are sometimes referred to as concurrent to Union competence, for an example see Tridimas (2012), *op cit.*, 64.

⁸²⁸ Allan Rosas, ‘Exclusive, shared and national competences in the context of EU external relations: Do such distinctions matter?’ in Inge Govaere, *et al.* (eds), *The European Union in the world: Essays in honour of Marc Mareseanu* (Martinus Nijhoff: 2014) 17-43.

External treaty-making competence over portfolio investment, which is derived by implication from Article 63 TFEU, is concurrent with treaty-making competence by the Member States in this area. This was duly recognized by the CJEU in the *EUSFTA* opinion. And carries important implications for the nature of the Union's treaty-making competence over ISDS provisions. First, however, it is helpful to briefly introduce the Union legal framework governing implied exclusivity.

5.4.3 *Implied exclusivity*

The compartmentalization of Union competence into either shared or exclusive is difficult to reconcile with the phenomenon of implied exclusive competences in Union law. This is because “the exhaustive use of a concurrent competence cannot transform it into an exclusive competence.”⁸²⁹ The terminology of ‘implied exclusivity’ is nonetheless helpful to demonstrate the impact of the Union's internal regulatory activity on the Member States' legislative autonomy in international law. The attempt with the Treaty of Lisbon to codify and consolidate the complex jurisprudence surrounding this hitherto purely judicial construction, has been criticized in literature for broadening opportunities for the Union to acquire exclusive treaty-making competence.⁸³⁰ Article 3(2) TFEU now reads:

“The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”

Like Article 216(1) TFEU, this provision must be understood in light of the Court's case law.⁸³¹

Implied exclusivity generally requires the exercise of internal competences. This is particularly obvious where the exclusive nature a treaty-making competence is implied from a legal act that explicitly provides for the conclusion of an international agreement. Notably, the nature of external competence for areas of an international agreement that lie beyond the substantive scope of the authorising provision, are *prima facie* presumed to be shared.⁸³²

More generally, exclusivity of the Union's treaty-making competence arises as a result of pre-emption,⁸³³ the Union enjoys exclusive competence where the

⁸²⁹ von Bogdandy and Bast (2009), *op cit.*, 291.

⁸³⁰ Rosas (2014), *op cit.*, 21-23; Rossi (2012), *op cit.*, 99.

⁸³¹ Koutrakos (2015), *op cit.*, 77; for an overview over the Court's post-Lisbon case law on this issue, see Castillo de la Torre (2016), *op cit.*, 142 *et seq.*

⁸³² Tridimas (2012), *op cit.*, 72.

⁸³³ Case 22/70 *ERTA op cit.*, paras. 16-22; Case C-266/03 *Commission v Luxembourg (Inland Waterways)* [2005], EU:C:2005:341, para. 40; Koutrakos discusses the origins of the implied powers doctrine in the

conclusion of an international agreement by the Member states is liable to affect common rules or alter their scope. Article 3(2) TFEU reflects in this respect the long-standing *ERTA* doctrine.⁸³⁴ The CJEU has not, however, provided, clear guidance on when common rules are altered or their scope is deemed to be affected. On one end of the spectrum the CJEU suggested in its *ERTA* judgment that the existence of common rules would be sufficient for external competence to become exclusive.⁸³⁵ On the diametrically opposite end of that spectrum the Court has endorsed the view that complete harmonization would in fact be required.⁸³⁶ In recent cases the CJEU adopted a more lenient view application of Article 3(2) TFEU, which was previously articulated in Opinion 2/91 and Opinion 1/03.⁸³⁷ Accordingly, exclusivity arises where the area is “already covered to a large extent by Union rules”.⁸³⁸

The restrictive approach adopted in Opinion 1/94 is in light of these developments perhaps best explained by the broad sectoral approach of the TRIPs and GATS agreement. It does not, however, suggest that the exclusivity under Article 3(2) TFEU only arises where the scope of internal rules and the international agreement are identical. On the contrary, although it is imperative that the international agreement covers the same subject matter as the common rules,⁸³⁹ the CJEU acknowledged that they must not “coincide fully”.⁸⁴⁰ Instead, an assessment of the nature of the Union’s implied competences

“must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of

context of other constitutional milestones such as the doctrines of supremacy and direct effect, see Koutrakos (2015), *op cit.*, 83.

⁸³⁴ Case 22/70 *ERTA op cit.*, para. 22.

⁸³⁵ Case 22/70 *ERTA op cit.*, para. 17.

⁸³⁶ Opinion 1/94 *WTO Agreements op cit.*, para. 96.

⁸³⁷ Opinion 2/91 *ILO Convention op cit.*, para. 25; Opinion 1/03 *Lugano Convention op cit.*, para. 120

⁸³⁸ Opinion 2/15 *EUSFTA op cit.*, para. 181; Opinion 3/15 *Marrakesh Treaty op cit.*, para. 107; Opinion 1/13 *The Hague Convention op cit.*, para. 73; Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* [2014], EU:C:2014:2399, para. 31.

⁸³⁹ Eeckhout (2011), *op cit.*, 76; note, however, that it is not necessary that the rules were adopted within the framework of a 'common policy', see Opinion 2/91 *ILO Convention op cit.*, paras. 9-11; for a discussion, see Tridimas (2012), *op cit.*, 62.

⁸⁴⁰ Opinion 2/15 *EUSFTA op cit.*, para. 181; Opinion 3/15 *Marrakesh Treaty op cit.*, para. 106; Opinion 1/13 *The Hague Convention op cit.*, para. 72; Case C-114/12 *Commission v Council op cit.*, para. 69; Case C-66/13 *Green Network op cit.*, para. 30; Opinion 1/03 *Lugano Convention op cit.*, para. 126

undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.”⁸⁴¹

This intrinsic link between internal regulation and external action is a reflection of the overall inseparability of these dimensions that fundamentally informs the genesis of an implied powers doctrine in the constitutional order of the Union.⁸⁴² Exclusivity is, thus, limited to the extent that an effect on common rules is ascertainable,⁸⁴³ albeit that a risk of such an effect is sufficient, even if it concerns foreseeable future developments in Union law.⁸⁴⁴ In essence, it is relevant to inquire whether “the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.”⁸⁴⁵

Where the Union has not yet exercised an internal competence, exclusivity of treaty-making competence arises where it is necessary for the exercise of an internal competence. Article 3(2) TFEU not only codifies Opinion 1/76, but emphasizes the limited character of this alternative for the construction of exclusivity.⁸⁴⁶ Treaty-making competence is, therefore, exclusive only where internal powers can be exercised by no other means than through external action.⁸⁴⁷ Unlike the existence of treaty-making competence (i.e. Article 216(1) TFEU), therefore, exclusivity always requires the exercise of internal regulatory competence.⁸⁴⁸ It is noteworthy that this restrictive articulation of necessity is not manifested in the drafting of Article 3(2) TFEU.⁸⁴⁹ Indeed, the wording of that provision suggests that it is sufficient for treaty-making competence to become exclusive that the international agreement is instrumental for the exercise of internal powers. The CJEU has yet to confirm whether, and to what extent, the pre-Lisbon case law is relevant for the interpretation of Article 3(2) TFEU. The new provision nonetheless contributes to improved clarity over the Union’s implied competences. It explicitly disassociates

⁸⁴¹ Opinion 3/15 *Marrakesh Treaty* *op cit.*, para. 108; Opinion 1/13 *The Hague Convention* *op cit.*, para. 74; Case C-114/12 *Commission v Council* *op cit.*, para. 74; Case C-66/13 *Green Network* *op cit.*, para. 33; Opinion 1/03 *Lugano Convention* *op cit.*, para. 133; Opinion 2/91 *ILO Convention* *op cit.*

⁸⁴² Koutrakos (2015), *op cit.*, 107.

⁸⁴³ Opinion 2/91 *ILO Convention* *op cit.*, para. 18.

⁸⁴⁴ Castillo de la Torre (2016), *op cit.*, 163.

⁸⁴⁵ Opinion 3/15 *Marrakesh Treaty* *op cit.*, para. 108; Opinion 1/13 *The Hague Convention* *op cit.*, para. 74; Case C-66/13 *Green Network* *op cit.*, para. 33; Opinion 1/03 *Lugano Convention* *op cit.*, para. 128

⁸⁴⁶ Cremona (2011), *op cit.*, 245.

⁸⁴⁷ Case C-476/98 *Commission v Germany (Open Skies)* [2002], EU:C:2002:631, para. 88; Eeckhout observed that this development renders it virtually impossible for the Union to exercise exclusive external competence on this basis, see Eeckhout (2011), *op cit.*, 104.

⁸⁴⁸ Opinion 1/94 *WTO Agreements* *op cit.*, paras. 88-89; Opinion 1/92 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1992], 10 April 1992, EU:C:1992:189, para. 4; for a discussion, see Dashwood and Heliskoski (2000), *op cit.*, 13-14.

⁸⁴⁹ Koutrakos (2015), *op cit.*, 128.

the relevance of a treaty-making competence for the attainment of a specific Treaty objective from the concept of ‘necessity’ for the determination of the nature of that competence. The CJEU recently confirmed this view.⁸⁵⁰

5.4.4 *Implications for investor-state disputes settlement provisions*

The dual footing of Union competence over its foreign investment policy carries implications beyond the existence of treaty-making competence in this area. Indeed, the nature of such competence is likewise characterized by a sharp, though imaginative, dividing line between FDI and portfolio investment. Whereas treaty-making competence over FDI falls under *a priori* exclusive competence under Article 207 TFEU, portfolio investment is derived by implication from internal market provisions, for which shared competence is the norm. The nature of external competence for institutional provisions logically follows the nature of competence for substantive provisions that they are related to. In principle, therefore, dispute settlement should be the domain of exclusive Union competence in as far as it relates to FDI.

This view is not entirely confirmed by the CJEU in the *EUSFTA* opinion, the operative part of which reads:

“The [EUSFTA] falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States:

- the provisions of [Investment Protection], in so far as they relate to non-direct investment [...];
- the provisions of [Investor-State Dispute Settlement]; and
- the provisions of [Objectives and General Definitions, [Transparency, Dispute Settlement between the Parties, Mediation, and Institutional, General and Final Provisions], in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States.”

With the exception of ISDS provisions, therefore, institutional arrangements can be associated with either FDI or portfolio investment. The fact that ISDS provisions are treated separately warrants a number of observations.

First, this study advocates that the differentiation between various forms of dispute settlement on the basis of procedural or institutional idiosyncratic features should have no impact on the division or nature of treaty-making competences.

⁸⁵⁰ Opinion 2/15 *EUSFTA op cit.*, paras. 237-40.

Similar to state-to-state dispute settlement provisions, ISDS ensures the effective implementation of substantive commitments and are therefore to be treated as ancillary to the substantive provisions of the agreement to which they correspond.⁸⁵¹ In as far as ISDS provisions in Union IIAs relate to FDI, therefore, the Union's treaty-making competence would be exclusive, and shared with respect to portfolio investment.⁸⁵² Whether or not the design of individual ISDS provisions is compatible with the Treaties is unrelated to the question of competence.⁸⁵³ This point is further substantiated in Chapter Six. Yet, it is important to note that in spite of acknowledging this very differentiation in its *EUSFTA* opinion,⁸⁵⁴ it remains unclear how this affected the Court's assessment of the Union's treaty-making competence viz ISDS.

Indeed, even if such a differentiation on the basis of procedural features is made—recalling the Court's conclusions in its *EUSFTA* opinion⁸⁵⁵—it is nonetheless the existence of treaty-making competence that imprints on its nature.⁸⁵⁶ This flows as a natural corollary of the indispensable requirement to identify a legal basis for Union action that arises directly out of the principle of conferred powers.⁸⁵⁷ The second observation to be made here is, therefore, that for ISDS to be treated different from other institutional provisions it requires a separate legal basis, independent from the substantive provisions to which it is linked. Although the CJEU in its *EUSFTA* opinion refrains from offering an alternative legal basis, it was suggested in the previous section that treaty-making competence for ISDS provisions could be established on the basis of Article 21 TEU. It is therefore helpful to revisit that argument and assess its relevance for the nature of external competence.

Thus far the general principles and objectives of the Union's external action were merely invoked by the Court in order to extend the substantive scope of an existing policy field for which the Union already enjoyed external competence, such as the CCP.⁸⁵⁸ In other words, treaty-making competence for ISDS could be established on the basis of Article 207 TFEU because it purports to promote the rule of law,

⁸⁵¹ For a similar argument, see Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, para. 526-27.

⁸⁵² Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, para. 535.

⁸⁵³ Advocate General Sharpston observes that the details of concrete policy choices "concerns the manner in which external competence is exercised rather than the existence and nature of that external competence", see Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, para. 526.

⁸⁵⁴ Opinion 2/15 *EUSFTA op cit.*, paras. 30 and 290.

⁸⁵⁵ "Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature [...]", see Opinion 2/15 *EUSFTA op cit.*, para. 292.

⁸⁵⁶ Opinion 1/08 *GATS Schedules op cit.*, para. 112; Opinion 2/92 *Third Revised Decision of the OECD on national treatment* [1995], EU:C:1995:83, para. 12.

⁸⁵⁷ Opinion 1/08 *GATS Schedules op cit.*, para. 110; Case C-370/07 *Commission v Council (CITES)* [2009], EU:C:2009:590, para. 47; Opinion 2/00 *Cartagena Protocoll op cit.*, para. 5.

⁸⁵⁸ Opinion 2/15 *EUSFTA op cit.*, 142-47.

the principles of international law, and an international system based on good global governance all of which are represented in Article 21 TEU. A similar argument can be made for ISDS with respect to portfolio investment on the basis of Article 63 TFEU. The crucial point, however, is that treaty-making competence for ISDS would under these circumstances still be—at least partly—exclusive, and is, therefore, not reconcilable with the Court’s approach.

More importantly, in either of the two scenarios advanced here, the shared nature of treaty-making competence over ISDS in as far as it concerns portfolio investment is liable to change over time. On the one hand, treaty-making competence over ISDS would become exclusive were the Union to extensively regulate portfolio investment on the internal market. This would occur where a legislative act would explicitly provide for the negotiation of IIAs covering portfolio investment, or ISDS more specifically. Indeed, certain aspects of portfolio investment are already subject to internal regulation with an explicit external dimension. The point is well illustrated at the example of Directive 2004/39 on markets in financial instruments⁸⁵⁹ that in Article 15 created external powers for the Commission to engage in negotiations in order to guarantee that third countries grant national treatment for EU investment firms.⁸⁶⁰ The regulation was replaced by Directive 2014/65 that limited these powers to the conclusion of cooperation agreements for the purpose of information sharing.⁸⁶¹

Notably, the CJEU was reluctant to accept that the external dimension of Article 63 TFEU itself as an authorization that could convey exclusive treaty-making competence.⁸⁶² Indeed, the implied powers doctrine was established as a functional supplement to cases where no express external power was devised by the Treaties.⁸⁶³ This is reflected in the Court’s case law as it interprets Article 3(2) TFEU so as to require a close relationship between the exclusive nature of treaty-making competence and the effective and uniform interpretation and application of internal market rules.⁸⁶⁴ Acknowledging exclusive external competence by direct implication from a Treaty provisions would embroil the CJEU into a reconstruction of the constitutional fabric of the Union legal order that would, indeed, go against the intention of the drafters of the Treaty of Lisbon.

⁸⁵⁹ OJ L 145/1, 30 April 2004, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

⁸⁶⁰ OJ L 173/349, 12 June 2014, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

⁸⁶¹ Directive 2014/65 Article 88.

⁸⁶² Opinion 2/15 *EUSFTA op cit.*, paras. 231-36.

⁸⁶³ Case 22/70 *ERTA op cit.*, paras. 15-17.

⁸⁶⁴ Opinion 3/15 *Marrakesh Treaty op cit.*, para. 108; Opinion 1/13 *The Hague Convention op cit.*, para. 74; Case C-66/13 *Green Network op cit.*, para. 33; Opinion 1/03 *Lugano Convention op cit.*, para. 128

Exclusivity arises also where an international agreement adopted by the Member States would affect common rules or alter their scope.⁸⁶⁵ Thus, the adoption of internal market regulations on investment protection for portfolio investments or the establishment of an intra-EU ISDS mechanism could pre-empt Member States from regulating portfolio investment through international agreements, irrespective of whether or not Member States would maintain certain legislative autonomy internally.⁸⁶⁶

The Court's holistic approach adopted in recent years, with a focus on a detailed analysis of the relationship between the internal rules and an international agreement for the purpose of ensuring the *effet utile* of the internal market plays in favour of such an argument. Indeed, the complex and integrated structure of economic markets renders the separation of the internal from the external dimension of investment activity a technical and seemingly unrealistic exercise. More importantly, investment protection affects a range of policy areas beyond capital movements, such as competition and state aid. This is further aggravated by the apparent impossibility to separate FDI and portfolio investment in the negotiation of IIAs as well as their application. Consequently, wherever there are internal rules, the threshold to establish an effect on these rules for the purpose of Article 3(2) TFEU would arguably be low.

On the other hand, exclusivity for treaty-making competence over ISDS provisions viz portfolio investment could also arise in instances where internal measures have not yet been adopted. Here again the fact that financial markets are tightly integrated should have a bearing. Whereas the liberalization of capital movement on the internal market does not strictly speaking necessitate external action, the distinction between an internal and external domain is less obvious with respect to investment protection. The organizational links that economic entities share in globally integrated value chains and the complexity of corporate ownership structures have not only an impact on FDI but also the flow of capital. It cannot be excluded, therefore, that capital investment originating from outside the Union and capital investments within the internal market are interrelated. On this basis it is possible to argue that the protection of portfolio investments on the internal market necessitates the protection of such investment between the Union and third countries.

It should be mentioned at this point that the CJEU has not been receptive of this type of policy argument but has consistently rejected broad brushed assertions of the Commission, claiming that an all-encompassing and exclusive competence is a prerequisite for effective external action.⁸⁶⁷ This was already evident in Opinion

⁸⁶⁵ Opinion 2/15 *EUSFTA op cit.*, 142-47.

⁸⁶⁶ Opinion 3/15 *Marrakesh Treaty op cit.*, para. 108; Opinion 1/13 *The Hague Convention op cit.*, para. 74; Case C-114/12 *Commission v Council op cit.*, para. 74; Case C-66/13 *Green Network op cit.*, para. 33; Opinion 1/03 *Lugano Convention op cit.*, para. 133; Opinion 2/91 *ILO Convention op cit.*

⁸⁶⁷ Koutrakos (2015), *op cit.*, 118.

1/94,⁸⁶⁸ Opinion 2/00⁸⁶⁹ and the *Open Skies* judgments,⁸⁷⁰ but informs also the Court's position in the *EUSFTA* opinion.⁸⁷¹ More generally, these Court's reluctance to engage with policy-centred arguments manifests itself in the development of the concept of 'necessity' as an objective standard. As Koutrakos observed:

“The argument as to the desirability, in policy terms, of the conclusion of an international agreement as a facilitator of the attainment of internal objectives are irrelevant to the application of the ‘necessity’ principle.”⁸⁷²

In the absence of extensive internal market regulation, therefore, it seems unlikely that exclusive treaty-making competence over ISDS with respect to portfolio investment would arise.

On a more principled point, the two fundamental assumptions that are underlying the normative proposition that the existence and nature of Union treaty-making competence over ISDS should be divided between FDI and portfolio investment is not reconcilable with the Court's findings in the *EUSFTA* opinion. *In casu* the Court excluded ISDS as a legal structure in its entirety from the scope of the Union's exclusive external competence.

Only where treaty-making competence for ISDS provisions is established directly by implication from Article 21 TEU, i.e. in isolation of any link with the CCP, is the finding justified that ISDS provisions in their entirety fall within the ambit of shared competences. This is so, because shared competences are, in accordance with Article 5(2) TEU, the default position. Implied exclusive competence in accordance with Article 3(2) TFEU is unavailable considering that Article 216(1) TFEU in conjunction with Article 21 TEU situates competence entirely in the external realm explicitly negating any connection with internal competence. Be that as it may, a broad view on implied competence under Article 216(1) TFEU facilitates the establishment of treaty-making competences by reference only to objectives entailed in Article 21 TEU.⁸⁷³ Severing ties between the CCP and Article 21 TEU would, however, go against the clear wording of Article 207(1) TFEU, as it was also acknowledged by the CJEU in its *EUSFTA* opinion.⁸⁷⁴ It is, therefore, difficult to see how treaty-making competence over ISDS can be

⁸⁶⁸ Opinion 1/94 *WTO Agreements op cit.*, e.g. para. 36 and 54.

⁸⁶⁹ Opinion 2/00 *Cartagena Protocol op cit.*, e.g. para. 35.

⁸⁷⁰ Case C-476/98 *Open Skies op cit.*, paras. 71-75.

⁸⁷¹ Opinion 2/15 *EUSFTA op cit.*, 12-19 and 229, notably the Commission abstained from submitting arguments based on the necessity of external action, see para. 236.

⁸⁷² Koutrakos (2015), *op cit.*, 108.

⁸⁷³ Cremona (2011), *op cit.*, 225.

⁸⁷⁴ Opinion 2/15 *EUSFTA op cit.*, 142.

implied from Article 21 TEU, without accepting the concomitant implication on the nature of such competence that is ultimately derived partly through the CCP.

Indeed, the Court's conclusion that ISDS provisions of the EU-Singapore FTA *ipso facto* fell under shared competence is entirely based on the observation of their effect on the domestic judiciary.⁸⁷⁵ It remains unclear from the reasoning of the Court how that finding is substantiated. It is not entirely uncharacteristic of the CJEU to be vague when confronted with questions of constitutional relevance. Koutrakos observed that much of the Court's case law on implied competences until the 1990s is characterized by a lack of "consistent normative foundation for the newly introduced principles articulated [and] coherent account of their legal implications."⁸⁷⁶ Arguably, the Court's reasoning complements the restrictive line of cases on the compatibility of judicial mechanisms in international agreements with the Treaties, which is discussed in more detail in the Chapter Six. Such a reading of the *EUSFTA* opinion would emphasize that treaty-making competence for provisions that enable private claimants to escape the judicial dialogue established under Article 267 TFEU between domestic courts and the CJEU, are *a priori* and invariably shared. Indeed, the language employed by the CJEU is in this respect similar to Opinion 1/09 on the compatibility of the EPCT with the Treaties.⁸⁷⁷

Although this understanding leaves no room for an application of Article 3(2) TFEU, the fact that the focus in the CJEU is specifically on the fork-in-the-road clause in the *EUSFTA* raises an important question. What is the nature of treaty-making competence for ISDS in future agreements that do not feature a fork-in-the-road clause? Be that as it may, central to the Court's overall approach to the division of competence for the conclusion of the EU-Singapore FTA, and for the approach advocated in this analysis is the separation of FDI from portfolio investment and this distinction is likely to prove essential for the assessment of future agreements that include ISDS provisions.

5.5 The concept of foreign direct investment in Union external relations

The Treaties do not define the concept of direct investment. Apart from Article 207 TFEU, the term only appears in Article 64 TFEU concerning the imposition of restrictions on capital movements to or from third countries. It can therefore be assumed that the concept of 'direct investment' has developed in Union law as a sub-category of capital movement.⁸⁷⁸ This view is further supported by the fact that

⁸⁷⁵ Opinion 2/15 *EUSFTA op cit.*, 142.

⁸⁷⁶ Koutrakos (2015), *op cit.* Chapter 3.5.

⁸⁷⁷ Opinion 1/09 *European Patents Court* [2011], EU:C:2011:123.

⁸⁷⁸ Steffen Hindelang, *The free movement of capital and foreign direct investment: The scope of protection in EU law* (Oxford University Press: 2009) 66.

the only explicit definition of ‘direct investment’ can be found in the Nomenclature that was annexed to Directive 88/361 on the implementation of what is now Article 64 TFEU.⁸⁷⁹ Accordingly, the Union legislator understood direct investment to mean:

“Investments of all kinds [...] which serve to establish or to maintain *lasting and direct links* between [the investor and the investment] in order to carry on an economic activity. This concept must therefore be understood in its widest sense [and] include legally independent undertakings (wholly-owned subsidiaries) and branches.”⁸⁸⁰

At the outset this appears to reflect well the right of establishment in Article 49 TFEU, i.e. the right to “participate, on a stable and continuous basis, in the economic life of a Member State” through self-employment or by setting-up and managing secondary establishments, i.e. agencies, branches or subsidiaries.⁸⁸¹ And indeed, the right of establishment and the free movement of capital share a complex relationship when it comes to direct investment.⁸⁸²

In order for capital participation to fall within the ambit of the right of establishment it needs to furnish the investor with a ‘definite influence over the company’s decisions and allows him to determine its activities’.⁸⁸³ This is self-evident in cases of a 100% holding.⁸⁸⁴ At what level exactly the investor loses ‘definite influence’ is, however, less obvious, although the CJEU suggested that this might be

⁸⁷⁹ Section I of Annex I to Directive 88/361 provided an exhaustive list over direct investment activity, including establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings; participation in new or existing undertaking with a view to establishing or maintaining lasting economic links; long-term loans with a view to establishing or maintaining lasting economic links; reinvestment of profits with a view to maintaining lasting economic links.

⁸⁸⁰ Explanatory Notes of Annex I to Directive 88/361, emphasis added; on the indicative value of the nomenclature, see Case C-181/12 *Yvon Welte v Finanzamt Velbert* [2013], EU:C:2013:662, para. 32; Case C-464/14 *SECIL — Companhia Geral de Cal e Cimento SA v Fazenda Pública* [2016], EU:C:2016:896, para. 75; Case C-157/05 *Winfried L. Holböck v Finanzamt Salzburg-Land* [2007], EU:C:2007:297, para. 34; Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006], EU:C:2006:774, para. 178-79.

⁸⁸¹ Case C-55/94 *Reinhard Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995], EU:C:1995:411, paras. 23 and 25.

⁸⁸² For a comprehensive overview, see Hindelang (2009), *op cit.*, 81 *et seq.*

⁸⁸³ Case C-326/07 *Commission v Italy* [2009], EU:C:2009:193, para. 34; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007], EU:C:2007:161, para. 27; Case C-112/05 *Commission v Germany* [2007], EU:C:2007:623, para. 13; Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, [2006], EU:C:2006:544, para. 31; Case C-251/98 C. Baars *v Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem* [2000], EU:C:2000:205, para. 22; Case C-35/11 *Test Claimants in FII Group Litigation* [2012], EU:C:2012:707, para. 31; Case C-182/08 *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II* [2009], EU:C:2009:559, para. 47.

⁸⁸⁴ Case C-251/98 *Baars op cit.*, para. 26.

the case where the investor holds less than 25% of the share capital of the undertaking.⁸⁸⁵

With respect to holding companies the Nomenclature of Directive 88/361 stipulated in particular that:

“As regards those undertakings [...] which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares [...] enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, *to participate effectively in the management of the company or in its control.*”⁸⁸⁶

This suggests further that direct investment, as opposed to non-direct investment, requires an element of control. Indeed, the CJEU confirmed this understanding on numerous occasions.

“Movements of capital [...] include in particular direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively in its management and control (‘direct’ investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (‘portfolio’ investments)”⁸⁸⁷

While the CJEU consistently held that a 10% holding in the share capital of an undertaking is indicative of direct investment,⁸⁸⁸ the size of a holding is not in itself conclusive.⁸⁸⁹ Hindelang has in this respect pointed out that influence needs to be established objectively, i.e. whether the investor is “enabled” to participate in the

⁸⁸⁵ Case C-81/09 *Idrima Tipou AE v Ipourgou Tipou kai Meson Mazikis Enimerosis* [2010], EU:C:2010:622, para. 51.

⁸⁸⁶ Explanatory Notes of Annex I to Directive 88/361, emphasis added.

⁸⁸⁷ Case C-182/08 *Glaxo Wellcome op cit.*, 40; see also Case C-222/97 *Manfred Trummer and Peter Mayer* [1999], EU:C:1999:143, 21; Case C-464/14 *SECIL op cit.*, para. 76; Case C-326/07 *Commission v Italy op cit.*, para. 35; Case C-98/01 *Commission v United Kingdom* [2003], EU:C:2003:273, para. 40; Case C-483/99 *Commission v France* [2002], EU:C:2002:327, para. 37.

⁸⁸⁸ Joined Cases C-436 and 37/08 *Haribo and Österreichische Salinen AG v Finanzamt Linz* [2011], EU:C:2011:61, para. 137; Case C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v. Commissioners of Inland Revenue* [2008], Order of the Court, EU:C:2008:239, para. 47; see also the discussion in Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, para. 319-22.

⁸⁸⁹ Case C-47/12 *Kronos International Inc. v Finanzamt Leverkusen* [2014], EU:C:2014:2200, para. 35; Case C-282/12 *Itelcar – Automóveis de Aluguer Lda v Fazenda Pública* [2013], EU:C:2013:629, para. 22

management of control of a company.⁸⁹⁰ More importantly, this influence can arise without any capital participation at all.⁸⁹¹

It transpires from the above, that the dividing line between direct and non-direct investment does not separate the right of establishment from the free movement of capital. Rather, both direct and non-direct investment are concepts that pertain to the realm of free movement of capital. The conceptual dividing line is in fact irrelevant for the protection of an economic transaction under the free movement of capital. That is to say, both direct and non-direct investments fall within the ambit of Article 63 TFEU. A definition of direct investment merely serves as a tool for the CJEU to determine whether domestic legislation restricting capital movements to or from third countries can be examined under Article 64 TFEU.⁸⁹²

Relying on this established line of cases, the CJEU in its *EUSFTA* opinion confirms that direct investment is characterized by a lasting and direct link between the investor and her investment also in the context of the CCP.⁸⁹³ In the case of capital participation this requires a holding in the share capital of an undertaking that enables the investor to effectively participate in its management or control.⁸⁹⁴ The Court's reasoning suggests that the Union's exclusive competence for the conclusion of IIAs extends only over investments that exceed the indicative 10% level of capital participation. As this threshold is not conclusive, however, the determination of whether a particular investment is covered by shared or exclusive competence must be undertaken on a case-by-case basis.

The approach taken by the CJEU in its *EUSFTA* opinion warrants two remarks. First, the CJEU develops the concept of foreign direct investment in a manner that is consistent with the concept of direct investment in the internal market. There is, however, no apparent reason why such coherent conceptual development would be necessary. It was already illustrated in previous chapters that the CCP has emancipated from a policy that enabled an external dimension of the single market into a self-standing external policy.⁸⁹⁵ Its scope is evidently shaped by international developments and its core concepts must be developed within that international context. Foreign direct investment should not, therefore, be reduced to an external reflection of the internal market concept of direct investment.

On the contrary, such an approach is quite problematic. It transpires from the above that the internal market concept of direct investment in Union law excludes capital holdings that furnish investors with a 'definitive influence'. These positions are instead seen to fall within the ambit of the free movement of establishment. It

⁸⁹⁰ Hindelang (2009), *op cit.*, 71.

⁸⁹¹ Hindelang (2009), *op cit.*, 65.

⁸⁹² Case C-326/07 *Commission v Italy op cit.*, para. 36; see also Ohler (2011), *op cit.*, 429.

⁸⁹³ Opinion 2/15 *EUSFTA op cit.*, para. 82.

⁸⁹⁴ *Ibid.*, para. 82.

⁸⁹⁵ For a discussion, see *supra* Section 5.1.1.

cannot be denied, of course, that FDI activity has a clear overlap with the notion of establishment in Union law. Yet, as a legal concept the Union legal order does not identify establishment as direct investment. It would be implausible to assume that it was the intention of the CJEU to exclude with its *EUSFTA* opinion these types of economic transactions from the scope of the scope of exclusive treaty-making competence under the CCP. However, this is precisely what the Court's reasoning effectively does, i.e. it reduces the concept of foreign direct investment as a legal phenomenon to the realm capital movements. Instead of resorting to its internal market case law, the CJEU could have developed the concept with reference to international investment law and highlighted the fundamental character of FDI as a concept that spans both dimensions of the internal market, establishment and capital movement.

The second observation with respect to the Court's reasoning relates to its motivation in light of definitions of 'foreign direct investment' adopted in other international fora. As Advocate General Sharpston correctly points out in her opinion, the definition of direct investments in Union law is consistent with the definitions adopted by the OECD⁸⁹⁶ and the IMF.⁸⁹⁷ Notably, however, these definitions are international accounting standards that the Union has implemented by virtue of Regulation 549/2013 on the European system of national and regional accounts.⁸⁹⁸ It is not self-evident why coherence between these statistical standards and the substantive scope of FDI within the context of the CCP would provide any advantage.⁸⁹⁹ If consistency between the concept of foreign direct investment in Union law and internationally developed definitions are a relevant factor, it would have perhaps been more helpful to draw on the practice of investment tribunals. Investment tribunals are interested only in whether or not a particular economic activity falls within the ambit of the definition of 'investment' under the relevant IIA

⁸⁹⁶ "The motivation of the direct investor is a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence [...] in the management [which] is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise." OECD, 'Benchmark Definition of Foreign Direct Investment, 4th ed.' (2008), *op cit.*, para. 11.

⁸⁹⁷ "A direct investment relationship arises when an investor resident in one economy makes an investment that gives control or a significant degree of influence on the management of an enterprise that is resident in another economy. [...] Immediate direct investment relationships arise when a direct investor directly owns equity that entitles it to 10 percent or more of the voting power in the direct investment enterprise." IMF, 'Balance of payments and international investment position manual, 6th ed.' (BPM6), 2007 paras. 6.9 and 6.12.

⁸⁹⁸ OJ L 174/1, 26 June 2013, Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union, Annex A, para. 4.65.

⁸⁹⁹ Hindelang (2009), *op cit.*, 66 and 71-72.

and, where relevant, the applicable arbitration rules,⁹⁰⁰ but elaborate little on the conceptual difference between FDI and portfolio investment.

Similarly, few IIA explicitly differentiate FDI from portfolio investment. The Turkey-Denmark BIT of 1990 stipulates that the term investment “shall refer to all direct investments made in accordance with the laws and regulation in the territory of the Contracting Party where the investments are made.”⁹⁰¹ Arbitral practice has illustrated, however, that such reference to domestic laws has no bearing on the classification of an economic activity as investment under the treaty, but rather with its validity under domestic law. As such it excludes illegal investments from the scope of protection of the IIA.⁹⁰² Without going into more detail,⁹⁰³ it is important to recognize that the differentiation between FDI and portfolio investment is of limited practical relevance for international investment law and arbitration.⁹⁰⁴ From the perspective of Union law, however, it represents a crucial delimitation of the respective scope of regulatory activity of the Union and its Member States in the area of foreign investment.

5.6 ‘Mixity’ in EU foreign investment policy

Naturally, it may be tempting to infer from the Court’s conclusions in its *EUSFTA* opinion—i.e. that the EU-Singapore FTA would have to be concluded jointly with the Member States⁹⁰⁵—that future IIAs with third countries would have to be concluded by the Union as well as its Member States, so-called mixed agreements. There is an abundant body of literature available on mixed agreement as a phenomenon in EU external relations law, and it is not for this study to dwell on what is certainly a fascinating subject to study.⁹⁰⁶ A few remarks might nonetheless

⁹⁰⁰ August Reinisch, ‘The Scope of investor-state dispute settlement in international investment agreements’ (2013) 21(1) *Asia Pacific Law Review* 3-26, 20-21; Tietje (2009), *op cit.*, 51.

⁹⁰¹ Article 1(1)(b) of the Turkey-Denmark BIT of 1990.

⁹⁰² *Salini Costruttori S.p.A. & Italstrade S.p.A., v. Kingdom of Morocco* Award on Jurisdiction, 16 July 2001, ICSID Case No. ARB00/4.

⁹⁰³ Katia Yannaca-Small, ‘Definition of investor and investment in international investment agreements’ in OECD (ed), *International investment law: Understanding concepts and tracking innovations* (2008b) 7-100, 46 *et seq.*

⁹⁰⁴ Krajewski (2012), *op cit.*, 303.

⁹⁰⁵ Opinion 2/15 *EUSFTA op cit.*, paras. 243, 244 and 304.

⁹⁰⁶ e.g. Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International: 2001); Christophe Hillion and Panos Koutrakos, *Mixed agreements revisited: the EU and its member states in the world* (Hart: 2010); Koutrakos (2002), *op cit.*; Marc Maresceau, ‘A typology of mixed bilateral agreements’ in Christophe Hillion and Panos Koutrakos (eds), *Mixed agreements revisited* (Hart Publishing: 2010); Eleftheria Neframi, ‘The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations’ (2010) 47(2) *Common Market Law Review* 323-359; Eleftheria Neframi, ‘Mixed agreements as a source of European Union law’ in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International law*

be of help to appreciate 'mixity' in the context of EU foreign investment policy. Let's start by stating the obvious. The substantive scope of an international agreement does not usually correspond to the rather technical and seemingly binary classification of Union competences as either exclusive or shared,⁹⁰⁷ nor do existing legal frameworks or multilateral negotiations necessarily adapt to or prioritize the constitutional idiosyncrasies of the Union legal order.⁹⁰⁸ 'Mixity', therefore, provides for a "legal formula which enables both the Community and the Member States to negotiate, conclude and implement an international agreement whose scope falls within the competence of both."⁹⁰⁹

This is not to say, however, that 'mixity' is widely embraced as the desired legal formula. The view that 'mixity' is associated with inefficiency is aptly reflected in the opinion of Advocate General Kokott in the *Vietnam Accession to the WTO* case.⁹¹⁰

"The more players there are on the European side at international level, the more difficult it will be to represent effectively the interests of the Community and its Member States outwardly, in particular vis-à-vis significant trading partners. Even if the Commission acts as the joint spokesperson of the Community and the Member States in negotiations, this will be preceded by considerable work on coordination, together with de facto pressure for unanimity if, in addition to the Community, all the Member States act individually in dealings involving international law.

In addition, there is a risk that individual Member States may, to the detriment of the common interest, obstruct or protract negotiations with non-member countries in order to secure concessions for themselves. Conversely, for non-member countries it may be sufficient, in negotiations 'with Europe', to apply pressure to individual Member States in order circuitously to force concessions from the Community as a whole. Furthermore, the scope for complaints by non-member countries within the framework of the

as law of the European Union (Marinus Nijhoff: 2012) 325-49; Allan Rosas, 'The European Union and mixed agreements' in Alan Dashwood and Christophe Hillion (eds), *The general law of EC external relations* (Sweet & Maxwell: 2000) 200-20; Henry G. Schermers, 'A typology of mixed agreements' in David O'Keefe and Henry G. Schermers (eds), *Mixed agreements* (Kluwer: 1983); Guillaume Van Der Loo and Ramses Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017) 54(3) *Common Market Law Review* 735-70; Ramses A. Wessel, 'The EU as a party to international agreements: shared competences, mixed responsibilities' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge University Press: 2008) 152-187.

⁹⁰⁷ John Temple Lang, 'The Ozone Layer Convention: A new solution to the question of Community participation in "mixed" international agreements' (1986) 23(1) *Common Market Law Review* 157-76, 162.

⁹⁰⁸ Thym (2009), *op cit.*, 338.

⁹⁰⁹ Koutrakos (2002), *op cit.*, 25.

⁹¹⁰ Opinion of Advocate General Kokott, Case C-13/07 *Commission v Council (Vietnam)* [2009], EU:C:2009:190.

WTO's own dispute-resolution system will increase commensurately with the number of players on the European side which act and enter into commitments at international level.

Agreements to which the Member States as well as the Community are parties are consequently out of place in the common commercial policy."⁹¹¹

With the Treaty of Lisbon, it now appears that exclusivity has become the constitutional norm in treaty-making.⁹¹² Indeed, this is how the Commission has perceived its role over the past decade in the implementation of CCP. All post-Lisbon trade and investment agreements were initially pursued as exclusive agreements. This is exemplified at the example of CETA, where the proposal to conclude the agreement jointly with the Member States was only tabled once the text of CETA was already finalized.⁹¹³ The Commission position in the *EUSFTA* opinion likewise reflected the notion of an all-encompassing exclusivity over trade and investment.⁹¹⁴

In light of the Court's conclusions in the *EUSFTA* opinion the proposition that the Union enjoys exclusive competences to replace the Member States in the conclusion of IIAs has become unsustainable. This does not, however, imply that the Union has to exercise shared competences over ISDS in the form of mixed agreements.⁹¹⁵ Indeed, although exclusive treaty-making competence under Article 3(2) TFEU may in some cases not arise before shared competence has been exercised internally, this does not prevent the Council from choosing to exercise shared treaty-making competences by means of an EU-only agreement.⁹¹⁶ The difference is that an EU-only agreement is under these circumstances merely optional (i.e. facultative 'mixity').⁹¹⁷ The effects of the *EUSFTA* opinion and its concomitant confirmation of incomplete foreign investment competence is on the conclusion of IIAs with the ICS is discussed in more detail below.⁹¹⁸ It is sufficient to note at this point that the choice to exercise treaty-making competence over ISDS

⁹¹¹ Opinion of Advocate General Kokott, Case C-13/07 *Vietnam op cit.*, paras. 72-74.

⁹¹² Cremona (2008), *op cit.*, 62; Chapter 6 discusses the consequences of 'treatification' the Union

⁹¹³ European Commission, 'European Commission proposes signature and conclusion of EU-Canada trade deal', 5 July 2016 accessed at <http://europa.eu/rapid/press-release_IP-16-2371_en.htm>.

⁹¹⁴ Notably, the Commission did not assert that all of the EU-Singapore FTA fall under the CCP, but that cross-border transport and non-direct investment is an exclusive EU competence by virtue of Article 3(2) TFEU, see Opinion 2/15 *EUSFTA op cit.*, paras. 12-16.

⁹¹⁵ Castillo de la Torre (2016), *op cit.*, 181.

⁹¹⁶ Case C-600/14 *Germany v Commission (OTIF)* [2017], EU:C:2017:935, para. 52.

⁹¹⁷ For a practical example of a facultative EU-only agreement see the EU-Kosovo Stabilisation and Association agreement (Council Decision (EU) 2016/342 of 12 February 2016 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part (2016) OJ L71/1).

⁹¹⁸ See *infra* discussion 8.1.3.

by way of concluding future IIAs as mixed or EU-only agreements is not primarily determined by legal considerations but is for the reasons discussed above subject to political deliberation in the Council.

Two final observations should be made. First, it not possible for the Member State to exercise a political choice through the Council to the effect of exercising exclusive competence through a mixed agreement. In other words, an agreement that covers in its entirety exclusive competences can only be concluded by the Union alone.⁹¹⁹ This is not to say that these type of agreements do not exist, or that agreements that were concluded by the Union and its Member States cannot, over the course of time, become areas of exclusive competence.⁹²⁰ Indeed, ‘mixity’ has developed into a “constitutional practice wherever the division of external powers was uncertain or where the participation of the Member States simply seemed more expedient”,⁹²¹ or was otherwise politically desirable.⁹²² However, this situation is not comparable with facultative ‘mixity’. Where the Union alone concludes an international agreement, irrespective the nature of its treaty-making competence, the Union alone will become responsible for that agreement. Similarly, as a matter of EU law, the Union alone is responsible to perform an international agreement that falls in its entirety within the ambit of exclusive competences, be it concluded as an EU-only or mixed agreement. Second, in so far as elements of the international agreement fall outside of the scope of Union competence altogether, ‘mixity’ becomes inevitable.

5.7 Interim conclusion

The Union’s competence to conclude IIAs is generally derived partly from express authority under the CCP, and partly from implied legislative authority regarding capital movements on the internal market. Whereas the former is exclusive, the latter is shared with the Member States. A comprehensive IIA concluded by the Union without participation of the Member States may be unlikely, but it is not an impossible scenario. Indeed, whether future IIAs covering aspects of both direct and non-direct investment is primarily a policy choice that will depend on the political will of the Member States.⁹²³

Several scholars have pointed to the fact that the use of exclusive competences and the use of total harmonization measures are becoming a less popular governance

⁹¹⁹ e.g. Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, para. 75

⁹²⁰ agreements that were concluded as mixed agreements in areas of exclusive competences have at times been described as ‘false’ mixed agreements, see e.g. Schermers (1983), *op cit.*, 27; Rosas (2000), *op cit.*, 205 .

⁹²¹ Schütze (2004), *op cit.*, 267.

⁹²² Marcus Klamert, *The principle of loyalty in EU law* (Oxford University Press: 2014) 184.

⁹²³ See *infra* Chapter 8.1.

instruments in the EU.⁹²⁴ However, this does not seem to be the case in the CCP where the Commission persistently attempts to reassert its exclusive competence over commercial matters. Rather than embracing ‘mixity’ as a standard model for post-Lisbon trade and investment agreements, the Commission has approached all agreements as exclusive Union agreements. Even after *EUSFTA* opinion, the Commission bifurcated the agreement in order to conclude trade aspects in an exclusive EU-Singapore FTA, and investment aspects in a parallel mixed EU-Singapore IPA.⁹²⁵ Suffice it to emphasize that, at least in CCP, the Commission’s mindset prioritizes efficiency in the conclusion and implementation of international agreements over political dialogue and compromise with the Member States.⁹²⁶ The brief review of implied competences demonstrated in this respect that exclusive treaty-making competence of the Union does not presuppose Treaty amendments but could be achieved incrementally by means of internal regulatory activity. This provides an important policy-window for the Commission that enjoys the power of initiation and could exploit the relative uncertainty created by the *EUSFTA* opinion.

It also emerges from the present discussion that the Court’s view on ISDS provisions is inconsistent with established approaches *vis-à-vis* institutional provisions in international agreements. Unlike state-to-state dispute settlement or other horizontal provisions such as transparency that are viewed as incidental to substantive provisions, ISDS provisions are treated markedly different. The ISDS provisions included in the EU-Singapore FTA did not, therefore, inherit exclusive competence from the CCP in as far the resolution of disputes relating to FDI are concerned. Instead, these provisions fell in their entirety under shared competence. This peculiar position of ISDS is not sufficiently substantiated by the CJEU in its *EUSFTA* opinion. However, it feeds into the general scepticism of the CJEU towards mechanisms that furnish individuals with standing before international courts and tribunals, which is aptly illustrated by the evolution of the principle of autonomy that is the subject-matter of Chapter Six.

More generally, the differentiation between direct and non-direct forms of investment perpetuates a conceptual distinction that is of little practical relevance in international investment law, and elevates it to a critical factor for the delimitation of treaty-making competences. The approach is of course in line with the practice of the CJEU,⁹²⁷ and both, the Union and its Member States have reiterated the distinction between FDI and other forms of investment in international fora.⁹²⁸ However, it creates a potential for conflict where investment tribunals are asked,

⁹²⁴ Douglas-Scott (2002), *op cit.*, 170; von Bogdandy and Bast (2009), *op cit.*, 290; for a view to the contrary, see Tridimas (2012), *op cit.*, 74.

⁹²⁵ European Commission Press Release (18 April 2018) *op cit.*

⁹²⁶ Rosas (2014), *op cit.*, 24.

⁹²⁷ Tietje (2009), *op cit.*, 51.

⁹²⁸ European Commission, ‘Concept Paper on the definition of investment’, 16 April 2002 (WT/WGTI/W/115).

explicitly or implicitly, to determine whether a particular dispute concerns direct or non-direct forms of investment. This may occur in the interpretation of ‘investment’ under a particular Union IIA, and has broader ramifications on the consistency of Union law where it creates external effects, e. g. concerning the attribution of international responsibility.⁹²⁹

It emerges from these observations that the shared nature of substantive treaty-making competences does not determine the future of the ICS, but exposes the initiative to a wide range of policy factors.

⁹²⁹ Casteleiro (2016), *op cit*; Joni Heliskoski, 'EU Declarations of Competence and International Responsibility' in Malcolm David Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union : European and International Perspectives* (HART Publishing: 2013) 189-212; Pieter Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm David Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union : European and International Perspectives* (HART Publishing: 2013) 35-71; Luca Pantaleo, 'Respondent status and allocation of international responsibility under EU investment agreements ' (2016b) 1(3) *European Papers* 847-60; Christian Tomuschat, 'Attribution of international responsibility: Direction and control' in Malcolm David Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing: 2013); the author has also discussed this topic elsewhere, see Hannes Lenk, 'Issues of attribution: Responsibility of the EU in investment disputes under CETA' (2016) 13(1) *Transnational Dispute Management* 1-23.

6 THE PRINCIPLE OF AUTONOMY

Whether or not the Union has the legal capacity to conclude IIAs with ISDS provisions does not only depend on the existence and nature of treaty-making competences, but also on the compatibility ISDS provisions with the EU Treaties. The principle of autonomy has in this respect presented a reoccurring obstacle for international agreements that provide for their own system of dispute settlement,⁹³⁰ and the present Chapter demonstrates that this effects the Union's capacity to include ISDS provisions in its IIAs.

Contrary to the determination of substantive treaty-making competences, an assessment of ISDS provisions in light of the principle of autonomy is concerned with concrete policy choices and, thus, the institutional and procedural design features of ISDS. The *Green Network*⁹³¹ and the *Broadcasters*⁹³² judgements, which are discussed in more detail in Chapter 5.4, were both decided by the CJEU in the absence of a concrete draft agreement. Opinion 2/92 on the Union's first attempt to accede to the ECHR also illustrates this point.⁹³³ In fact, the CJEU has stressed that there are clear benefits to determine the division of competences before negotiations are commenced.⁹³⁴ This is qualitatively different from evaluating the compatibility of ISDS provisions with the Treaties, which "is an issue of negotiating outcomes, but not an issue of competences".⁹³⁵ The Court in its *EUSFTA* opinion reiterated that these issues, though related, are subject to distinct legal analyses.⁹³⁶

⁹³⁰ The author has previously discussed this issue elsewhere, see Hannes Lenk, 'Investor-state arbitration under TTIP: Resolving investment disputes in an (autonomous) EU legal order' (2015), SIEPS Report, 2015:3; Hannes Lenk, 'Investment arbitration under EU investment agreements: Is there a role for an autonomous EU legal order?' (2017) 28(2) *European Business Law Review* 135-62.

⁹³¹ Case C-66/13 *Green Network op cit.*

⁹³² Case C-114/12 *Commission v Council op cit.*

⁹³³ Case C-2/94 *First ECHR Accession Agreement op cit.*, paras. 7, 10-13, and 16-18.

⁹³⁴ e.g. Opinion 1/78 *International Agreement on Natural Rubber op cit.*, paras. 32-35.

⁹³⁵ Castillo de la Torre (2016), *op cit.*, 169.

⁹³⁶ Opinion 2/15 *EUSFTA op cit.*, paras. 30, 290 and 300; note that Advocate General Sharpston also proposed this view, see Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, paras. 85 and 536.

The principle of autonomy, therefore, determines the institutional design of ISDS provisions in IIAs concluded by the Union with third countries. This Chapter, in other words, establishes the foundation for the evaluation of the ICS in Chapter 8.3.

The present Chapter starts by exploring the origins of this principle of autonomy of the EU legal order (Section 6.1). This is followed by an introduction and brief discussion of the relevant case law of the CJEU regarding international agreements concluded by the Union (Section 6.2), including the *Achmea* judgment,⁹³⁷ and the request for an opinion on *CETA*⁹³⁸ (Section 6.3). Following this initial *exposé*, which is instrumental in identifying and describing the central elements of the principle of autonomy this Chapter assesses the relevance of EU law for the adjudicative function of investment tribunals (Section 6.4) and the position of investment awards in the EU legal order (Section 6.5). This will allow for an assessment of whether or not investment awards can bind the CJEU to a particular interpretation of EU law, or may otherwise disturb the uniform and coherent development of Union law. Lastly, the present Chapter addresses the need for a prior involvement of the CJEU in the form of a preliminary reference mechanism, which emerged as an indivisible element of the principle of autonomy from the Court's cases (Section 6.6).

6.1 Preliminary remarks: Origins of the principle of autonomy

The preceding chapter illustrated that the emergence of an implied powers doctrine was closely linked to the exercise, or at the very least existence, of corresponding internal competences.⁹³⁹ A similar type of parallelism between the external and internal dimension of the Union legal order is also visible in the evolution of the principle of autonomy. As Thym aptly observes:

“To date, [the Court’s] case law has been guided by the endeavour to protect the autonomy of the European legal order through the principled parallelism between the constitutional regime for external and internal policies; only occasionally has the Court integrated the methodological and substantive particularities of international law in its constitutional argument.”⁹⁴⁰

Indeed, the principle of autonomy does externally what the principle of supremacy does internally, i.e. it protects the integrity of the Union legal order influences.

⁹³⁷ Case C-284/16 *Achmea op cit.*, para. 23.

⁹³⁸ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement) op cit.*

⁹³⁹ For a discussion see *supra* Chapter 5.3.2.

⁹⁴⁰ Thym (2009), *op cit.*, 316.

In its seminal judgment in *Van Gend en Loos*⁹⁴¹ the CJEU remarked that: “the Community constitutes a *new legal order of international law* for the benefit of which the states have limited their sovereign rights, albeit within limited fields”.⁹⁴² The case is well-known for establishing the principle of direct effect, which stands in polar opposite to state-centred conceptions of international law, i.e. system that projects sovereign states as the addressees of international legal obligations.⁹⁴³ Drawing on these conclusions, the CJEU *Costa v E.N.E.L.* later distinguished between EU law and international law, in even clearer terms.⁹⁴⁴ Recognizing that the attainment of the internal market is at risk if Member States were permitted to exercise legislative autonomy for the purpose of circumventing the application of the Treaties, the CJEU pronounced the primacy of Union law. This conclusion was intellectually embedded in the conception of the Treaties, which “[b]y contrast with *ordinary* international Treaties, [...] has created *its own legal system* [...]”.⁹⁴⁵ Although neither *Van Gend* nor *Costa* was concerned with the external relations of the EU legal order, it is there view on the Treaties as “une source autonome”⁹⁴⁶ that laid the conceptual pedigree for the development of a principle of autonomy.⁹⁴⁷

Another relevant example of the Court’s attempt to shape an autonomous identity for the Union is the *Dairy Products* case.⁹⁴⁸ Here, the CJEU declared that ‘countermeasures’ were not available amongst Member.⁹⁴⁹ The ability to impose measures against another state that have failed to honour obligations under an international agreement is characteristic of international law.⁹⁵⁰ Unlike international

⁹⁴¹ Case 26/62 *Van Gend en Loos op cit.*

⁹⁴² *Ibid.*, para. 12 (emphasis added).

⁹⁴³ Joseph H. H. Weiler, ‘The transformation of Europe’ (1991) 100(8) *Yale Law Journal* 2403-83, 2413.

⁹⁴⁴ Case 6/64 *Costa v. E.N.E.L. op cit.*; Weiler argued that the separation of the Union legal order from international law is a combined effect of the development of constitutional principles and the evolution of a complete system of judicial remedies, see Weiler (1991), *op cit.*, 1422.

⁹⁴⁵ Case 6/64 *Costa v. E.N.E.L. op cit.*, 593 (emphasis added).

⁹⁴⁶ See the French language version of the judgment Case 6/64 *Costa v. E.N.E.L. op cit.*, (1964) ECR 1141, at 1160.

⁹⁴⁷ Rene Barents, *The Autonomy of Community Law* (Kluwer Law International: 2004) 182-83; Jan W. van Rossem, ‘The autonomy of EU law: More is less?’ in Ramses A. Wessel and Steven Blockmans (eds), *Between autonomy and dependence: The EU legal order under the influence of international organisations* (T.M.C. Asser Press: 2013) 13-46, 15.

⁹⁴⁸ Joined cases 90 and 91/63 *Commission v Luxembourg and Belgium (Dairy Products)* [1964], EU:C:1964:80.

⁹⁴⁹ Joined cases 90 and 91/63 *Dairy Products op cit.*, (1964) ECR 625, 631.

⁹⁵⁰ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1) accessible at <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> Article 22; for a comprehensive over this issue, see Eric A. Posner and Alan O. Sykes, ‘Efficient breach of international law: Optimal remedies, “legalized noncompliance”, and related issues’ (2011) 110(2) *Michigan Law Review* 243-94; on the availability of countermeasures in international investment law, see Junianto James Losari, ‘A clash of treaties the lawfulness of countermeasures in international trade law and international investment law’ (2015) 16(2) *The journal of world investment & 274-313*, 285-94.

agreements, neither the Treaties nor the legal acts emanating from them are characterized by reciprocity, but represents a judicialization of Member States' *inter se* relations with the CJEU as the ultimate arbiter over purported violations of EU law. The *Dairy Products* case is, thus, best understood as a continued effort to demarcate a dividing line between the EU legal order and international law.⁹⁵¹

The emergence of constitutional doctrines in this foundational period primarily addressed the relationship between the Union and its Member States. The broader effects of the Court's reasoning for the Union's external relations were only becoming apparent in the early 1990's.⁹⁵² *Van Gend and Costa*, but also *Dairy Products*, provided in this context the image of an autonomous EU legal order that was in subsequent cases developed into a self-referential system, which excludes international legal processes from having an impact on the interpretation and application of Union law.⁹⁵³ It will become clearer in due course, however, that the principle of autonomy also includes an institutional aspect that protects institutional structures and prerogatives, with the result of withdrawing the institutional dimension of the Union from the oversight of international law.⁹⁵⁴

Previous chapters illustrated that although the CCP developed incrementally into a horizontally integrated Union policy with common principles and objectives reaching beyond the liberalization of trade, it is nonetheless intrinsically linked to the operation of the internal market.⁹⁵⁵ It is suggested here that the evolution of the principle of autonomy could be viewed through a similar lens. It operates as a constitutional protection that ensures the full effectiveness of EU law, and incidentally insulates the internal market from adverse effects resulting from its exposure to international law.

6.2 The relevant case law

The practical concern with which the CJEU has been confronted is rather obvious. The proliferation of international courts and tribunals that were established through

⁹⁵¹ William Phelan, 'The Troika: The interlocking roles of Commission v. Luxembourg and Belgium, Van Gend en Loos and Costa v. ENEL in the creation of the European legal order' (2015) 21(1) *European Law Journal* 116-35, 121.

⁹⁵² van Rossem (2013), *op cit.*, 15-16.

⁹⁵³ Barents (2004), *op cit.*, 259.

⁹⁵⁴ In his seminal work Schilling presented an attempt to conceptualize the position of the superiority of the Court of Justice to the domestic courts of the Member States by recourse to theoretical concepts in internationalism or constitutionalism. In his own work, Weiler contested Schilling's findings and provides himself remarkable insight on the theoretical foundations of the institutional aspect of the autonomy of the EU legal order in its internal dimension. Compare Theodor Schilling, 'The autonomy of the Community legal order: An analysis of possible foundations' (1996) 37(2) *Harvard International Law Journal* 389-409; Weiler and Haltern (1996), *op cit.*

⁹⁵⁵ See *supra* Chapter 5.1.1.

an intricate net of bilateral, regional and multilateral agreements, has left the Treaties exposed to external influence vis-à-vis their interpretation and application. The participation in international frameworks has become a “necessity for effective policy-making”,⁹⁵⁶ and this is particularly true for the Union’s trade and investment policy. In spite of having its roots in the Treaties, the principle of autonomy was ultimately developed at the hands of the CJEU.⁹⁵⁷ It is therefore pivotal to revisit the case law that shaped the development of that principle of the past three decades. First signs of the emergence of a principle of autonomy can be found already in *Inland Waterways*, where the CJEU rejected the establishment of a judicial body out of concern that a preliminary reference system, operating in parallel to Article 267 TFEU, could have detrimental effects on the legal certainty within the Union legal order.⁹⁵⁸ It was, however, not until the early 1990’s that the contours of the principle of autonomy ultimately crystallized.

6.2.1 *The European Economic Area Agreements*

In the late 1980’s some of the EFTA states started to push for integration into the internal market. The climate was, however, not geared for further enlargement and as a political compromise (then) President of the Commission Jacques Delors floated the idea to create what has since come to be known as the EEA.⁹⁵⁹ The first draft agreement replicated verbatim large parts of the Treaty provisions. The geographical extension of the application of Treaty in that manner was not in itself problematic. More controversial, however, the creation of an independent judicial body, the EEA Court, which had jurisdiction over disputes arising out of the application of the EEA agreement. In particular, the CJEU conceived the exercise of the EEA Courts jurisdiction over provisions of the EEA agreement as an invasion on its own interpretive prerogative over corresponding Treaty provisions.⁹⁶⁰ The principle of autonomy of the Union legal order, thus, precludes the conclusion of an international agreement that purport to establish an international adjudicative body with jurisdiction that effectively binds the CJEU to a particular interpretation of Union law.

⁹⁵⁶ Christina Eckes, ‘The European Court of Justice and (quasi-) judicial bodies of international law’ in Ramses A. Wessel and Steven Blockmans (eds), *Between autonomy and dependence: The EU legal order under the influence of international organisations* (T.M.C. Asser Press: 2013) 85-109, para. 87

⁹⁵⁷ Holdgaard (2008), *op cit.*, in particular Ch. 5.3.2.

⁹⁵⁸ Opinion 1/76 *Inland Waterways op cit.*, paras. 19-20; notably, the Court was equally concerned with the potential double-hatting whereby Judges of the Court would also serve as members of the ‘Fund Tribunal’, see paras. 21-22.

⁹⁵⁹ Trevor C. Hartley, ‘The European Court and the EEA’ (1992) 41(4) *International and Comparative Law Quarterly* 841-48, 841.

⁹⁶⁰ Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association* [1991], EU:C:1991:490, paras. 41-46.

The agreement provided for only limited involvement of the CJEU through a preliminary reference mechanism. Unlike rulings under Article 267 TFEU, the EEA agreement merely endowed the CJEU to issue non-binding advisory opinions.⁹⁶¹ This was an encroachment on the institutional powers of the Court, and put at risk the homogeneous interpretation of Union law. The CJEU ultimately concluded that the EEA agreement was “likely adversely to affect [...] the *autonomy of the [Union] legal order*”.⁹⁶²

In the second EEA draft agreement the jurisdiction of the, by then rebranded, EFTA court⁹⁶³ was limited to the EFTA countries and rendered preliminary rulings by the CJEU binding in nature.⁹⁶⁴ The agreement was ultimately approved by the CJEU.⁹⁶⁵

6.2.2 *The European Common Aviation Area*

In the aftermath of the two EEA cases, the emerging principle of autonomy was in urgent need of conceptual clarification, which the CJEU ultimately provided for in the context of the *ECAA* agreement.⁹⁶⁶ Following the spirit of the EEA agreement, the ECAA was designed to extend an important sector of the EU internal market, i.e. air transport, to the EFTA countries and a number of CEE states. Although this agreement likewise reproduced for that purpose relevant Treaty provisions, it clearly incorporated the lessons learned from the EEA drama.⁹⁶⁷

Although the ECAA lacked an independent judicial body, the Court’s opinion contributed significantly to the evolution of the principle of autonomy. It transpires from the reasoning of the CJEU that the principle of autonomy sets out two conditions. First, the CJEU reiterated its position from the *EEA* opinion that an international court or tribunal cannot bind the Union and its institutions internally to a specific interpretation of Union law.⁹⁶⁸ Second, the CJEU observed that an international court or tribunal cannot affect the essential characteristics of powers conferred upon Union institutions under the Treaty.⁹⁶⁹ This includes, on the one hand, the interpretation of the allocation of competences, which remains exclusively

⁹⁶¹ *Ibid.*, para. 61-64.

⁹⁶² *Ibid.*, para. 35 (emphasis added).

⁹⁶³ Opinion 1/92 *Second EEA Agreement op cit.*, para. 4.

⁹⁶⁴ *Ibid.*, para. 34.

⁹⁶⁵ For a full discussion of these cases, see Barbara Brandtner, ‘The ‘drama’ of the EEA – Comments on Opinions 1/91 and 1/92’ (1992) 3(2) *European Journal of International Law* 300-23; Henry G. Schermers, ‘Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1992’ (1992) 29(5) *Common Market Law Review* 991-1009.

⁹⁶⁶ Opinion 1/00 *European Common Aviation Area* [2002], EU:C:2002:231.

⁹⁶⁷ Holdgaard (2008), *op cit.*, 85.

⁹⁶⁸ Opinion 1/00 *ECAA op cit.*, paras. 11 and 13.

⁹⁶⁹ *Ibid.*, paras. 12, 16, and 21.

a matter for the CJEU, and, on the other hand, it requires that the essential characteristics of powers allocated to institutions under the Treaty remain unaltered.

6.2.3 *The European Patents Court*

Another seminal opinion of the CJEU in the evolution of the principle of autonomy stands in connection with the attempt to complete the single market in patents.⁹⁷⁰ Relying on the presupposition of a strong connection between industrial growth and the level of IP protection, the Commission advocated in 2007 to enhance the patent system in Europe.⁹⁷¹ The Commission recognized, however, that there was little political impetus at the time to push for further harmonization on substantive patent law.⁹⁷² Instead, the Commission focused on a radical reform of the existing patent litigation system by *inter alia* proposing the creation of “unified and specialised patent judiciary”.⁹⁷³ Out of the Commission’s proposal emerged the EPCt; a pan-European court for intellectual property rights with exclusive jurisdiction.⁹⁷⁴

In its reasoning, the CJEU placed a heavy focus on institutional implications, rather than the EPCt’s binding jurisdiction over questions of Union law. By way of replacing domestic courts in the area of EU patents law the EPCt, so the CJEU concluded, “...would deprive those courts of their task, as ‘ordinary’ courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU.”⁹⁷⁵ Although domestic courts are not Union institutions,⁹⁷⁶ the CJEU acknowledged their role in the judicial architecture of the Union legal order by way of extending the institutional protection under the principle of autonomy to cover the role of domestic courts vis-à-vis the Court of Justice.⁹⁷⁷ In light of the Court’s efforts to clarify the concept of the principle of autonomy in its *EEA* opinion it emerges that a circumvention of the

⁹⁷⁰ For a comprehensive overview of the processes leading up to Opinion 1/09, see Roberto Baratta, ‘National courts as ‘guardians’ and ‘ordinary courts’ of EU law: Opinion 1/09 of the ECJ’ (2011) 38(4) *Legal Issues of Economic Integration* 297-320, 298-303.

⁹⁷¹ European Commission, Communication from the Commission to the European Parliament and to the Council, ‘Enhancing the patent system in Europe’ (COM(2007) 165 final), 3 April 2007

⁹⁷² Commission, ‘Enhancing the patent system in Europe’ (2007), *op cit.*, 3.

⁹⁷³ *Ibid.*, 9.

⁹⁷⁴ Article 15(2) Draft Agreement, see Council, Working Document from the General Secretariat of the Council to the Working Party on Intellectual Property (Patents), ‘Draft Agreement on the European and Community Patent Court and draft Statute - revised Presidency text’ (7928/09 PI 23 COUR 29), 23 March 2009 accessible at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%207928%202009%20INIT>> .

⁹⁷⁵ Opinion 1/09 *European Patents Court op cit.*, para. 80.

⁹⁷⁶ Article 13 TEU.

⁹⁷⁷ The defect of the draft agreement was further aggravated by substituting the EPCt as the only judicial body to communicate with the CJEU in the field of patent litigation, see Opinion 1/09 *European Patents Court op cit.*, para. 81; Baratta (2011), *op cit.*, 305-06.

domestic courts' responsibilities under Article 267 TFEU is to be understood as altering the essential characteristic of their powers derived from the Treaties.

Rather than merely safeguarding the powers of domestic courts, however, the CJEU ultimately protects its own judicial prerogative to prior involvement in questions relating to the interpretation and application of Union law. This was an issue even before Opinion 1/09. Indeed, one may recall that the first EEA draft agreement contained a preliminary reference mechanism that altered the essential characteristics of the Court's power by declaring its intervention advisory rather than binding in nature.⁹⁷⁸ With Opinion 1/09, however, this aspect seems to have been given a greater significance for the Court's appraisal of international judicial bodies in light of the principle of autonomy.

6.2.4 *The European Court of Human Rights*

More recently the CJEU rejected the Union's draft accession agreement to the ECHR,⁹⁷⁹ arguing *inter alia* that procedural and institutional arrangements with respect to the litigation of human rights violations before the ECtHR were irreconcilable with the Court's judicial prerogative. On the one hand, the CJEU highlighted shortcomings of the preliminary reference mechanism that the draft accession agreement provided for. This assertion was based on the fact that the envisaged mechanism allowed for references on questions concerning the interpretation of primary EU law only. Accordingly, so the CJEU concluded, the prior involvement mechanism must extend to the review of all Union law in as far as its compatibility with the ECHR is concerned.⁹⁸⁰ In the absence of those assurances, "there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law."⁹⁸¹

On the other hand, the CJEU pointed out that the existence of a preliminary reference mechanism constitutes a *condition sine qua non* for the compatibility of an international judicial mechanism with exclusive jurisdiction.

"The necessity for the prior involvement of the Court of Justice in a case [...] in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved [...]."⁹⁸²

⁹⁷⁸ Opinion 1/09 *European Patents Court op cit.*, the CJEU's statement in para. 59 acknowledging jurisdiction under an international agreement with para. 61 declaring it outright unacceptable that the nature of its intervention is altered; see also Opinion 1/91 *EEA Agreement op cit.*, paras. 59, 61-64.

⁹⁷⁹ Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014], 18 December 2014, EU:C:2014:2454.

⁹⁸⁰ Opinion 2/13 *Accession to the ECHR op cit.*, paras. 245, and 247.

⁹⁸¹ *Ibid.*, para. 246.

⁹⁸² *Ibid.*, para. 237.

This statement is remarkable. Earlier case law did not suggest that the existence of a such a mechanism in itself constitutes an element of the principle of autonomy, but rather suggested that, should the agreement provide for it, a preliminary reference mechanism must safeguard the essential characteristics of the CJEU under Article 267 TFEU.

6.2.5 *Synthesis*

It emerges from a discussion of the relevant case law that the principle of autonomy defines the relationship between international agreements and the EU legal order, but also governs the relationship that the Union and its Member States enjoy with international adjudicative bodies. The above observations, however, also give rise to the proposition that the principle of autonomy is ultimately concerned with the protection of the Court's judicial prerogatives, and focuses to that end primarily on the effects that international adjudicative structures and their decisions could exert on the EU legal order.⁹⁸³ Since the Court's *ECAA* opinion it is clear that this prevents the Union and its Member States from concluding an international agreement that purports to establish an international court or tribunal with jurisdiction that would have the effect of binding the CJEU to a particular interpretation of EU law, or otherwise interfere with the exercise of internal powers.

⁹⁸⁴

Since the *EEA* cases, the CJEU has displayed tangible concerns over potential transgressions into the Court's authority to determinatively interpret the Treaties. Whereas these concerns were expressed through the binding effect of international rulings on the normative content of EU law provisions, the focus shifted over the years by placing explicit emphasis on safeguarding the Court's core institutional characteristics. Remarkable, in this respect, is the central role that the prior involvement of the CJEU in disputes concerning questions on the interpretation of EU law plays in the assessment of international agreements in light of the principle of autonomy. This transpired above all from the Court's reasoning in Opinion 1/09.⁹⁸⁵ In its function of protecting its own prior involvement, the CJEU conceptualized the scope of autonomy as inclusive of the institutional features of the domestic courts of the Member States in so far as Article 267 TFEU requires them to engage in a judicial dialogue with the CJEU.⁹⁸⁶ The proposition that the prior involvement of the CJEU has become the predominant determining factor of autonomy was later confirmed in the *ECHR* opinion.

⁹⁸³ Eckes (2013), *op cit.*, 89.

⁹⁸⁴ de Waele (2011), *op cit.*, 143.

⁹⁸⁵ Opinion 1/09 *European Patents Court op cit.*

⁹⁸⁶ Lavranos (2013), *op cit.*, 216.

The following section focuses in more detail on ISDS provisions, but it becomes apparent already at this point that ISDS as a legal structure cannot in principle be excluded from the purview of the principle of autonomy. This Chapter goes further and argues that it is likely to pose an insurmountable hurdle for EU foreign investment policy, a view that is not unanimously shared.⁹⁸⁷ Indeed, the CJEU itself prominently observed that:

“An international agreement such a system of courts is in principle compatible with [Union] law. The [Union’s] competence in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.”⁹⁸⁸

One may in particular be tempted to find comfort in the Union’s persistent practice to accede to agreements with extensive dispute settlement provisions such as the WTO or the ECT.⁹⁸⁹ Indeed, the compatibility of the WTO dispute settlement system has never been the subject of a legal challenge, and the Union’s participation therefore seems to be within the bounds of Union law. The conviction that the WTO dispute settlement system is entirely unproblematic in light of the Unions constitutional constraints is, however, a misconception. On the contrary, WTO panels and the AB produce binding decisions that are little different in effect from the judgments of the ECtHR,⁹⁹⁰ and their impact on the internal market and the CJEU is difficult to negate.⁹⁹¹ This is partly due to the persistent trend towards international judicialization, i.e. a trend away from political compromise and towards “legal dispute settlement in international law”.⁹⁹²

Two brief remarks are warranted in this respect. First, it is important to recall that for the compatibility of the WTO dispute settlement system with the EU Treaties to be determined by the CJEU presupposes that a Union institution or Member States is prepared to raise such a challenge—*ubi non accusator, ibi non index*. The current state of affairs, therefore, appears to reflect above all a political

⁹⁸⁷ Herrmann (2014), *op cit.*, 582-83; Stephan W. Schill, ‘Editorial: Opinion 2/13 – The end for dispute settlement in EU trade and investment agreements?’ (2015) 16(3) *The Journal of World Investment & Trade* 379-88, 388; Dimopoulos (2011a), *op cit.*, 117-19.

⁹⁸⁸ Opinion 1/91 *EEA Agreement op cit.*, 40; with minor variations in the wording, see Opinion 1/09 *European Patents Court op cit.*, para. 74; Opinion 2/13 *Accession to the ECHR op cit.*, para. 182.

⁹⁸⁹ Herrmann (2014), *op cit.*, 581.

⁹⁹⁰ Eckes (2013), *op cit.*, 90.

⁹⁹¹ Kuijper and Hoffmeister (2013), *op cit.*, 153-54; On the special nature of WTO law in the Union legal order see also Christina Eckes, ‘International law as law of the EU: The role of the European Court of Justice’ in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International law as law of the European Union* (Leiden : Martinus Nijhoff Publishers: 2012) 353-77, 273.

⁹⁹² Thomas Cottier, ‘Dispute settlement in the World Trade Organization: Characteristics and structural implications for the European Union’ (1998) 35(2) *Common Market Law Review* 325-78, 335.

unwillingness to disturb the pragmatic arrangement that has been worked out amongst the Union and its Member States vis-à-vis the WTO. It is not, however, indicative of the compatibility of the WTO dispute settlement system with the Treaties. Advocate General Léger, for instance, remarked that reports of WTO panel and the AB

“[...]would inevitably determine the Court’s interpretation of the corresponding rules of Community law. Such an outcome would jeopardise the autonomy of the Community legal order in the pursuit of its own objectives.”⁹⁹³

Indeed, WTO tribunals and the AB have frequently entertained questions on the interpretation and application of Union law.⁹⁹⁴ The political realities surrounding ISDS, on the other hand, are markedly different. As an alternative to domestic courts, investment arbitration is highly contested by political actors in Member States, Union institutions and the broader civil society.⁹⁹⁵ As a matter of fact, with the *CETA* opinion currently pending before the CJEU, a challenge of ISDS in light of the principle of autonomy is no longer hypothetical.⁹⁹⁶

Second, from *Inland Waterways* to the *ECtHR*, all of the incidents where the CJEU felt compelled to strike down an international agreement in light of the principle of autonomy contained judicial structures that furnished individuals with direct access to an international court or tribunal. It would, therefore, be incorrect to perceive of the principle of autonomy simply in terms of an expression of self-interest, i.e. the Court’s desperate attempt to hang on to its authority. The judicial oversight exercised by the CJEU and the complete system of judicial remedies established by the Treaties are essential constitutional features of the Union legal order. With its roots in *Van Gend* and *Costa* they are deeply embedded in the origins of the principle of autonomy. Empowering market actors to circumvent these safeguards through the use of international courts and tribunals is liable to undermine the effectiveness of EU law, taking the internal market down with it.

This inherent parallelism, however, reveals a paradox. Whereas the domestic courts of the Member States take an important role in the interpretation and

⁹⁹³ Opinion of Advocate General Léger, Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2006], EU:C:2006:236, paras. 78 and 79; on activity of the WTO Dispute Settlement Body in light of the autonomy of the Union legal order see also Jan-Peter Hix, ‘Indirect effect of international agreements: Consistent interpretation and other forms of judicial accommodation of WTO law by the EU Courts and the US Courts’ (2013), Jean Monnet Working Paper 03/13 accessible at <<http://jeanmonnetprogram.org/wp-content/uploads/2014/12/Hix.pdf>> 96 and 97.

⁹⁹⁴ e.g. *EC - Customs Classification of Certain Computer Equipment* WTO Panel Report, 5 June 1998, WT/DS62/R, WT/DS67/R, WT/DS68/R.

⁹⁹⁵ For a discussion of the criticism against investor-state arbitration, see *supra* Chapter 3.3, for the opposition from the EP and the Member States, see *infra* Chapter 8.1.3.

⁹⁹⁶ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement)* *op cit*.

application of Union law, the CJEU is critical towards international courts and tribunals. Likewise, internally “the elevation of the individual to the rank of a subject of law alongside of the Member State”⁹⁹⁷ is indissociably sown into the fabric of the Union legal order, this is not reflected in EU external relations. Subsequent sections will elaborate on the WTO dispute settlement system, where the CJEU has persistently rejected the direct effect of the WTO Agreements,⁹⁹⁸ even where an inconsistency was confirmed by a WTO panel or the AB.⁹⁹⁹ Only where the Union had undertaken to adopt implementing measures was the CJEU required to determine their compatibility with the requisite WTO panel and AB reports.¹⁰⁰⁰ Suffice it to note that this stands in contrast to ISDS, the very *raison d’être* of which is the empowerment of individual investors to pursue claims directly before an international tribunal. It is for that purpose that ISDS represents a paradigmatic case for an assessment in light of the principle of autonomy.

6.3 Recent developments: *Achmea* and the *CETA* opinion

Whereas the above case law certainly allows a glimpse into the compatibility of ISDS provisions with the Treaties in light of the principle of autonomy, recent developments addressed investor-state arbitration explicitly. On the one hand, the CJEU in *Achmea* declared incompatible the ISDS provisions of a BIT concluded between two Member States, and this raises the question whether the reasoning carries relevance for EU external relations (Section 6.3.1). On the other hand, at the time of writing the CJEU is deliberating over the compatibility of the ISDS provisions in CETA. The opinion of AG Bot was recently published and is briefly discussed below (Section 6.3.2)

⁹⁹⁷ A. G. Toth, ‘The individual and European law’ (1975) 24(4) *International and Comparative Law Quarterly* 659-706, 659.

⁹⁹⁸ Case C-93/02 P *Biret International SA v Council* [2003], EU:C:2003:517, para. 52; Case C-307/99 *OGT Fruchtbandelsgesellschaft mbH and Hauptzollamt Hamburg-St. Annen v* [2001], Order of the Court, EU:C:2001:228, para. 24; Case C-149/96 *Portuguese Republic v Council (Textiles)* [1999], EU:C:1999:574, para. 47; for a discussion of the complex relationship between the WTO dispute settlement system and the CJEU, see Marco Bronckers, ‘From ‘direct effect’ to ‘muted dialogue’: Recent developments in the European Courts’ case law on the WTO and beyond’ (2008) 11(4) *Journal of International Economic Law* 885–98.

⁹⁹⁹ Joined Cases C-120 and 121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC v Council and Commission* [2008], EU:C:2008:476, para. 176; Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* [2005], EU:C:2005:121, paras. 38-40; Eckes (2012), op cit., 363.

¹⁰⁰⁰ Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2007], EU:C:2007:547, para. 28; Case C-377/02 *Van Parys op cit.*, para. 40; Case C-149/96 *Portugal v Council op cit.*, para. 49; Case C-69/89 *Nakajima All Precision Co. Ltd v Council* [1991], EU:C:1991:186, para. 31; Case 70/87 *Fédération de l’industrie de l’huilerie de la CEE (Fediol) v Commission* [1989], EU:C:1989:254, paras. 19-22.

6.3.1 *Achmea*

Achmea (formerly Eureko) initiated arbitration proceedings against Slovakia in October of 2008, claiming damages for a breach of the Netherlands-Czechoslovakia BIT of 1991. The tribunal, with a seat in Frankfurt am Main in Germany, rendered its final award in favour of the investor in 2012.¹⁰⁰¹ During the proceedings the Slovak Republic raised a number of objections against the jurisdiction of the tribunal based on EU law¹⁰⁰² and decided to challenge the award on jurisdiction before the Higher Regional Court of Frankfurt am Main, which did not share these concerns.¹⁰⁰³ Slovakia subsequently also challenged the final award, which the German Court likewise rejected.¹⁰⁰⁴ Upon appeal to the German Federal Court of Justice the Slovak Republic reiterated its view that the ISDS provision of the Netherlands-Czechoslovakia BIT¹⁰⁰⁵ was in violation of *inter alia* Articles 18, 267 and 344 TFEU.¹⁰⁰⁶ The German Federal Court of Justice decided to refer the issue to the CJEU.

It is important from the outset to stress that *Achmea* concerns investor-state arbitration in the context of an IIA that was concluded between two Member States (intra-EU BIT). A number of pertinent issues are unique to this context. An example of this is Article 344 TFEU, which precludes Member States from submitting disputes arising in relations between them over subject matters that come within the purview Union law before any court or tribunal other than the CJEU.¹⁰⁰⁷ Article 344 TFEU and its relation to the principle of autonomy is no novelty to the CJEU.¹⁰⁰⁸ It is generally accepted that Article 344 TFEU is not, however, applicable to the Union's relation with third countries and is, therefore, not further discussed here.¹⁰⁰⁹ As a preliminary remark, therefore, it must be observed that the context of the *Achmea* decision is quite different from the main object of study in the present

¹⁰⁰¹ For an overview over the procedural history, see *Achmea (formerly Eureko) B.V. v. The Slovak Republic* Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, UNCITRAL, PCA Case No. 2008-13, 3-10.

¹⁰⁰² For an overview over the procedural history, see *Achmea (formerly Eureko) B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension *op cit.*, paras. 132-38.

¹⁰⁰³ OLG Frankfurt am Main, 26. Zivilsenat, Beschluss, 10 May 2012, Az. 26 SchH 11/10; note that the appeal was rejected as inapplicable, see BGH, III. Zivilsenat, Beschluss, 30 April 2014, Az. II ZB 37/12.

¹⁰⁰⁴ OLG Frankfurt am Main, 26. Zivilsenat, Beschluss *op cit.*

¹⁰⁰⁵ Article 8, Netherlands-Czechoslovakia BIT of 1991.

¹⁰⁰⁶ BGH, I. Zivilsenat, Beschluss, 31 October 2018, Az. I ZB 2/15.

¹⁰⁰⁷ Case C-284/16 *Achmea op cit.*, para. 32.

¹⁰⁰⁸ e. g. Case C-459/03 *Commission v. Ireland (MOX Plant)* [2006], EU:C:2006:345; for a discussion of the case, see Nikolaos Lavranos, 'Protecting its Exclusive Jurisdiction: The MOX Plant-Judgment of the ECJ' (2006) 5 *The Law and Practice of International Courts and Tribunals* 479.

¹⁰⁰⁹ Gisèle Uwera, 'Investor-state dispute settlement (ISDS) in future EU investment-related agreements: Is the autonomy of the EU legal order an obstacle?' (2016) 15(1) *The Law and Practice of International Courts and Tribunals* 102-51.

analysis, i.e. ISDS provisions in Union agreements with third countries. Nonetheless, *Achmea* offers important insight into the Court's approach to an assessment of ISDS provisions in light of the principle of autonomy. It is the purpose of this section to assess whether the reasoning of the CJEU in *Achmea* is limited to the intra-EU context.

6.3.1.1 Opinion of Advocate General Wathelet

The position of Advocate General Wathelet in the proceedings before the CJEU was striking and deserves some comments. The AG concludes that the ISDS provision of the Netherlands-Czechoslovakia BIT is compatible with the Treaties.¹⁰¹⁰ He finds support for this view in the role of domestic courts in the recognition and enforcement of investment awards,¹⁰¹¹ and the potential for the Commission to bring action against Member States in accordance with Article 258 and 260 TFEU.¹⁰¹² Accordingly, investor-state arbitration does not undermine the complete system of judicial remedies established by the Treaties that safeguards coherence and unity in the interpretation of Union law.¹⁰¹³

More importantly, however, the Advocate General argues that investment tribunals qualify as courts and tribunals within the meaning of Article 267 TFEU, which would render questions over incompatibilities with Article 344 TFEU or the autonomy of the Union legal order redundant.¹⁰¹⁴ In fact Advocate General Wathelet has previously suggests that investment tribunals, unlike commercial arbitration tribunals, are able to refer preliminary reference to the CJEU,¹⁰¹⁵ and similar views have been circulated in scholarship for some time.¹⁰¹⁶

It is helpful to recall at this point that the CJEU has consistently held that a court or tribunal within the meaning of Article 267 TFEU must fulfil certain criteria. It must be established by law, it must also be permanent, exercise compulsory jurisdiction in *inter partes* proceedings, apply rules of law, and enjoy independence.¹⁰¹⁷

¹⁰¹⁰ Opinion of Advocate General Wathelet, Case C-284/16 *Slovak Republic v Achmea BV* [2018], EU:C:2017:699, para. 256.

¹⁰¹¹ Opinion of Advocate General Wathelet, Case C-284/16 *Achmea op cit.*, paras. 236-50

¹⁰¹² *Ibid.*, para. 255.

¹⁰¹³ AG Wathelet alludes to this expression (i.e. "a judicial system intended to ensure coherence and unity") describing the principle of autonomy, see *Ibid.*, para. 234

¹⁰¹⁴ *Ibid.*, para. 255, para. 133.

¹⁰¹⁵ Opinion of Advocate General Wathelet, Case C-567/14 *Genentech Inc. v Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH* [2016], EU:C:2016:177, footnote 34.

¹⁰¹⁶ Jürgen Basedow, 'EU law in international arbitration: referrals to the European Court of Justice' (2015) 32(4) *Journal of International Arbitration* 367-86; John Gaffney, 'Should investment treaty tribunals be permitted to request preliminary rulings from the Court of Justice of the European Union?' (2013) 10(2) *Transnational Dispute Management* 1-14; Paschalis Paschalidis, 'Arbitral tribunals and preliminary references to the EU Court of Justice' (2016) 33(4) *Arbitration International* aiw026

¹⁰¹⁷ Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Bulgaria AD, and others* [2013], EU:C:2013:48, para. 38; Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral*

Moreover, questions may only be referred in relation to pending cases where the decision is of a judicial nature.¹⁰¹⁸ There is, indeed, room to argue that investment tribunals are established by law. Unlike commercial arbitration that is based on private contract, investment tribunals derive their jurisdiction from domestic law, i.e. the act ratifying the IIA.¹⁰¹⁹ With respect to permanence, the Advocate General observed that this “does not relate to the composition of the arbitral tribunal as such but to the institutionalisation of arbitration as a dispute settlement method”¹⁰²⁰. He furthermore concludes that the jurisdiction of investment tribunals is compulsory. The AG emphasizes in this respect the prior and general consent that is enshrined in the ISDS provision of the Netherlands-Czechoslovakia BIT.¹⁰²¹ Finding no difficulty in establishing the remaining criterion, the AG concludes that investment tribunals established in accordance with the ISDS provision of the Netherlands-Czechoslovakia BIT should be considered a court or tribunal for the purpose of Article 267 TFEU.

This suggestion of the AG invites some criticism. For example, his reasoning heavily relies on two recent judgments, *Ascendi*¹⁰²² and *Merck*.¹⁰²³ This is problematic considering that both cases concern the Portuguese tax arbitration system, where arbitration court is deeply anchored in the domestic judicial system.¹⁰²⁴ This is arguably not the case with investment arbitration, which is instituted to operate outside of the domestic courts. In fact, it was illustrated in Chapter 2.2.1 that ISDS provisions were initially motivated by a distrust of the domestic judiciary. Recognizing investment tribunals as being capable of referring question on the

e Alta SA v Autoridade Tributária e Aduaneira [2014], EU:C:2014:1754, para. 23; Case C-196/09 Paul Miles and Others v European Schools [2011], EU:C:2011:388, para. 37; Case C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH [1997], EU:C:1997:413, para. 23.

¹⁰¹⁸ Case C-53/03 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc., and others [2005], EU:C:2005:333, para. 29; Case C-134/97 Victoria Film A/S [1998], EU:C:1998:535, para. 14; Case 318/85 Regina Greis Unterweger [1986], Order of the Court, EU:C:1986:106, para. 4.

¹⁰¹⁹ Opinion of Advocate General Wathelet, Case C-284/16 *Achmea op cit.*, paras. 96-99; supported by Case C-377/13 *Ascendi op cit.*, para. 24; and Case C-555/13 *Merck Canada Inc. v Accord Healthcare Ltd and Others* [2014], Order of the Court, EU:C:2014:92, para. 19.

¹⁰²⁰ Opinion of Advocate General Wathelet, Case C-284/16 *Achmea op cit.*, para. 256; supported by Case C-377/13 *Ascendi op cit.*, para. 26; and Case C-555/13 *Merck Canada*, Order of the Court *op cit.*, para. 24.

¹⁰²¹ Opinion of Advocate General Wathelet, Case C-284/16 *Achmea op cit.*, paras. 118-19; supported by Case C-555/13 *Merck Canada*, Order of the Court *op cit.*, para. 19; and Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989], EU:C:1989:383, paras. 7-8.

¹⁰²² Case C-377/13 *Ascendi op cit.*

¹⁰²³ Case C-555/13 *Merck Canada*, Order of the Court *op cit.*

¹⁰²⁴ For an overview over the statutory nature of Portuguese tax arbitration, see Nuno Villa-Lobos and Tânia Carvalhais Pereira, 'The special nature of tax arbitration courts' in Nuno Villa-Lobos and Tânia Carvalhais Pereira (eds), *The Portuguese tax arbitration regime* (Almedina: 2015) 49-83, 56-67.

interpretation and application of EU law to the CJEU presents a pragmatic solution to the potential conflict of ISDS provisions with the principle of autonomy. Such an approach would integrate rather than reject investment arbitration as a legal phenomenon. It would also signal willingness for judicial dialogue instead of the imposition of judicial prerogative as a characteristic defining the interaction of the CJEU with international courts and tribunals.

6.3.1.2 The decision of the Court

The CJEU, which did not concur with the view of AG Wathelet on these points, unequivocally rejected his suggestion to include investment tribunals into the rank of judicial bodies with the authority to submit preliminary references in accordance with Article 267 TFEU. However, it remains unclear whether or not investment tribunals established on the basis of the Netherlands-Czechoslovakia BIT lack the characteristics of a ‘court or tribunal’. Instead, the CJEU jumps right to the conclusion that investment tribunal could in any case not be considered as a court or tribunal ‘of a Member State’.¹⁰²⁵ A comparison with the Benelux Court,¹⁰²⁶ which gave rise to a decision in *Parfums Christian Dior* is adequate in this connection.¹⁰²⁷ *In casu*, the CJEU concluded that “[t]here is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.”¹⁰²⁸ However, unlike the Benelux Court, investment tribunals are neither integrated into the domestic judicial system of the Contracting Parties to the BIT, nor are these tribunals motivated by an endeavour to guarantee uniformity and consistency in the interpretation of legal rules that are common to the Contracting Parties.¹⁰²⁹

Having previously established that EU law is relevant to proceedings before an investment tribunal as both, part of the domestic law and the international law applicable between the Netherlands and the Slovak Republic,¹⁰³⁰ the CJEU accentuates that the judicial dialogue established on the basis of Article 267 TFEU must remain intact.¹⁰³¹ The involvement of domestic courts in challenges to the award or at the stage of enforcement is, so the CJEU concludes, insufficient. Concretely, the Court observes that the well-established case law on commercial arbitration is not applicable to investment arbitration.¹⁰³² A decisive factor in the Court’s reasoning appears to be the international nature of the tribunals, i.e. that its

¹⁰²⁵ Case C-284/16 *Achmea op cit.*, para. 47-49.

¹⁰²⁶ Opinion of Advocate General Wathelet, Case C-284/16 *Achmea op cit.*, para. 129.

¹⁰²⁷ Case C-337/95 *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* [1997], EU:C:1997:517.

¹⁰²⁸ Case C-337/95 *Benelux Court op cit.*, para. 21.

¹⁰²⁹ Case C-284/16 *Achmea op cit.*, para. 48

¹⁰³⁰ *Ibid.*, para. 40.

¹⁰³¹ *Ibid.*, para. 50.

¹⁰³² *Ibid.*, para. 55.

jurisdiction is derived by an international agreement, rather than private contract. On that backdrop the CJEU concludes that the ISDS provision in the Netherlands-Czechoslovakia BIT has “an adverse effect on the autonomy of EU law.”¹⁰³³

6.3.1.3 Relevance of *Achmea* for investment agreements with third countries

Although the CJEU reiterates repeatedly that *Achmea* concerns an intra-EU BIT, the decision is nonetheless significant for an appraisal of post-Lisbon IIAs concluded by the Union with third countries. It is in this context noteworthy that both the CJEU as well as the Advocate General agree on the consequences of recognizing investment tribunals as ‘court or tribunals’ within the meaning of Article 267 TFEU.

“The consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU.”¹⁰³⁴

This supports the above analysis of the *European Patents Court* opinion where the CJEU concluded that circumventing the judicial dialogue, which Article 267 TFEU purports to establish, affects the powers that the Treaty confers upon domestic courts as ordinary courts of the Union legal order. With its *Achmea* judgement the CJEU reiterates its emphasis on the integrity and self-sufficiency of the ‘EU judicial system’.

Consequently, a judicial body that forms part of the ‘EU judicial system’, has the means to protect the autonomy of the Union legal order merely because it is subject to Article 267 TFEU. In other words, an assessment of ISDS provision in light of the principle of autonomy is secondary to the determination of investment tribunals as ‘courts or tribunals’ under Union law. If investment tribunals were endowed with powers to refer questions over the interpretation of EU law to the CJEU, an appraisal of the principle of autonomy would be redundant. This illustrates the centrality of procedural guarantees for the involvement of the CJEU to an assessment of the principle of autonomy.

Yet, the Court’s decision represents a categorical rejection of AG Wathelet’s invitation to recognize investment tribunals as ‘courts or tribunals’ under EU law. A normative argument can be made for the Court to reconsider its stance. If intra-EU investment tribunals fail the test, there is little argumentative room for manoeuvre when considering investment tribunals established on the basis of IIA between the EU, its Member State and a third country. A more inclusive approach in *Achmea* might have led investment tribunals to seek cooperation with the CJEU, guaranteeing the enforceability of their awards within the internal market. Of course, there is no sign that investment tribunals had any intention to ever show deference

¹⁰³³ *Ibid.*, para. 59.

¹⁰³⁴ *Ibid.*, para. 34, references omitted.

to the CJEU. However, *Achmea* decisively forecloses this possibility in the intra-EU context, and potentially even beyond that.

Notable is also the Court's exclusive focus on the fact that investment tribunals are not tribunals 'of the Member States'. Arguably, therefore, creative drafting of domestic legislation or constitutional amendments could redefine the role of investment arbitration within the framework of the domestic system of judicial remedies, similar to the Portuguese tax arbitration system that found the Court's approval in *Ascendi* and *Merck*. It is for those reasons unfortunate that the CJEU did not elaborate in more detail on how the institutional features of investment tribunals in order to meet the relevant criteria for a 'court or tribunal' within the meaning of Article 267 TFEU.

In short, the argumentation in *Achmea* aptly illustrates the centrality of the prior involvement of the CJEU for an assessment of international courts and tribunals in light of the principle of autonomy and reflects a logical extension of the Court's prior case law to investor-state arbitration. Although the context of the *Achmea* case is clearly determined by the relationship of two Member States as contracting parties to the underlying BIT, the judgment of the CJEU does not indicate that the Court's conclusions are confined to ISDS provisions in intra-EU BITs.

6.3.2 *The CETA Opinion*

As a condition for its consent to sign and preliminary apply CETA,¹⁰³⁵ Belgium insisted to request a ruling from the CJEU on the compatibility of the agreement with the Treaties.¹⁰³⁶ In particular, the request before the CJEU requires an assessment of the ICS in light of *inter alia* the principle of autonomy, the principle of equal treatment. At the time of writing the *CETA* opinion is still pending before the CJEU. In late January of 2019, however, AG Bot published his legal view on this issue.

As a preliminary point the AG acknowledges the conclusions of the CJEU in its *EUSFTA* opinion, i.e. that the effect that ISDS "removes disputes from the jurisdiction of the courts of the Member States", but emphasizes recalls that the CJEU was not concerned with the compatibility of ISDS with the Treaties.¹⁰³⁷ Although the CJEU has persistently emphasized the need to maintain the judicial dialogue between the domestic courts and the CJEU, the AG observes that principle of autonomy cannot be understood as "a synonym for autarchy",¹⁰³⁸ but merely

¹⁰³⁵ See *infra* Chapter 8.1.4.

¹⁰³⁶ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement) op cit.*

¹⁰³⁷ Opinion of Advocate General Bot, Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* [2019], EU:C:2019:72, para. 47.

¹⁰³⁸ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 59.

requires that the integrity of the EU legal order is preserved. This cannot, however, be assessed without taking into account need for reciprocity, and the essential nature of ISDS for the protection of foreign investments.¹⁰³⁹

“It is therefore impossible to examine whether the autonomy of EU law is sufficiently preserved by the CETA unless account is taken of that reciprocal aspect of the desired substantive and procedural protection.”¹⁰⁴⁰

The fact that European investors equally benefit from the access to ISDS regarding their investments in third countries is, according to AG Bot, a relevant factor to be taken into account,¹⁰⁴¹ not least before considering to incorporate a mechanism for the prior involvement of the CJEU.¹⁰⁴²

He also refutes the idea that *Achmea* can be transposed to ISDS provisions with EU IIAs with third countries,¹⁰⁴³ based in part on the limited scope of the applicable law clause,¹⁰⁴⁴ and the inapplicability of the principle of mutual trust between the Union, its Member States and Canada.¹⁰⁴⁵ Hence, reviewing the institutional and procedural features of the CETA ICS,¹⁰⁴⁶ AG Bot comes to the conclusion that

“[I]n view of that precisely defined jurisdiction, it cannot undermine the objective of uniform interpretation of EU law or the role of reviewing the legality of the acts of the institutions, for which the European Union judicature is responsible.”¹⁰⁴⁷

This conclusion is not called into question by the fact that CETA establishes a parallel and alternative system of judicial remedies that operates outside of the EU legal order. Considering that the investor may choose to pursue her claim before the domestic court in one of the Member States, in his view, supports the proposition that domestic courts are not deprived of their status as ordinary courts.¹⁰⁴⁸

6.4 The relevance of EU law for investment disputes

In order to assess the compatibility of ISDS provisions with the Union legal order, it is relevant to inquire whether the process of adjudication requires investment

¹⁰³⁹ *Ibid.*, paras. 80-84.

¹⁰⁴⁰ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 84

¹⁰⁴¹ *Ibid.*, paras. 87-89.

¹⁰⁴² *Ibid.*, para. 182.

¹⁰⁴³ *Ibid.*, paras. 106 and 109.

¹⁰⁴⁴ *Ibid.*, paras. 105-110.

¹⁰⁴⁵ *Ibid.*, para. 112.

¹⁰⁴⁶ For a discussion, see *infra* Chapter 8.3.

¹⁰⁴⁷ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 155

¹⁰⁴⁸ *Ibid.*, para. 172.

tribunals to engage in an interpretation of EU law. This section investigates whether investment tribunals established on the basis of an EU agreement interpret EU law as a matter of law (Section 6.4.1), or merely as an element of the factual matrix of the dispute (Section 6.4.2) and reveals that this distinction is irrelevant for an assessment of ISDS provisions in light of the principle of autonomy.

6.4.1 *A matter of law*

Applicable law provisions in IIAs frequently refer to the agreement itself, general principles of international law, and sometimes even include international agreements in force between the contracting parties to the IIA as the law.¹⁰⁴⁹ The CJEU in *Achmea* had no difficulty in finding that the tribunal was indeed asked to interpret EU law in as far as it became relevant to the dispute. The point was already raised earlier that in an intra-EU context the Contracting Parties to the IIA are both Member States. The Court's conclusion that the Treaties therefore constitute an agreement in force between the Contracting Parties is rather uncontroversial.¹⁰⁵⁰ A similar reasoning is not, however, available to IIAs that do not apply to Member State relations *inter se*. In as far as EU IIAs with third countries are concerned neither the EU Treaties nor EU legislation emanating from the Treaties can be seen as an international agreement in force between the Contracting Parties.

In *Achmea*, however, the CJEU also found that the tribunal would inevitably face questions over the interpretation of Union law as a matter of domestic law. Notably, Article 8(5) of the Netherlands-Czechoslovakia BIT stipulates that the tribunal shall decide on the basis of *inter alia* "the law in force of the Contracting Party concerned". Provisions in IIA that determine domestic law as the relevant applicable law are rare.¹⁰⁵¹ Likewise, the denomination of domestic law as applicable law in ICSID proceedings was interpreted restrictively by tribunals. This does not call into question the observation of the CJEU in *Achmea* that "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital".¹⁰⁵² It is argued here that an investment tribunal is inevitably faced with questions over the interpretation of EU law where the dispute concerns an economic activity on the internal market, irrespective of whether or not the claimant investor is a national of a Member State (i.e. in an intra-EU situation) or not, and notwithstanding possible limitations in the applicable law provision. The following section therefore explores whether the differentiation between the interpretation of EU law as a matter of law or fact provides a helpful conceptual tool.

¹⁰⁴⁹ For an overview, see *supra* Chapter 3.2.2.

¹⁰⁵⁰ For a discussion of the *Achmea* case, see *supra* in this Chapter.

¹⁰⁵¹ For a discussion, see *supra* Chapter 3.2.2.

¹⁰⁵² Case C-284/16 *Achmea op cit.*, para. 42.

6.4.2 *A matter of fact*

The appreciation of domestic law by international courts is a delicate issue. Palmeter and Mavroidis, for instance, observed in the context of the WTO dispute settlement system that:

“international judges decide legal questions, and that, of necessity, involves deciding what the ‘facts’ of a municipal legal question are – in a word, it involves ‘interpreting’ municipal legal materials.”¹⁰⁵³

It is not, therefore, necessary that EU law becomes part of the applicable law for it to play an important role in the settlement of investment disputes. This is well exemplified by the ECHR, where the CJEU was troubled by the fact that the draft accession agreement enabled the ECtHR to choose between several plausible interpretations of EU law.¹⁰⁵⁴ This implies that an assessment of EU law with commitments under the ECHR requires the ECtHR to engage in an interpretation of relevant provisions of EU law. Similar to the adjudicative activity of the ECtHR, investment tribunals are tasked with determining whether legal measures adopted in the respondent state conform to the broadly defined standards of investment protection that are set out in the IIA. This is all the more obvious where the dispute concerns a direct challenge against the regulatory measure.¹⁰⁵⁵

An economic activity on the internal market may be regulated under Union law by way of a specific decision that is directly addressed to a group of economic operators, or generally by means of a directive or regulation. An investment tribunal could be asked to determine whether such a Union legal act, or a particular provision thereof, is compatible with commitments made under the IIA. This would by necessity involve an interpretation of the relevant EU law. It is furthermore possible to imagine a situation where an investor could bring a claim on the basis of a directive, where that directive has direct effect. In addition to adopting a substantive interpretation of that directive, the tribunal would also have to determine whether the investment derived rights from that directive, a question that is entirely governed by EU law.

This is only exacerbated by the extensive reach of EU law that leaves hardly any economic activity on the internal market exclusively confined to the domestic law of the Member States. Where it is not directly regulated through individual decisions or directly applicable Union legislation, it might nonetheless be subject to directives. Domestic implementing legislation, and even administrative decisions based on such legislation, have to be interpreted in light of the EU law. It is important to

¹⁰⁵³ David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization - Practice and Procedure*, 2nd edn (Cambridge University Press: 2004) 46.

¹⁰⁵⁴ Opinion 2/13 *Accession to the ECHR op cit.*, paras. 245-47.

¹⁰⁵⁵ This is particularly relevant in the context of expropriation, see e.g. *Pope & Talbot Inc. v. The Government of Canada*, Interim Award of 26 June 2000 *op cit.*, para. 99.

acknowledge in this respect that the interpretation and application of domestic law by municipal administrations and domestic courts in the Member States is guided by a range of principles in EU law, i.e. primacy of EU law,¹⁰⁵⁶ direct effect,¹⁰⁵⁷ non-discrimination,¹⁰⁵⁸ the principle of consistent interpretation,¹⁰⁵⁹ and even the duty of loyal cooperation.¹⁰⁶⁰ EU law may therefore be relevant to an investment dispute without the issue having been raised by either of the disputing parties.

In principle, therefore, investment tribunals may be called on to interpret EU law, albeit indirectly, where the challenge is based on domestic law or even an administrative measure.¹⁰⁶¹ An omission to take account of the relevant EU law, or a wrongfully appreciation of EU law has an effect on the tribunal's determination of the contested measure with the IIAs. There is no reason why the Court's conclusions in the *ECtHR* opinion and *Achmea* would not extend to instances where a compatibility assessment under an international agreement requires such an indirect appraisal of Union law.

A common objection in this respect is that investment tribunals engage in an assessment of domestic law, and consequently Union law, merely as a matter of fact.¹⁰⁶² Indeed, this view appears to reflect a general principle of international law expressed by PCIJ in the *German interests in Polish Upper Silesia* case:

“From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States [...]”¹⁰⁶³

Consequently, even where it enters the dispute as a matter of fact, law is always subject to interpretation.

In practice, however, it is nearly impossible to differentiate clearly between matters of law and matters of fact because the “line between exposition and interpretation is perilously indeterminate, and it would therefore seem to be a

¹⁰⁵⁶ This includes setting aside conflicting provisions in national law, see Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978], EU:C:1978:49, para. 21.

¹⁰⁵⁷ For a detailed account of the direct effect of various forms of legal acts of the Union, see Robert Schütze, *European Union Law* (Cambridge University Press: 2015) 77-116.

¹⁰⁵⁸ Article 18 TFEU, see discussion *infra* Chapter Seven.

¹⁰⁵⁹ Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*. [1984], EU:C:1984:153, para. 26; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990], EU:C:1990:395, para. 9.

¹⁰⁶⁰ Article 4(3) TEU.

¹⁰⁶¹ This is in principle acknowledged by AG Bot, see Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 137.

¹⁰⁶² For an overview over this argument, see Steffen Hindelang, 'The Autonomy of the European Legal Order' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy after Lisbon: Special Issue* (Springer Verlag: 2013) 187-198, 193-94; Herrmann (2014), *op cit.*, 582.

¹⁰⁶³ *Certain German Interests in Polish Upper Silesia* Judgment on Merits, 25 May 1926, PCIJ Series A, No 6, p. 20.

mistake to attach undue importance¹⁰⁶⁴ to that distinction. This applies equally to investment arbitration where it is not always clear whether a tribunal engages with domestic law as a matter of law or fact; or, indeed, what an interpretation of domestic law as a matter of fact actually entails.¹⁰⁶⁵ The proposition that investment tribunals are not involved in an interpretation of EU law is, therefore, unsustainable. On the contrary, they are liable to be called on to evaluate EU law—directly or indirectly—be it as a matter of law or a matter of fact.

Lastly, the principle of autonomy as it was presented by the CJEU in *Achmea* primarily serves to ensure the full effectiveness of Union law, which is applicable to all economic operators on the internal market irrespective of the nationality of the controlling entity.¹⁰⁶⁶ Establishing a second layer of protection that allows economic operators on the internal market to circumvent the application of EU law—wherever it is, or may be, applicable—by virtue of having recourse to an international tribunal that purports itself to operate outside of the confines of EU law and the system of judicial remedies it establishes presents in itself a violation of the principle of autonomy.¹⁰⁶⁷ There is, therefore, no imperative reason why the line of conclusions of the CJEU in *Achmea* should be limited to economic relations between Member States.¹⁰⁶⁸

6.5 The indirect effect of investment awards

The Treaties are silent on the position and effect of international decisions, i.e. decisions adopted by international bodies established on the basis of an EU agreement, within the Union legal order. The general proposition, emerging from long-standing practice of the CJEU, suggests that the qualities of international judicial decisions are determined in accordance to the nature of the underlying international agreement. The present section demonstrates that this approach extends to investment awards, and argues that ISDS therefore indirectly influences the interpretation and application of secondary EU law.

6.5.1 *Investment agreements and the hierarchy of Union legal acts*

The enumeration of legal acts of the Union in Article 288 TFEU does not include international agreements. And yet, Article 216 TFEU explicitly refers to the Union's

¹⁰⁶⁴ C. Wilfred Jenks, 'The interpretation and application of municipal law by the Permanent Court of International Justice' (1938) 19 *British Yearbook of International Law* 67-103, 68.

¹⁰⁶⁵ Gáspár-Szilágyi (2016), *op cit.*, 728-29.

¹⁰⁶⁶ The issue of equal treatment is discussed in more detail below, see *infra* Chapter Seven

¹⁰⁶⁷ Burkhard Hess, 'The fate of investment dispute resolution after the *Achmea* decision of the European Court of Justice' (2018) 10.

¹⁰⁶⁸ Case C-284/16 *Achmea op cit.*, para. 43; Opinion 1/09 *European Patents Court op cit.*, para. 82.

competence to interact with the wider world through international agreements. Their legal character within the EU legal order can, therefore, hardly be doubted.¹⁰⁶⁹ Indeed, the CJEU has consistently reiterated its position that international agreements form an “integral part” of the Union legal order from the time they enter into effect.¹⁰⁷⁰ This general proposition must, however, be qualified in two respects.

First, it is important to note that the constitutional nexus between an international agreement and the EU legal order is the Council decision by virtue of which that international agreement was concluded. This view is supported by the long-standing practice of the CJEU that views a challenge against an international agreement as a challenge against the act of conclusion.¹⁰⁷¹ The absence of any reference to international agreements in Article 288 TFEU further suggests that the international agreement fits uneasily into formal conceptions of hierarchy of legal acts in the EU legal order.¹⁰⁷² This Treaty provision does not, therefore, provide a helpful frame of reference for the assessment of international agreements concluded by the Union.

This does not call into question the expansive jurisdiction that the CJEU asserts over international agreements, including aspects of mixed agreements that fall under shared competence.¹⁰⁷³ In its recent *Western Sahara* judgment, the CJEU observed that:

“[T]he review of validity which the Court may be required to carry out in that context is nonetheless capable of encompassing the legality of that act [of conclusion] in the light of the actual content of the international agreement at issue [...]”¹⁰⁷⁴

¹⁰⁶⁹ Craig (2010), *op cit.*, 252.

¹⁰⁷⁰ Case 181/73 *R & V Haegeman v. Belgian State* [1974], EU:C:1974:41, para. 5; Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987], EU:C:1987:400, para. 7; Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998], EU:C:1998:293, para. 41; Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda* [2007], EU:C:2007:496, para. 31; Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010], EU:C:2010:91, para. 39; Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010], EU:C:2010:243, para. 60; Case C-366/10 *Air Transport Association of America v. Secretary of State for Energy and Climate Change* [2011], EU:C:2011:864, para. 50; Cases C-224/16 *Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozhi i patishtata (Aebtri) v Nachalnik na Mitnitsa Burgas* [2017], EU:C:2017:880, para. 50.

¹⁰⁷¹ Case C-327/91 *France v Commission* *op cit.*, para. 17; Case C-122/95 *Federal Republic of Germany v Council of the European Union* [1998], EU:C:1998:94, para. 42; Joined cases C-402 and 415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008], EU:C:2008:461, para. 286.

¹⁰⁷² Schütze (2006), *op cit.*, 108.

¹⁰⁷³ Koutrakos (2002), *op cit.*, 34; Neframi (2012), *op cit.*, 346-48; de Waele (2011), *op cit.*, 150.

¹⁰⁷⁴ Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018], EU:C:2018:118, para. 51.

Indeed, it follows from their recognition as an act of a Union institution within the meaning of Article 267(1)(b) TFEU that the CJEU is competent to review the legality of international agreements, and determine the interpretation of provisions of the international agreements in the context of the preliminary reference procedure.¹⁰⁷⁵ Although international agreements remain external to the hierarchy of Union legal acts, a certain order of priority that situates these agreements between primary and secondary EU law Union law logically flows from the Court's jurisdiction to review international agreements.

This gives rise to the second qualification to the general proposition that international agreements are an integral part of the EU legal order, namely that their position as a legal act is dependent on their effect on other EU legal acts. As a general principle, the Union institutions and the Member States are bound by international law, including the rules and principles of customary international law¹⁰⁷⁶ as well as, by virtue of Article 216(2) TFEU, the provisions of international agreements.¹⁰⁷⁷ However, in case of conflict with secondary EU law the provision of an international agreement will only prevail if it is directly applicable, that is if it fulfils the requirements of direct effect in EU law. Laying out this general principle in *Kupferberg*,¹⁰⁷⁸ the CJEU observed that:

“[T]he question whether such a stipulation is unconditional and sufficiently precise to have direct effect must be considered in the context of the Agreement of which it forms part [...] in the light of both the object and purpose of the Agreement and of its context.”¹⁰⁷⁹

The primacy of international agreements does not, however, extend to primary EU law. On the contrary international agreements must be compatible with the

¹⁰⁷⁵ Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989], EU:C:1989:646, para. 8; Case C-11/05 *Friesland Coberco Dairy Foods BV v Inspecteur van de Belastingdienst/Douane Noord/kantoor Groningen* [2006], EU:C:2006:312, para. 36; Case C-386/08 *Brita op cit.*, para. 39; Case C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* [2017], EU:C:2017:448, para. 30.

¹⁰⁷⁶ *Joined Cases 21 to 24/72 International Fruit Company op cit.*, para. 6; Case C-162/96 *Racke op cit.*, para. 27.

¹⁰⁷⁷ Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992], EU:C:1992:453, para. 9; *Joined cases C-402 and 415/05 P Kadi op cit.*, para. 291; Case C-366/10 *Air Transport Association of America v. Secretary of State for Energy and Climate Change op cit.*, paras. 101 and 123.

¹⁰⁷⁸ Case C-104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982], EU:C:1982:362.

¹⁰⁷⁹ Case C-104/81 *Kupferberg op cit.*, para. 23.

Treaties.¹⁰⁸⁰ This has given support to the view that international agreements rank in an almost hierarchical fashion in between primary and secondary Union law.¹⁰⁸¹

As a consequence of the non-invokability of international agreements that are not directly effective that the hierarchical rank of international commitments over secondary Union law is conditional on their direct effect in the EU legal order.¹⁰⁸² In other words, secondary EU law prevails over a provision in an international agreement that lacks the qualities of direct effect. It is true that the CJEU has consistently held the view that secondary EU law shall, as far as possible, be interpreted in light of international commitments.¹⁰⁸³ However, the fact that secondary EU law shall be interpreted in conformity with an international agreement precludes the existence of a conflict,¹⁰⁸⁴ and alleviates questions over a formal hierarchical ordering. A principle of consistent interpretation nonetheless imprints on the normative content of secondary Union law. Where several plausible interpretations are available the Union institutions, including the CJEU, and the Member States are bound to adopt an interpretation that is consistent with the Union's international obligations. This view is supported by an CJEU in an early case concerning the GATT Dairy Arrangement, the CJEU concluded that:

When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. [...] Similarly, the primacy of international agreements concluded by the Community over provisions of

¹⁰⁸⁰ Joined cases C-402 and 415/05 P *Kadi* op cit., para. 285; Opinion 1/15 Draft agreement between Canada and the European Union on the transfer of Passenger Name Record data from the European Union to Canada [2017], EU:C:2016:656, para. 67; Case C-266/16 *Western Sahara* op cit., para. 46.

¹⁰⁸¹ Kirsten Schmalenbach, 'Struggle for exclusiveness: The ECJ and competing international tribunals' in Isabelle Buffard, et al. (eds), *International law between universalism and fragmentation: Festschrift in honour of Gerhard Hafner* (Martinus Nijhoff: 2008), 1048-49; Brandtner (1992), op cit., 309-10.

¹⁰⁸² Daniel Thym, 'The CJEU ruling in *Achmea*: Death sentence for autonomous investment protection tribunals', *EU Law Analysis*, 9 March 2018 <accessed at <http://eulawanalysis.blogspot.com/2018/03/the-cjeu-ruling-in-achmea-death.html>>.

¹⁰⁸³ Case C-61/94 *Commission of the European Communities v. Federal Republic of Germany* (International Dairy Arrangement) [1996], EU:C:1996:313, para. 52; Case C-286/02 *Bellio F.lli Srl v. Prefettura di Treviso* [2004], EU:C:2004:212, para. 33; Case C-344/04 *International Air Transport Association v. Department for Transport* [2006], EU:C:2006:10, para. 35; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht BV v Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2006], EU:C:2006:23, para. 25; Joint Cases C-447 and 448/05 *Thomson Multimedia Sales Europe and Vestel France v Administration des douanes et droits indirects* [2007], EU:C:2007:151, para. 30; For a discussion, see Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal* 1304, 1309-11; Dashwood et al. (2011), op cit., 9644

¹⁰⁸⁴ Piet Eeckhout, 'A panorama of two decades of EU external relations law' in Anthony Arnall, Piet Eeckhout and Takis Tridimas (eds), *Continuity and change in EU law: Essays in honour of Sir Francis Jacobs* (Oxford University Press: 2008) 324-37, 331.

secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.¹⁰⁸⁵

In other words, an international agreement that enjoys no direct effect can still exert an indirect effect on the interpretation and application of EU law. This conclusion logically extends to IIAs concluded by the Union with third countries, i.e. they become an integral part of the EU legal order from the moment they become effective. They are subject to the far-reaching jurisdiction of the CJEU and create effects on the interpretation of secondary EU law.

6.5.2 *The position and effect of investment awards*

These preliminary observations regarding international agreements are of immediate relevance for an evaluation of the position and effect of investment awards in the Union legal order, because decisions adopted by treaty bodies generally inherit the qualities of the agreement they purport to implement. This view is well reflected in consistent case law by the CJEU with respect to association agreements. In its *Special aid to Turkey* judgment,¹⁰⁸⁶ for instance, the CJEU concluded that because the decision of the Council of Association under the Ankara Agreement was “directly connected with the Association agreement [it] forms, from its entry into force, an integral part of the Community legal order.”¹⁰⁸⁷ The CJEU confirmed this view again in *Sevince*.¹⁰⁸⁸ Adjudicative decisions are of course qualitatively different from decisions adopted by treaty bodies in the exercise of legislative or executive powers, as is commonly the case in the context of association agreements. As legal acts implementing the international agreement, there are, however, no reasons why this should affect the position of judicial decisions within the Union legal order. This view is exemplified by the Court’s case law on WTO panel and AB reports, which reflects a similar ‘effects-based’ approach than that applied to international agreements.¹⁰⁸⁹ The rejection of the first EEA Draft Agreement itself supports the general proposition that judicial decisions of international tribunals established under an EU agreement do in fact penetrate the EU legal order.¹⁰⁹⁰ Similar concerns were reflected in the *EPCf*¹⁰⁹¹ as well as the *ECHR*¹⁰⁹² opinions.

¹⁰⁸⁵ Case C-61/94 *International Dairy Arrangement op cit.*, para. 52.

¹⁰⁸⁶ Case 30/88 *Greece v Commission (Special aid to Turkey)* [1989], EU:C:1989:422.

¹⁰⁸⁷ Case 30/88 *Special aid to Turkey op cit.*, para. 13.

¹⁰⁸⁸ Case C-192/89 *S. Z. Sevince v. Staatssecretaris van Justitie* [1990], EU:C:1990:322, para. 9.

¹⁰⁸⁹ Nikolaos Lavranos, *Legal interaction between decisions of international organizations and European law* (Europa Law Publishing: 2004) 141-42.

¹⁰⁹⁰ Lavranos (2013), *op cit.*, 207-08.

¹⁰⁹¹ Opinion 1/09 *European Patents Court op cit.*, para. 78.

¹⁰⁹² Opinion 2/13 *Accession to the ECHR op cit.*, paras. 181-86.

From the perspective of hierarchy, therefore, it is prudent to assume that investment awards penetrate the EU legal order at the same level as the IIA that they are intended to implement. Like the agreement itself they become an integral part of the EU legal order, not through the prism of a formal system of hierarchical order, but with the help of functional principles of direct effect and consistent interpretation.¹⁰⁹³ Looking into the effects of adjudicative decisions in the EU legal order in more detail, it is helpful to differentiate between, on the one hand, the Union and its institutions, and, on the other hand, the Member States.

6.5.2.1 The effect of investment awards on the Union and its institutions

The preceding section alluded to the extensive jurisdiction that the CJEU assumes over international agreements pursuant to Article 267 TFEU. In the context of association agreements the Court has moreover confirmed jurisdiction over decisions emanating from treaty bodies.¹⁰⁹⁴ This is not to say, however, that the Court is drawn to the idea that international decisions have direct effect in Union law.¹⁰⁹⁵ As an emanation of the international agreement, decisions adopted under it enjoy direct effect in the EU legal order only where the agreement itself fulfils the requisite criteria.¹⁰⁹⁶ The CJEU has frequently affirmed that provisions of association agreements are directly effective,¹⁰⁹⁷ and—unsurprisingly—so do the decisions adopted under such agreements,¹⁰⁹⁸ unless their implementation is subject to supplementary measures that have not yet been adopted on EU level.¹⁰⁹⁹ On other occasions the Court has rejected the direct effect of international agreements.

¹⁰⁹³ This is similar to the organization of the internal organization of the relationship between domestic law and EU law, see Case 26/62 *Van Gend en Loos op cit.*, p. 13-14; Case C-14/83 *Von Colson op cit.*, para. 28.

¹⁰⁹⁴ Case 12/86 *Demirel op cit.*, para. 10.

¹⁰⁹⁵ Martines observed that: "Only if the objective and scope and the global analysis of the system established by the agreement can lead to the conclusion that the agreement 'intended' to create individual rights in the same manner as the EU legal order creates individual rights, and only in this case can the agreement's provision have direct effect." Francesca Martines, 'Direct effect of international agreements of the European Union' (2014) 25(1) *European Journal of International Law* 129-47, 138.

¹⁰⁹⁶ Alike Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51(4) *Common Market Law Review* 1125, 1132.

¹⁰⁹⁷ Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzęptowicz-Meyer* [2002], EU:C:2002:57, paras. 19-26.

¹⁰⁹⁸ Case C-192/89 *Sevince op cit.*; Case C-355/93 *Hayriye Eroglu v Land Baden-Württemberg* [1994], EU:C:1994:369, para. 17; Joined Cases C-317 and 369/01 *Eran Abatay and Others, and Nadi Sabin v Bundesanstalt für Arbeit* [2003], EU:C:2003:572, para. 117; Case C-171/01 *Wählergruppe Gemeinsam Zajedno / Birlikte Alternative und Grüne GewerkschafterInnen / UG, and Others* [2003], EU:C:2003:260, para. 67; Case C-188/00 *Bülent Kurz, né Yüce v Land Baden-Württemberg* [2002], EU:C:2002:694, para. 52; Case C-65/98 *Safet Eyyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000], EU:C:2000:336, para. 48.

¹⁰⁹⁹ Case C-277/94 *Z. Taflan-Met, S. Altun-Baser, E. Andal-Bugdayci v Bestuur van de Sociale Verzekeringsbank and O. Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1996], EU:C:1996:315, para. 33.

This was the case with the Aarhus Convention,¹¹⁰⁰ UNCLOS,¹¹⁰¹ and customary principles of international law.¹¹⁰² The restrictive stance of the CJEU on international commitments is, however, best illustrated by the example of the GATT and later WTO.¹¹⁰³

As an integral part of the Union legal order, the WTO agreements are binding on the Union and its institutions. In principle, therefore, the Union is obligated to abide by WTO commitments, and required to implement the reports of WTO panels and the AB. It is unsurprising, therefore, that the CJEU repeatedly confirmed its extensive interpretive jurisdiction over the WTO agreements.¹¹⁰⁴ Indeed, persistently alluding to the importance of that jurisdiction in order to ensure the consistent interpretation of those provisions that fall within the ambit of both, national and EU competence,¹¹⁰⁵ the CJEU alleviates questions over the precise determination of competences, which is, thus, irrelevant for the Court to assert interpretive jurisdiction.¹¹⁰⁶

¹¹⁰⁰ Regarding Article 9(3) of the Aarhus Convention, see Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011], EU:C:2011:125, para. 52.

¹¹⁰¹ Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008], EU:C:2008:312, para. 65.

¹¹⁰² The approach of the CJEU to the effects of customary international law is more complex than 'direct effect' is able to capture. It appears that an individual may rely on principles of customary international law in order to challenge the validity of an act of secondary EU law that has the effect suspending rights deriving directly from the international agreement, see Case C-162/96 *Racke op cit.*, para. 51; more recently the CJEU acknowledged that an individual may invoke rules of customary international law in order to challenge the validity of an EU legal that is liable to affect an individual's rights under EU law or establishes obligations in so far as the rule of customary international law calls into question the the Union's competence to adopt that act, see Case C-366/10 *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change*, [2011], EU:C:2011:864, para. 107; for a comprehensive discussion of this issue and the relevant case law, see e. g. Dagmara Kornobis-Romanowska, 'Effects of international customary law in the legal order of the European Union' (2018) 8(1) *Wroclaw Review of Law, Administration & Economics* 405-28; Alessandra Gianelli, 'Customary international law in the European Union' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International law as law of the European Union* (Martinus Nijhoff: 2011) 93-110; Jan Wouters and Dries Van Eeckhoutte, 'Giving effect to customary international law through European Community law' (2002), Insittute for International Law (Working Paper No 25 June 2002) accessible at <<https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP25e.pdf>>.

¹¹⁰³ Eeckhout (2008), *op cit.*, 330.

¹¹⁰⁴ Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998], EU:C:1998:292, para. 29; Joined Cases C-300 and 392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Ascco Geriëste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* [2000], EU:C:2000:688, para. 30.

¹¹⁰⁵ Case C-53/96 *Hermès op cit.*, para. 32; Joined Cases C-300 and 392/98 *Dior and Ascco op cit.*, para. 39.

¹¹⁰⁶ Koutrakos (2002), *op cit.*, 36.

From the very beginning the Court had foreclosed the direct effect of the WTO agreements. Already the GATT 1947 was conceived of as too flexible,¹¹⁰⁷ and even though the nature of the legal regime changed with the implementation of the WTO framework,¹¹⁰⁸ the mindset within the Union appeared to remain the same.¹¹⁰⁹ The CJEU swiftly confirmed that the WTO Agreements are “not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.”¹¹¹⁰ Secondary Union law could not, therefore, be reviewed in light of the WTO agreements, unless they were “intended to implement” WTO commitment, or specifically referred to a provision of the WTO agreements.¹¹¹¹

A similar reasoning is applied to WTO panel and AB reports.¹¹¹² The direct link between the direct effect of WTO rulings and the WTO agreements was drawn by the CFI in *Biret*¹¹¹³

“There is an inescapable and direct link between the decision and the plea alleging infringement of the SPS Agreement, and the decision could therefore only be taken into consideration if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question[...].”¹¹¹⁴

¹¹⁰⁷ Joined Cases 21 to 24/72 *International Fruit Company op cit.*, paras. 21-27; Case 9/73 *Carl Schlüter v Hauptzollamt Lörrach* [1973], EU:C:1973:110, paras. 29-30; Joined cases 267, 268 and 269/81 *SAMI op cit.*, para. 23; Case C-280/93 *Federal Republic of Germany v Council of the European Union* [1994], EU:C:1994:367, para. 110.

¹¹⁰⁸ Ernst-Ulrich Petersmann, ‘The transformation of the world trading system through the 1994 Agreement establishing the World Trade Organization’ (1995) 6(1) *European Journal of International Law* 161-221.

¹¹⁰⁹ The preamble of the Council Decision concluding the WTO Agreement reads: “Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts”, see OJ L336/1, 23 December 1994, Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994); de Waele (2011), *op cit.*, 72.

¹¹¹⁰ Case C-149/96 *Portugal v Council op cit.*, para. 47; Joined Cases C-300 and 392/98 *Dior and Assco op cit.*, para. 44; for a discussion of *Portugal v Council*, see Stefan Griller, ‘Judicial enforceability of WTO law in the European Union. Annotation to Case C-149/96, Portugal V. Council’ (2000) 3(3) *Journal of International Economic Law* 441-72, 447 *et seq.*

¹¹¹¹ Case C-149/96 *Portugal v Council op cit.*, para. 49; Case C-69/89 *Nakajima op cit.*, para. 31; Case 70/87 *Fediol op cit.*, paras. 19-22.

¹¹¹² Case T-18/99 *Cordis Obst und Gemüse Großhandel GmbH v Commission* [2001], EU:T:2001:95, paras. 58-60.

¹¹¹³ Case T-174/00 *Biret International SA v Council of the European Union* [2002], EU:T:2002:2.

¹¹¹⁴ *Ibid.*, para. 67; for a similar conclusion regarding GATT, see Case C-104/97 P *Atlanta AG and others v Commission of the European Communities and Council of the European Union* [1999], EU:C:1999:498, paras. 19 and 20.

On appeal, Advocate General Alber suggested to reverse these findings,¹¹¹⁵ but the case was dismissed by the CJEU in its entirety without further addressing the issue of direct effect.¹¹¹⁶ WTO panel and AB reports cannot therefore be said to exert a direct influence on the interpretation and application of secondary Union law, let alone its legality. In spite of forming an integral part of the Union legal order, they are of no avail to individual traders and other economic operators on the internal market.

A similar logic would undoubtedly be applied to investment awards. Their effect in the EU legal order is, thus, directly dependent on the effect of IIAs. This would have to be determined “in the light of both the object and purpose of the Agreement and of its context”.¹¹¹⁷ The fact that IIAs are not comparable to Association Agreements does not lead to the conclusion that they should be treated like the WTO Agreements. A principal reason for rejecting the direct effect of the WTO Agreements was Article 22 DSU that allows WTO Members to negotiate a mutually acceptable solution in case of non-compliance with a WTO ruling. This option would disappear if the national courts of the Member States were obliged to set aside domestic law that is in conflict with provisions of the WTO agreements, and panel and AB rulings.¹¹¹⁸ The Court’s reasoning in *Kupferberg*, however, illustrates that reciprocity is not itself detrimental to establish the direct effect of an FTA.¹¹¹⁹ Furthermore, IIAs are in principle unconditional as their *raison d’être* is the creation of rights for private investors that are directly enforceable. It should be noted at this point that recent FTAs have been concluded by the Union with an explicit exclusion of direct effect.¹¹²⁰ The implications of this for the ICS are addressed below.¹¹²¹ Suffice it for now to note that contracting parties are indeed at liberty to determine the effect of legal commitments within their respective legal order in the text of the agreement.¹¹²²

That being said, the preceding section emphasized that the CJEU is generally required to interpret secondary EU law in light of the Union’s international

¹¹¹⁵ Opinion of Advocate General Alber, Case C-93/02 P *Biret International SA v Council* [2003], EU:C:2003:291, para. 114.

¹¹¹⁶ Case C-93/02 P *Biret op cit.*

¹¹¹⁷ Case C-104/81 *Kupferberg op cit.*, para. 23.

¹¹¹⁸ Case C-149/96 *Portugal v Council op cit.*, para. 41.

¹¹¹⁹ Case C-104/81 *Kupferberg op cit.*, paras. 18-23; for a discussion, see Eeckhout (2011), *op cit.*, 333-37.

¹¹²⁰ Semertzi (2014), *op cit.*, 1125; this issue is at times addressed in the Council Decision concluding the agreement, for an illustration the EU-Korea FTA see OJ L 127/1, 14 May 2011, Council Decision (EU) 2011/265 of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Article 8: "The Agreement shall no be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals."

¹¹²¹ See *infra* Chapter 8.3.6.

¹¹²² Case C-104/81 *Kupferberg op cit.*, para. 17.

commitments. This is a practical consequence of the principle of consistent interpretation, which safeguards the uniform interpretation and application of EU law.¹¹²³ Considering the relationship of dependency between the effect of WTO decisions and the effect of the WTO agreement in the EU legal order, this principle also extends to WTO decisions.¹¹²⁴ This view is supported by the CJEU in Opinion 1/91:

“[W]here, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice.”¹¹²⁵

Decisions of international courts and tribunals, therefore, determine the interpretation of international agreements to which the Union is a party, and in light of which the CJEU has to interpret secondary EU law. It follows from these observations, that investment awards are given an indirect effect on the Court’s interpretation of both, the IIA and secondary Union law, through the medium of consistent interpretation.

6.5.2.2 The effect of investment awards on the Member States

It is well-established that EU law imposes an obligation on the Member States to respect and give full effect to international commitments arising out of agreements concluded between the Union and third countries.¹¹²⁶ The Treaty of Lisbon has consolidated this view in Article 216(2) TFEU, which stipulates that international agreements are binding on both, the Union institutions and the Member States. As the CJEU observed in *Kupferberg*¹¹²⁷

“in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, and obligation in relation to the

¹¹²³ André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press: 2011) 152; note that the principle of unity in external representation imposes a requirement on the CJEU to interpret secondary EU law in as far as possible in light of the Member States Case C-308/06 *Intertanko op cit.*, para. 52; for a discussion, see Federico Casolari, ‘The principle of loyal co-operation: A ‘master key’ for EU external representation?’ (2012), Steven Blockmans and Ramses A. Wessel, Principles and practices of EU external representation (CLEER Working Papers 2012/5), 11-36 accessible at <https://www.asser.nl/upload/documents/20120911T102448-cleer2012-5book_web.pdf> 29-30.

¹¹²⁴ Cottier (1998), *op cit.*, 369.

¹¹²⁵ Opinion 1/91 *EEA Agreement op cit.*, para. 39.

¹¹²⁶ Martines (2014), *op cit.*, 133.

¹¹²⁷ Case C-104/81 *Kupferberg op cit.*

Community, which has assumed responsibility for the due performance of the agreement.¹¹²⁸

More generally, however, the requirement to ensure consistency in the implementation of international commitments is inherent to Article 4(3) TEU, which sets out the duty of loyalty,¹¹²⁹ and finds specific expression in the principle of unity in international representation.¹¹³⁰ This is of particular importance for the implementation of mixed agreements. Although the shared nature of competences underlying these types of agreements indicates that the Member States retain responsibility for the implementation of parts of the agreement, the judicial authorities in the Member States are nonetheless bound to follow the interpretations by the CJEU that covers the agreement in its entirety.¹¹³¹ The principle of consistent interpretation also extends to national courts in their application of domestic law and, where applicable, secondary Union law.¹¹³² Incidentally, this imposes an obligation on domestic courts to refer questions over the interpretation of mixed agreement to the CJEU in accordance with Article 267 TFEU.¹¹³³

Consequently, the national courts and the CJEU are in principle bound to interpret secondary EU law in consistency with EU IIAs, the normative content of which is to be determined in light of investment awards. As this requirement extends equally to parts of the agreement that fall within the ambit exclusive and shared competence, these investment awards exert a far reaching, albeit indirect, effect on the interpretation and application of domestic law in the Member States.

6.5.3 Discussion and interim conclusion

Section 6.4 in this Chapter illustrated that investment tribunals inevitably face questions over the interpretation of EU law. It was furthermore argued that the conceptual distinction between the interpretation of EU law as a matter of law or

¹¹²⁸ *Ibid.*, para. 13.

¹¹²⁹ On the relationship between the duty of sincere cooperation and duty of consistency, see Peter Van Elsuwege and Hans Merket, 'The role of the Court of Justice in ensuring the unity of the EU's external representation' (2012), Steven Blockmans and Ramses A. Wessel, Principles and practices of EU external representation (CLEER Working Papers 2012/5), 37-58 accessible at <https://www.asser.nl/upload/documents/20120911T102448-cleer2012-5book_web.pdf> 43-45.

¹¹³⁰ Opinion 2/91 *ILO Convention op cit.*, para. 36; Opinion 1/94 *WTO Agreements op cit.*, para. 108; Opinion of Advocate General Maduro, Case C-246/07 *Commission v Sweden (PFOS)* [2009], EU:C:2009:589, para. 37; Joris Larik, 'Pars Pro Toto: The Member State's Obligations of Sincere Cooperation, Solidarity and Unity' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing: 2018) 175-99, 180-81; Christophe Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing: 2018) 117-74, 135; Neframi (2012), *op cit.*, 343-45.

¹¹³¹ Neframi (2010), *op cit.*, 335.

¹¹³² Case C-61/94 *International Dairy Arrangement op cit.*, para. 52.

¹¹³³ Case C-431/05 *Merck Genéricos op cit.*, para. 33.

fact is irrelevant for an assessment of ISDS provisions in light of the principle of autonomy. The present section demonstrated that these interpretations also have an ascertainable effect on the interpretative prerogative of the CJEU. In other words, the present section set out to investigate whether the jurisdiction of an investment tribunal established on the basis of an IIA that was concluded by the Union with a third country has the effect of binding the CJEU to a particular interpretation of EU law.

Just as any other international agreement concluded by the Union, IIAs, once ratified, become an integral part of the EU legal order, and so do investment awards based on these agreements. Although their direct effect in the EU legal order is subject to the particular qualities of an IIA, it transpires from the discussion in this section that their effect on secondary Union law and domestic law in the Member States is far greater than the concept of direct effect is able to capture. The extensive jurisdiction of the CJEU over IIAs, combined with the requirement to interpret these agreements and secondary EU law consistently with investment awards results in a far-reaching indirect effect of these decisions within the EU legal order. Faced with multiple plausible interpretations domestic courts in the Member States as well as the CJEU will in principle have to adopt the interpretation that is consistent with international commitments under an IIAs. Investment tribunals are asked to examine the compatibility of measure, including regulatory measures, with substantive standards of investment protection. Their conclusions necessarily limit the available interpretations of domestic law, and secondary EU law, to those interpretations that do not conflict with the investment award. Lacking direct effect in the EU legal order, investment awards cannot challenge the validity of secondary EU law, nor can an award provoke a *contra legem* interpretation. It may, however, prompt the CJEU to adapt its interpretations of secondary EU law in light of the recent practice of investment tribunals, to prevent an application of secondary EU law that would entail a violation of the IIA. This would in particular concern situations where an interpretation of the CJEU would lead could lead to a change in the application of secondary EU law to economic operators on the internal market. Short of binding the CJEU to a particular interpretation of EU law, therefore, ISDS provisions in IIAs concluded by the Union with third countries have the effect of restraining the CJEU in the exercise of its interpretive prerogative.

It is true that unlike the EEA Agreement, IIAs do not pursue an explicit objective of homogeneous interpretation.¹¹³⁴ However, many of the substantive standards of investment protection overlap the internal market provisions on free movement of capital and the right of establishment.¹¹³⁵ Protection from expropriation without

¹¹³⁴ Opinion 1/91 *EEA Agreement op cit.*, para. 5 and 45; Dimopoulos (2011a), *op cit.*, 117.

¹¹³⁵ European Commission, 'Protection of intra-EU investments' (COM(2018) 547 final), 19 July 2018 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&from=EN>> .

compensation is, furthermore, recognized under the Charter of Fundamental Rights.¹¹³⁶ Without going into this in any detail it appears that IIAs generally extend more beneficial rights than domestic law.¹¹³⁷ It is true that there exists no general obligation in EU law that corresponding provisions of an international agreement must be interpreted in the same way as like-worded provisions in EU law. This transpires above all from the judgements of the CJEU in *Polydor*¹¹³⁸ and *Kupferberg*¹¹³⁹ However, both these cases concerned the FTA in place between the EEC and Portugal, which was then an EFTA state, and effectively differentiated between treatment awarded to economic operators *viz* their activity on the internal market and their activity with respect to third countries. The underlying logic is, thus, similar to the exclusion of the principle of non-discrimination from external action, which is discussed in more detail below.¹¹⁴⁰ From this discussion it will also transpire that IIAs and related investment awards directly govern the activity of operators on the internal market, because post-establishment treatment covers the investment once incorporated in one of the Member States. An EU company is therefore subject to protection under EU law, as well as an IIAs in as far as the element of foreign ownership or control is situated outside of the Union. For present purposes this means that *Polydor* and *Kupferberg* do not call into question the extensive indirect effect of investment awards within the EU legal order.

It is argued here that the concept of jurisdiction that is binding on the CJEU for the purpose of the principle of autonomy does not merely refer to the existence of a legal mandate that would empower an international court or tribunal to determinatively interpret EU law. This view is supported that neither decision of the EEA court nor the ECtHR would have been binding on the CJEU *strictu sensu*. Briefly recalling the above discussion, international decisions cannot affect the interpretation of primary EU law. The EEA courts interpretation of the EEA agreement would not, therefore, have had a binding effect on the Court's interpretation of corresponding provisions in primary Union law. The same is true for the ECtHR, which could not have restricted the CJEU to a particular interpretation of the rights under the Charter in any more binding fashion than what the Article 52 of the Charter already envisages. Rather, these cases support an understanding of the Court's desire to maintain a uniform and consistent interpretation of EU law in the widest sense. Such a harmonious development of

¹¹³⁶ OJ C 326/391, 26.10.2012, Charter of Fundamental Rights of the European Union, Article 17; for a discussion in the intra-EU context, see Dimopoulos (2011b), *op cit.*, 64-66.

¹¹³⁷ For a comprehensive comparison of investment protection on the internal market and IIAs, see Mavluda Sattorova, 'Investor rights under EU law and international investment law' (2016) 17(6) *The Journal of World Investment & Trade* 895-918.

¹¹³⁸ Case 270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited* [1982], EU:C:1982:43, para. 14.

¹¹³⁹ Case C-104/81 *Kupferberg op cit.*, para. 30.

¹¹⁴⁰ See *infra* Chapter 7.2.

EU law is in peril by the development of a parallel system of judicial remedies that ISDS represent.

6.6 The prior involvement of the CJEU

The principle of autonomy does not only safeguard the harmonious interpretation of EU law, but also protects the institutional integrity of the Union legal order. On the backdrop of the *exposé* of the relevant case law in Section 6.2 of the present Chapter, it is clear that this precludes the conclusion of international agreements that establish jurisdiction for adjudicative bodies over the division of competences between the Union and its Member States,¹¹⁴¹ and requires that essential character of powers conferred upon Union institutions under the Treaties is preserved.¹¹⁴²

Regarding the first aspect, the CJEU observed in its first *EEA* opinion that the envisaged EEA Court, in interpreting the term ‘Contracting Party’ to the EEA draft agreement, would inevitably “rule on the respective competences of the [Union] and the Member States as regards the matters governed by the provisions of the agreement.”¹¹⁴³ In similar terms the CJEU observed that under the co-respondent procedure as envisaged in the Union’s draft accession agreement to the ECHR “the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States [...]”.¹¹⁴⁴ Assuming jurisdiction over a dispute, investment tribunals confirm, explicitly or implicitly, that the investor has correctly identified the respondent to the dispute. Whereas this may be a straightforward task under traditional IIAs, the multi-layered structure such as the EU legal order requires in this an assessment of the attribution of competences between the Member States and the EU. Consequently, even though an investment tribunal might not explicitly address this question, by asserting jurisdiction over a particular dispute the tribunal would implicitly determine whether or not the respondent was correctly identified, and, thus, incidentally pronounce on the division of competences in the EU. That risk, of course, only materialises if future IIAs are concluded as mixed agreements.¹¹⁴⁵ As Chapter 8.1 will later demonstrate, this is likely to be the case in light of the legal preconditions and the prevailing political environment in the Union. The compatibility of ISDS provisions is therefore preconditioned on the incorporation of rigorous safeguards that alleviate the investment tribunal from determining the respondent to the dispute.¹¹⁴⁶

¹¹⁴¹ Opinion 1/00 *ECAA op cit.*, para. 15; Opinion 1/91 *EEA Agreement op cit.*, paras. 31-36.

¹¹⁴² Opinion 1/00 *ECAA op cit.*, para. 18.

¹¹⁴³ Opinion 1/91 *EEA Agreement op cit.*, para. 34.

¹¹⁴⁴ Opinion 2/13 *Accession to the ECHR op cit.*, para. 224.

¹¹⁴⁵ Hindelang (2013), *op cit.*, 196.

¹¹⁴⁶ See discussion *infra* in Chapter 8.3.4.

With respect to the second aspect, the cases discussed above illustrated that protection of the institutional powers of Union institutions under the principle of autonomy refers above all to the judicial prerogatives of the CJEU. In recent cases, procedural mechanisms that ensure the prior-involvement of the CJEU over issues that are likely to involve—albeit remotely—the interpretation of EU law, have emerged as an indispensable feature safeguarding the compatibility of an international agreement with the Treaties.¹¹⁴⁷ As the CJEU has demonstrated, a preference towards preserving the judicial dialogue established by Article 267 TFEU, which appears to provide the yardstick for any reference mechanism incorporated in an international agreement.¹¹⁴⁸

It is well-established in the case law of the CJEU that domestic courts in collaboration with the CJEU are responsible to ensure that “in the interpretation and application of the Treaties the law is observed.”¹¹⁴⁹ This fundamental principle of the Union legal order is derived from Article 2 TEU that lays out the values on which the Union is founded, including the rule of law which is common to a society in which justice prevails such as the one established by the Member States. The rule of law finds particular expression through Article 19(1) TEU that requires Member States, in accordance with their duty of sincere cooperation arising from Article 4(3) TEU, to establish an effective judiciary.¹¹⁵⁰ To that end the Treaties establish with Article 267 TFEU a judicial dialogue between the domestic courts of the Member States and the CJEU. Incidentally, it flows from Article 19 TEU that the CJEU is endowed with authority to lay down final definitive interpretations of Union law, and enjoys jurisdiction to “give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institution”.¹¹⁵¹ The institutional dimension of the principle of autonomy incidentally ensures that international agreements do not undermine this fundamental characteristic of the EU legal order.

Indeed, once initiated, there is practically no involvement of the domestic courts or CJEU in the settlement of an investor-state dispute. Nor do the traditional procedural frameworks provide for any means of judicial review of investment

¹¹⁴⁷ Case C-284/16 *Achmea op cit.*, para. 37; Opinion 2/13 *Accession to the ECHR op cit.*, para. 176; Opinion 1/09 *European Patents Court op cit.*, para. 84.

¹¹⁴⁸ Opinion 1/09 *European Patents Court op cit.*, para. 85.

¹¹⁴⁹ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018], EU:C:2018:117, para. 33; C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013], EU:C:2013:625, para. 99; Opinion 1/09 *European Patents Court op cit.*, para. 69; Joined Cases C-422, 423, and 424/93 *Teresa Zabala Erasun, Elvira Encabo Terrazos and Francisco Casquero Carrillo v Instituto Nacional de Empleo* [1995], EU:C:1995:183, 15; Case 244/80 *Pasquale Foglia v Mariella Novello* [1981], EU:C:1981:302, 16.

¹¹⁵⁰ Opinion 1/09 *European Patents Court op cit.*, para. 66; C-583/11 P *Inuit op cit.*, para. 99.

¹¹⁵¹ Article 19(3)(b) TEU.

awards by domestic courts.¹¹⁵² This is most pronounced by the de-centralized nature of ICSID arbitration. As a consequence of domestic courts being excluded from the investment arbitration, the CJEU has neither direct nor indirect control over the interpretation of EU law in the context of adjudicative review before investment tribunals.¹¹⁵³ The CJEU already recognized this in its *EUSFTA* opinion, remarking that ISDS provisions are liable to remove disputes from the jurisdiction of the courts of the Member States.¹¹⁵⁴ The application of the above line of reasoning in the context of ISDS provisions is also reflected in *Achmea*.¹¹⁵⁵ Considering that the CJEU has resolved the question of whether an intra-EU investment tribunal constitutes a court or tribunal within the meaning of Article 267 TFEU,¹¹⁵⁶ it is redundant to address this point in the context of post-Lisbon IIAs.

Being unable to raise questions over the interpretation of EU law *ex officio*, ISDS provisions in EU IIAs must provide for the prior involvement of the CJEU in a manner that respects the fundamental characteristics of the judicial dialogue established by Article 267 TFEU. It cannot, in other words, allow the investment tribunals to exercise discretion over the referral of preliminary reference,¹¹⁵⁷ it must extend over primary as well as secondary EU law,¹¹⁵⁸ and it must be binding on the investment tribunal.¹¹⁵⁹

6.7 Interim conclusion

Previous Chapters in this study portrayed the particular nature of ISDS, which emanates directly from the contracting states' sovereign power,¹¹⁶⁰ as having broad and systemic implications on the regulatory policy space of contracting states.¹¹⁶¹ Exercising their adjudicative function within the EU legal order by way of assessing

¹¹⁵² On the limited involvement of domestic courts in the recognition and enforcement of investment awards, see *supra* Chapter 3.2.3.

¹¹⁵³ Burgstaller argues for the need of a Treaty amendments to facilitate a recognition of investment tribunals as 'courts or tribunals of a Member State' in the meaning of Article 267 TFEU by the CJEU and, thus, accommodate for the consequences of Opinion 1/09. See Markus Burgstaller, 'Investor-State arbitration in EU international investment agreements with third states' (2011a) 39(2) *Legal Issues of Economic Integration* 207-21.

¹¹⁵⁴ Opinion 2/15 *EUSFTA op cit.*, para. 292, note however that the CJEU was concerned with an assessment of competence rather than an assessment of compatibility of ISDS provisions with the principle of autonomy (para. 290).

¹¹⁵⁵ See discussion *supra* in this Chapter.

¹¹⁵⁶ Case C-284/16 *Achmea op cit.*, paras. 43-44.

¹¹⁵⁷ Opinion 1/09 *European Patents Court op cit.*, paras. 81 *et seq.*

¹¹⁵⁸ Opinion 2/13 *Accession to the ECHR op cit.*, 247.

¹¹⁵⁹ Opinion 1/91 *EEA Agreement op cit.*, para. 61.

¹¹⁶⁰ Van Harten (2008), *op cit.*, 64.

¹¹⁶¹ For a discussion of the criticism against investor-state arbitration, see *supra* Chapter 3.3.

Union legal acts in light of substantive standards of investment protection,¹¹⁶² investor-state tribunals fulfil a *de facto* function of international adjudicative review.¹¹⁶³ Under the Union's IIAs the investment tribunal will express itself on the compatibility of regulatory acts of the Member State or the Union generically phrased standards of treatment, resulting in the award of monetary compensation. The present Chapter argued that this adjudicative function of investor-state tribunals raises a number of concerns in light of the principle of autonomy of the EU legal order.

First, investment tribunals inevitably face questions over the interpretation of EU law. This circumstance is largely undisputed, as it is a practical effect to the far-reaching scope of secondary EU law over virtually all economic sectors on the internal market. The quality of its involvement in the interpretation of EU law is, however, contested. It is often reiterated that investment tribunals merely interpret EU law as a matter of fact, rather than law. This Chapter argued that this conceptual distinction is irrelevant for an assessment of ISDS provisions in light of the principle of autonomy. Having become an integral part of the EU legal order, the CJEU enjoys extensive jurisdiction over the interpretation of international agreements. Investment awards influence this interpretation, because the CJEU is generally bound to take into account the international decisions that were rendered in the implementation of an agreement. Indeed, this has been recognized by the CJEU as a necessary corollary of the Union being an international actor and is rather uncontroversial.

However, due to the involvement of investment tribunals in the evaluation of EU law, be that as a matter of law or fact, investment awards have the effect of narrowing the range of interpretations of secondary EU law that are available to the CJEU. Where more than one plausible interpretation exists, the CJEU has to adopt one that is consistent with the international agreement and relevant international decisions. In the context of ISDS, the requirement to interpret secondary EU law in consistency with international committee's restricts the CJEU in its interpretation of EU law. Not only to a view that is consistent with the IIAs as it was interpreted by a tribunal, but since investment tribunals themselves are faced with question over the interpretation of EU law, this principle of consistent interpretation requires domestic courts and the CJEU to adopt an interpretation of EU law as it was pronounced by the tribunal in the exercise of its adjudicative function. It is for those reasons that ISDS provisions interfere with the interpretive prerogative of the CJEU, in violation of the principle of autonomy. This restricts

¹¹⁶² Lavranos remarks that the pre-Bosphorus case law of the ECtHR also reflects a *de facto* review of EU legal acts vis-à-vis the ECHR, see Nikolaos Lavranos, 'The ECJ's Relationship With Other International Courts' in Henning Koch, *et al.* (eds), *Europe: the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf Publishing: 2010), 399.

¹¹⁶³ Schill (2010), *op cit.*, 10-17; Gus Van Harten and Martin Loughlin, 'Investment treaty arbitration as a species of global administrative law' (2006) 17(1) *European Journal of International Law* 121-50.

the Union's legal capacity to include ISDS provisions in IIAs, unless adequate safeguards are put into place.

Second, although the CJEU has acknowledged a need for the establishment of judicial bodies as an indispensable element of EU external relations,¹¹⁶⁴ it has consistently rejected the establishment of adjudicative bodies that furnish individuals with direct standing in international law. The creation of a parallel system of judicial remedies, that allows individuals to pursue legal disputes that would otherwise come before the domestic courts of the Member States outside of the EU legal order. Bypassing the CJEU in question concerning the interpretation of EU law, undermines the judicial dialogue that is established by the Treaties under Article 267 TFEU, and which ensures the effectiveness of EU law.¹¹⁶⁵ This is only exacerbated by the general consent to dispute settlement, and the absence of domestic courts from the settlement process. In sum, given the involvement of investment tribunals in the interpretation of EU law, a procedural mechanism safeguarding that relevant questions over the interpretation of EU law are referred to the CJEU is pivotal to ensure the compatibility of ISDS provisions in EU IIAs with the EU Treaties. Such a mechanism cannot, however, undermine the fundamental characteristics of institutional powers underlying the judicial dialogue established by Article 267 TFEU.

In spite of the fact that the structure of ISDS, its purpose and objective, and the context in which it operates is hardly comparable to the situations under the EEA court, the EPCT, or, indeed, the ECtHR it has so far been demonstrated that the CJEU has adopted a rationale that expresses generic concerns over the adverse effect of adjudicative mechanisms on the uniform and consistent interpretation of EU law, and the institutional prerogatives of the CJEU. This Chapter, thus, demonstrated that the principle of autonomy of the EU legal order places specific conditions on the design of ISDS provisions in post-Lisbon IIAs.

¹¹⁶⁴ Opinion 1/91, *EEA Agreement*, para. 40; Opinion 1/09, *European Patents Court*, para. 74.

¹¹⁶⁵ Opinion 1/09, *European Patents Court*, para. 76; Opinion 2/13, *Accession to the ECHR*, para. 183.

7 THE PRINCIPLE OF NON-DISCRIMINATION

Concerns over the compatibility of ISDS provisions with EU law have also arisen in light of the general principle of non-discrimination. This issue was previously raised in the context of intra-EU BITs. In *Achmea* the CJEU missed the opportunity to pronounce on this question, but the issue has now re-emerged in the request for an opinion on CETA.¹¹⁶⁶ Advocate General Bot only recently addressed the matter, and although a comprehensive discussion of the AG's opinion cannot be offered at this time, it should be noted that he did not find an incompatibility.¹¹⁶⁷ Although AG Bot approaches this question on the basis of Article 21(2) of the Charter,¹¹⁶⁸ he swiftly concludes that this corresponds in scope with the first paragraph of Article 18 TFEU.¹¹⁶⁹ For that reasons, the present Chapter limits itself to an assessment of the general principle of non-discrimination, as it is now consolidated in Article 18(1) TFEU.

This chapter demonstrates that, should the ICS in CETA indeed lead to discrimination, any future attempt to incorporate ISDS provisions in an EU IIAs would have to extend equal access to ISDS to all economic operators on the internal market with investment activity in another Member State. Such an endeavour requires first of all an understanding of the meaning of non-discrimination in EU law (Section 7.1), as well as its geographical (Section 7.2), and substantive scope (Section 7.3). The present Chapter will subsequently introduce the main problem, which is the elusive concept of corporate nationality (Section 7.4). Section 7.5 provides an overview over the common arguments in the context of intra-EU BITs and argues that these are transferable to the context of EU IIAs. Lastly, this Chapter illustrates how discrimination under an EU IIAs could materialize at example of EU competition law (Section 7.6).

¹¹⁶⁶ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement) op cit.*

¹¹⁶⁷ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 213.

¹¹⁶⁸ OJ C 326/391, 26 October 2012, Charter of Fundamental Rights of the European Union.

¹¹⁶⁹ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement) op cit.*, para. 196.

7.1 The meaning of non-discrimination

Classical authorities defined the concept of discrimination within the context of the ECSC and EEC Treaty as “the application of dissimilar conditions to comparable transactions”¹¹⁷⁰ and “dissimilar treatment of comparable situations”,¹¹⁷¹ respectively. It was not until the mid-1960’s that the CJEU arrived at its more general conception of discrimination as “treating either similar situations differently or different situations identically”.¹¹⁷² The Court later clarified that the prohibition of discrimination in specific provisions of the Treaty is an expression of the “general principle of equality which is one of the fundamental principles of [Union] law.”¹¹⁷³ The Court’s reasoning is deeply rooted in a desire to maintain the equality of competitive relationships on the internal market.¹¹⁷⁴ In *Ruckdeschel*, therefore, the Court concluded that the Treaties’ non-discrimination provisions must be understood broadly.¹¹⁷⁵ In light of these cases, Herdegen observes:

“The test of discrimination does not concern the (isolated) relation between the impact of an act on the material sphere of the affected persons or undertakings and the aim underlying [sic] the measure, but rather deals with the effect on the competitive relationship of undertakings.”¹¹⁷⁶

It transpires, thus, that the economic rationale underlying the general principle of non-discrimination, which is now enshrined in Article 18 TFEU, is a desire to safeguard competitive relationships between economic operators on the internal market.

The Union principle of non-discrimination thus shares a conceptual core with expressions of non-discrimination in international trade and investment law. Both these fields, however, categorizes non-discrimination provisions by functionally delimiting—explicitly, and often by denomination—its substantive scope of

¹¹⁷⁰ Joined cases 7-54 and 9-54 *Groupement des Industries Siderurgiques Luxembourgeoises v High Authority of the European Coal and Steel Community* [1956], EU:C:1956:2, ECR I-0175, 192.

¹¹⁷¹ Case 14/59 *Société des fonderies de Pont-à-Mousson v High Authority of the European Coal and Steel Community* [1959], EU:C:1959:31, ECR I-0215, 231.

¹¹⁷² Case 13/63 *Italian Republic v Commission of the Economic Communities* [1963], EU:C:1963:20, p. 178; see for more recent examples Case C-148/02 *Carlos Garcia Avello v Belgium* [2003], EU:C:2003:539, para. 31; Case C-164/07 *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions*, [2008], EU:C:2008:321, para. 13.

¹¹⁷³ Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströb & Co. v Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe* [1977], EU:C:1977:160, para. 7.

¹¹⁷⁴ Joined Cases 32 and 33/58 *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community* [1959], EU:C:1959:18.

¹¹⁷⁵ Joined Cases 117/76 and 16/77 *Ruckdeschel op cit.*, para. 7.

¹¹⁷⁶ Matthias Herdegen, “The relation between the principles of equality and proportionality” (1985) 22 *Common Market Law Review*, 685.

protection to, on the one hand, treatment no less favourable than that awarded to nationals (i.e. national treatment), and, on the other hand, treatment no less favourable than the most favourable treatment awarded to a foreign national (i.e. most-favoured nation, or MFN treatment). Similar constructs have been used as reference points to define the meaning and scope of protection from discriminatory treatment in the Union legal order.¹¹⁷⁷

While it may be true that the general principle of non-discrimination enunciated in Art 18 TFEU is broadly phrased as prohibiting “any discrimination based on nationality”,¹¹⁷⁸ the provision is merely of a residual character.¹¹⁷⁹ This is to say that Article 18 TFEU only lays out an independent and separate legal obligation in areas where no other, more specific provision on the prohibition of non-discrimination applies.¹¹⁸⁰ Indeed, the Treaty provides for many much more specific expressions of non-discrimination. It can hardly be denied, however, that these provisions lack a common meaning.¹¹⁸¹

”[I]t is settled case-law that the principle of non-discrimination, whether it has its basis in [now Article 18 TFEU] and [now Articles 45 TFEU or 49 TFEU], requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued [...]”¹¹⁸²

The discussions in Chapter Five revealed that Article 63 TFEU is of some relevance for EU foreign investment policy, as the appropriate legal basis from which treaty-

¹¹⁷⁷ See discussion *infra* in this Chapter.

¹¹⁷⁸ With the exception of Article 45(3)(c) TFEU, which more explicitly refers to NT with respect to the conditions of employment for worker from another Member State.

¹¹⁷⁹ Henry G. Schermers and Denis Waelbroeck, *Judicial protection in the European Communities*, 5 edn (Kluwer: 1992) 121; Tridimas (2006), *op cit.*, 120; see also Opinion of Advocate General Jacobs, Joined cases C-92 and 326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993], EU:C:1993:276, para. 13.

¹¹⁸⁰ Case C-336/96 *Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998], EU:C:1998:221, para. 37; Case C-566/15 *Konrad Erxberger v TUI AG* [2017], EU:C:2017:562, para. 25; Case C-474/12 *Schiebel Aircraft GmbH v Bundesminister für Wirtschaft, Familie und Jugend* [2014], EU:C:2014:2139, para. 20; Case C-195/16 *I v Staatsanwaltschaft Offenburg* [2017], EU:C:2017:815, para. 70.

¹¹⁸¹ The CJEU, for instance, recognised that the non-discrimination requirement in Article 49 TFEU gives specific effect to the general principle of non-discrimination, see Case C-289/02 *AMOK Verlags GmbH v A & R Gastronomie GmbH* [2003], EU:C:2003:669, para. 26; more generally, see Case C-222/07 *Unión de Televisiónes Comerciales Asociadas (UTECA) v Administración General del Estado* [2009], EU:C:2009:124, paras. 38-39; Tridimas (2006), *op cit.*, 119.

¹¹⁸² Case C-524/06 *Heinz Huber v Germany* [2008], EU:C:2008:724, para. 75.

making competence over portfolio investment is derived.¹¹⁸³ It is therefore helpful to point out that unlike other internal market provisions, the Treaty imposes an outright ban on restrictions on capital movements between Member States and between Member States and third countries, and makes no specific mention of non-discrimination. The Council, may under exceptional circumstances adopt safeguard measures restricting capital movements to and from third countries and may,¹¹⁸⁴ in accordance with the ordinary legislative procedure, regulate with respect to capital movements in connection with direct investments.¹¹⁸⁵ Member States, furthermore, maintain fiscal sovereignty with respect to determining the connecting factor for taxation of individuals.¹¹⁸⁶ These regulatory activities are subject to the general principle of non-discrimination.

The fact that there are general and specific expressions of non-discrimination supports the general proposition for this Chapter, i.e. that Article 18 TFEU is to be approached as laying down a broad standard of non-discrimination in EU law. Indeed, there is little reason to maintain a sectoral approach if not to allow for nuances in the application of various expressions of non-discrimination in the Treaty. This is reflected in the drafting of Article 18 TFEU, particularly if read in conjunction with Article 21(2) of the EU Charter, which stipulates that “[w]ithin the scope of application of the Treaty [...] any discrimination on grounds of nationality shall be prohibited”.¹¹⁸⁷ In sum, it is suggested here that the general principle of non-discrimination safeguards equal competitive opportunities for economic operators in comparable situations.

7.2 The geographical scope of Article 18 TFEU

An assessment of the Union principle of non-discrimination in an analysis of international agreements between the Union and third countries appears, at first sight, counterintuitive. The CJEU has time and again reiterated that Article 18 TFEU has no external effects.¹¹⁸⁸ The classical authorities supporting this view are *Balkan-Import Export*,¹¹⁸⁹ *Faust*,¹¹⁹⁰ *T. Port*,¹¹⁹¹ and—perhaps most often cited in this

¹¹⁸³ See specifically *supra* Chapter 5.5.

¹¹⁸⁴ Article 64(3) TFEU.

¹¹⁸⁵ Article 64(2) TFEU.

¹¹⁸⁶ Article 56(1)(a) TFEU.

¹¹⁸⁷ Emphasis added.

¹¹⁸⁸ Case 245/81 *Edeka Zentrale AG v Federal Republic of Germany* [1982], EU:C:1982:277, para. 19.

¹¹⁸⁹ Case 55/75 *Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof* [1976], EU:C:1976:8, para. 14.

¹¹⁹⁰ Case 52/81 *Offene Handelsgesellschaft in Firma Werner Faust v Commission of the European Communities* [1982], EU:C:1982:369, para. 25.

¹¹⁹¹ Joined Cases C-364 and 365/95 *T. Port GmbH & Co v Hauptzollamt Hamburg-Jonas* [1998], EU:C:1998:95, para. 76.

respect—the *ACP Bananas* case.¹¹⁹² The latter case concerned a challenge against the Council decision concluding the Framework Agreement on Bananas that effectively granted trade benefits to Banana exporters in ACP countries. Germany asserted *inter alia* that importers of bananas originating from non-ACP countries were discriminated compared to importers of bananas from ACP countries.¹¹⁹³ Deliberating over whether or not the general principle of non-discrimination in Union law applied to the contested Framework Agreement, the Court observed:

“It must also be borne in mind that there is no general principle of Community law obliging the Community, in its external relations, to accord third countries equal treatment in all respects. Therefore [...] if different treatment of third countries is compatible with [Union] law, then different treatment accorded to traders within the [Union] must also be regarded as compatible with Community law where that different treatment is merely an automatic consequence of the different treatment accorded to third countries with which such traders have entered into commercial relations.¹¹⁹⁴ (references omitted)

This view was reiterated more recently by the CJEU in *Swiss International*.¹¹⁹⁵ Accordingly, “the principle of equal treatment does not apply to the relations of the Union with third countries.”¹¹⁹⁶ The CJEU, thus, considers Union agreements with third countries to fall outside of the purview of Article 18 TFEU, in spite of creating a “*de facto* differentiation of economic operators”¹¹⁹⁷ in the internal market. In other words, the above cases define an important demarcation line in the scope of application of the principle of non-discrimination in Union law.¹¹⁹⁸ These cases should not, however, be read as outright precluding the application of Article 18 TFEU to international agreements.

The applicant in *Balkan-Import Export*, a trader on the internal market relied on the principle of non-discrimination in an attempt to expand benefits granted to products originating in a one third country to products originating in another third country. Faced with the question of whether the Commission was under an obligation to extend equal treatment to all its trading partners, the CJEU noted:

¹¹⁹² Case C-122/95 *Bananas case op cit.*

¹¹⁹³ *Ibid.*, para. 48.

¹¹⁹⁴ *Ibid.*, para. 56.

¹¹⁹⁵ Case C-272/15 *Swiss International Air Lines AG v Secretary of State for Energy and Climate Change* [2016], EU:C:2016:993.

¹¹⁹⁶ Case C-272/15 *Swiss International op cit.*, para. 31.

¹¹⁹⁷ Henry G. Schermers and Denis Waelbroeck, *Judicial protection in the European Union*, 6 edn (Kluwer: 2001) para. 165, para 165.

¹¹⁹⁸ Case C-272/15 *Swiss International op cit.*, para. 32.

“In the Treaty there exists no general principle obliging the [Union], in its external relations, to accord to third countries equal treatment in all respects, and in any event traders do not have the right to rely on the existence of such a general principle.”¹¹⁹⁹

The Court’s conclusion, thus, rests on two elements. On the one hand, the CJEU excluded the relationship between third countries from the scope of application of Article 18 TFEU. On the other hand, economic operators are not included within the group of beneficiaries of the non-discrimination principle. The first element has since been consistently confirmed. Most recently, in *Swiss International* the CJEU recalled in unambiguous language that “a difference in treatment of third countries is not contrary to EU law [...] there is no obligation to treat third countries equally”.¹²⁰⁰

The significance of the second element was further clarified in *Faust* where the CJEU was explicitly asked to address the discriminatory effect of international agreements for internal market participants. This time the Court opined:

“[I]f different treatment of non-Member Countries is compatible with [Union] law, different treatment accorded to traders within the [Union] must also be regarded as compatible with [Union] law, *where that different treatment is merely an automatic consequence of the different treatment accorded to non-Member Countries with which such traders have entered into commercial relations.*”¹²⁰¹

Similarly, in *ACP Bananas*¹²⁰² and *T. Port*,¹²⁰³ both cases concerning the Framework Agreement on Bananas, the CJEU remarked that:

“[I]t is clear that the restrictions on import opportunities which the introduction of country quotas is likely to entail from economic operators [...] are *the automatic consequence of differences in the treatment accorded to third countries*, depending on whether or not they are parties to the Framework Agreement and on the size of the quota allocate to them in that agreement.”¹²⁰⁴

Traders on the internal market cannot therefore rely on Article 18 TFEU in order to even out unequal competitive opportunities in so far as these are an automatic consequence of diverging conditions awarded to third countries under international agreements.

¹¹⁹⁹ Case 55/75 *Balkan-Import Export op cit.*, para. 14 (emphasis added).

¹²⁰⁰ Case C-272/15 *Swiss International op cit.*, para. 26.

¹²⁰¹ Case 52/81 *Faust op cit.*, para. 25 (emphasis added).

¹²⁰² Case C-122/95 *Bananas case op cit.*, para. 56.

¹²⁰³ Joined Cases C-364 and 365/95 *T. Port op cit.*, para. 76.

¹²⁰⁴ Joined Cases C-364 and 365/95 *T. Port op cit.*, para. 77 (emphasis added).

The above cases do not, therefore, support the general proposition that Union agreements with third countries escape the scrutiny of the EU non-discrimination principle. Ultimately, this doctrine is essential in safeguarding the Union's effective implementation of the CCP. The Union would, indeed, be incapable of defining the broader economic conditions under which international trade were to take place if it were restrained by offering equal opportunities to all third countries. After all, the move towards expansive bilateral trade negotiations (re)emerged in 2003, as a response to the stalemate in the WTO Doha Round negotiations.¹²⁰⁵ However, the principle does apply in so far as the agreement purports to govern conditions for economic entities on the internal market, and in particular their competitive relationship. Chapter Six already extensively alluded to the fact that “an international agreement cannot have the effect of prejudicing the constitutional principles of the [Treaties]”.¹²⁰⁶ This includes that the general principle of non-discrimination in Article 18 TFEU is preserved. Generally speaking, therefore, the Union is precluded from regulating, by means of an international agreement, economic activity on the internal market in a manner that is incompatible with the principle of non-discrimination. Put differently, EU IIAs do not escape an assessment of compatibility in light of Article 18 TFEU.

7.3 The substantive scope of non-discrimination

The principle of non-discrimination is applicable to all legal relations within “the scope of application of the Treaties”,¹²⁰⁷ including the conclusion of international agreements insofar as their subject-matter falls within the scope of EU law.¹²⁰⁸ Access to investor-state arbitration in itself might also be considered a benefit under intra-EU BITs. The CJEU concluded in *Data Delecta and Forsberg*¹²⁰⁹ that a procedural provision may come within the meaning of the principle on non-discrimination in so far as it “is liable to affect the economic activity of traders from other Member States on the market of the State in question.”¹²¹⁰ This reasoning must be extended to ISDS provisions, which provide certain investors with a procedural alternative to claim damages and can take this into account in their risk assessment. Notably, although Member States are at liberty to establish a higher level of protection for

¹²⁰⁵ Stephen Woolcock, ‘European Union policy towards Free Trade Agreements’ (2007), ECIPE Working Paper 03/2007 accessible at <<https://ecipe.org/wp-content/uploads/2014/12/european-union-policy-towards-free-trade-agreements.pdf>> 2-3.

¹²⁰⁶ Joined cases C-402 and 415/05 P *Kadi op cit.*, para. 285.

¹²⁰⁷ Article 18 TFEU covers legal entities with the corporate nationality of one of the Member States, see Case C-221/89 *The Queen / Secretary of State for Transport, ex parte Factortame* [1991], EU:C:1991:320.

¹²⁰⁸ Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006], EU:C:2006:773, paras 36-38.

¹²⁰⁹ Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd.* [1996], EU:C:1996:357.

¹²¹⁰ Case C-43/95 *Data Delecta and Forsberg op cit.*, para 13.

investors than that provided for in EU law, rights must be extended to all EU citizens on a non-discriminatory basis. Intra-EU BITs, on the other hand, establish benefits only for investors of a certain nationality and are therefore under scrutiny by the Commission.¹²¹¹

7.4 Corporate ownership structures

The judicial authorities revisited in Section 7.2 reflect the position of the CJEU with respect to trade agreements, which define the parameters for the exchange of goods and services by virtue of setting conditions under which foreign products gain access to the internal market. In this context, discrimination between economic operators on the internal market is merely an indirect effect, i.e. the automatic consequence of differences in the treatment accorded to third countries.¹²¹² It is important to note that trade agreements do not purport to regulate the economic activity of a foreign economic operator on the internal market. The situation is rather different with IIAs. In addition to investment liberalization, i.e. the conditions for the entry of foreign capital, the main purpose of the IIA is to extend post-establishment investment protection to foreign investors and their investments. Recalling at this point that FDI essentially denominates entities that are themselves incorporated in the host country IIAs thereby extend a protective umbrella over economic entities established in the territory of one of the Member States.

In the corporate ownership structure of MNEs, nationality is not a static element. On the contrary, the corporate nationality of an economic entity can be changed with the stroke of a pen, and for the purpose of determining the nationality of a foreign investor, it can exist on multiple levels in the corporate ownership structure. Its elusiveness renders nationality a particularly inadequate determining factor for the application of EU IIAs.¹²¹³ This is because an economic operator that is established in a Member States, enjoys protection under an IIA for reasons only that it is owned or controlled by a corporate entity with the nationality of a third country. It is not uncommon for a MNE to structure an investment for the sole purpose to locate the operation within the most beneficial regulatory framework,¹²¹⁴ including

¹²¹¹ Tridimas concludes that “[A]ny rule of national law, whether substantive or procedural, which bears even an indirect effect on trade in goods and services between Member States falls within the Scope of [EU] law for the purposes of the application of [Article 18 TFEU].” Tridimas (2006), *op cit.*, 130; for a detailed analysis of the benefits extended under intra-EU BITs in relation to the Treaty see Dahlquist, Lenk and Rönnelid (2016), *op cit.*

¹²¹² For a discussion, see Chapter 7.2.

¹²¹³ Schill observes that “the possibilities of multi-jurisdictional structuring are a phenomenon of the globalization of financial markets and cross-border economic activity”, see Schill (2009), *op cit.*, 239.

¹²¹⁴ e.g. *Aguas del Tunari, S.A. v. Republic of Bolivia* Decision on Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, para. 330.

for the purpose of acquiring third-country nationality in the first place.¹²¹⁵ Investment tribunals have generally been lenient in allowing economic operators to exploit their corporate structure to establish jurisdiction under an IIA.¹²¹⁶

This may lead to a discrimination between economic operators on the internal market where only one of them enjoys protection as foreign investment under an EU IIA.¹²¹⁷ This discriminatory effect is exacerbated by the robust enforcement mechanisms for investment. The CJEU confirmed in *Factortame* that a violation of the principle of non-discrimination could arise where the differential treatment is solely based on the element of direction or control.¹²¹⁸ This was reaffirmed in the *Open Skies* cases, where the CJEU had to consider agreements that a number of Member States had concluded with the US in the air transport sector. Differential treatment in the award of benefits under the agreement was based on the ownership and control of airlines in the Member States parties to the agreement. The CJEU observed:

“In this case, the clause on the ownership and control of airlines does, amongst other things, permit the United States of America to withdraw, suspend or limit the operating authorisations or technical permissions of an airline designated by the Federal Republic of Germany but of which a substantial part of the ownership and effective control is not vested in that Member State or in German nationals.

There can be no doubt that airlines established in the Federal Republic of Germany of which a substantial part of the ownership and effective control is vested either in a Member State other than the Federal Republic of Germany or in nationals of such a Member State (Community airlines) are capable of being affected by that clause.”¹²¹⁹

It follows that an international agreement that facilitates differential treatment amongst economic operators on the internal market for no other reason than an element of foreign ownership and control is principally in violation of Article 18

¹²¹⁵ e.g. *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* Award, 2 October 2006, ICSID Case No. ARB/03/16, paras. 358-59.

¹²¹⁶ *Banro American Resources, Inc. and Société Anonyme du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo* Award (excerpts), 1 September 2000, ICSID Case No. ARB/98/7, paras. 11 and 12; see also Muchlinski (2007), *op cit.*, 726-27.

¹²¹⁷ In the context of intra-EU BITs, see Dimopoulos (2011b), *op cit.*, 83.

¹²¹⁸ Case C-221/89 *Factortame II* *op cit.*, paras. 29-35, the CJEU concluded that “[a provision of domestic law] would not be compatible with [the right of establishment] if it had to be interpreted as precluding registration [of fishing vessels] in the event that a secondary establishment or the centre for directing the operations of the vessel in the Member State in which the vessel was to be registered acted on instructions from a decision-taking centre located in the Member State of the principal establishment” (para. 35).

¹²¹⁹ Case C-476/98 *Open Skies* *op cit.*, para. 150.

TFEU. This conclusion cannot be called into question by the fact that the element of ownership and control under EU IIAs is situated in a third country. It is for those reasons that EU IIAs come within the purview of the principle of non-discrimination.

7.5 An overview of the arguments

There is yet to emerge a comprehensive assessment of IIAs concluded by the Union in light of Article 18 TFEU. However, the issue has been raised in the context of intra-EU BITs.¹²²⁰ The Commission has also referred to an incompatibility with the non-discrimination principle in its reasons to initiate infringement proceedings over the termination of intra-EU BITs,¹²²¹ and argued the point before the CJEU in *Achmea*.¹²²² The issue was discussed by Advocate General Wathelet in that case, who rejected any incompatibility,¹²²³ but CJEU did not ultimately decide on that question.¹²²⁴ It is helpful to recall at this point that the argument developed in the present Chapter rests on a normative proposition that there is no material difference between intra- and extra-EU IIAs.¹²²⁵ In both cases the privileged access to ISDS results in a distortion of competitive conditions between economic operators on the internal market.

In order to substantiate his proposition, the following subsection will shed some light on the case law of the CJEU on DTT. These cases have frequently been invoked to resist the assumption that the non-discrimination principle in EU law can be understood to include an MFN provision.¹²²⁶

7.5.1 The argument against MFN treatment

A core characteristic of DTT is that they extend tax benefits to individuals with a nationality of one of the contracting states with assets in, or income from, the other contracting state. The Union does not enjoy substantive competence over direct

¹²²⁰ Dimopoulos (2011b), *op cit.*, 81; Moskván (2015), *op cit.*, 116; Wehland (2009), *op cit.*, 310-12; the author has also discussed this issue in the context of intra-EU BITs elsewhere, see Dahlquist, Lenk and Rönnelid (2016), *op cit.*, 4-6; Lenk (2019), *op cit.*

¹²²¹ European Commission, 'Formell underrättelse – överträdelse nummer 2013/2207, skrivelse från Europeiska kommissionen, Generalsekretariatet till Sveriges ständiga representation vid Europeiska unionen', 18 June 2015.

¹²²² 30 August 2016, Schriftliche Erklärungen zum Vorabentscheidungsersuchen gemäß Artikel 23 Absatz 2 des Protokolls über die Satzung des Gerichtshofs accessible at <http://ec.europa.eu/dgs/legal_service/submissions/c2016_284_obs_de.pdf>, paras. 140 *et seq.*

¹²²³ Opinion of Advocate General Wathelet, Case C-284/16 *Achmea op cit.*, paras. 65-82.

¹²²⁴ Case C-284/16 *Achmea op cit.*, para. 61.

¹²²⁵ For a discussion, see *supra* Chapters 6.3 and 6.4.

¹²²⁶ Dimopoulos (2011b), *op cit.*, 81-82; Wehland (2009), *op cit.*, 315-17.

taxation, which explains the large number of DTT in place amongst the Member States, and between Member States and third countries.¹²²⁷ The practice of extending selective tax benefits on the basis of residence raises obvious concerns in light of the general principle of non-discrimination in Union law.¹²²⁸

Indeed, the CJEU in *Saint-Gobain*¹²²⁹ confirmed that entities that carry out comparable economic activities are to be treated as beneficiaries under DTT, irrespective of their corporate status. German legislation differentiated between subsidiaries and permanent establishments in the application of its DTTs with, respectively Switzerland and the US. Whereas subsidiaries acquired the status as German resident and were, thus, eligible for tax concessions under DTTs, permanent establishments of companies incorporated in another Member State were not. The question put before the Court was whether the German practice was in breach of (now) Articles 49 and 54 TFEU. The CJEU concluded that Germany had to unilaterally extend the group of beneficiaries to include permanent establishments to the extent that these are in a comparable situation to subsidiaries.¹²³⁰ Having acknowledged that Member States in principle enjoy fiscal sovereignty, the CJEU was nonetheless prepared to peak behind the element of corporate nationality to consider the competitive relationship between national and foreign companies on a domestic market.

“In the case of a double-taxation treaty concluded between a Member State and a non-member country, the *national treatment principle* requires the Member State which is party to the treaty to grant to permanent establishments of non-resident companies the advantages provided for by that treaty on the same conditions as those which apply to resident companies.”¹²³¹

In other words, DTT violate the principle of non-discrimination to the extent that they differentiate between economic entities on the basis of nationality, with the effect of excluding non-national entities in a comparable situation from tax concessions.

In *D*¹²³² a German national a significant portion of his private wealth located in the Netherlands invoked tax benefits under the Belgium-Netherlands DTT.

¹²²⁷ Rixen argued that bilateralism caters more effectively for concerns over the distribution of tax revenues than multilateralism, see Thomas Rixen, ‘Bilateralism or multilateralism? The political economy of avoiding international double taxation’ (2010) 16(4) *European Journal of International Relations* 589-614, 597 et seq.

¹²²⁸ Eric C. C. M. Kemmeren, ‘Double tax conventions on income and capital and the EU: Past, present and future’ (2012) 21(3) *EC Tax Review* 157-77, 170.

¹²²⁹ Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999], EU:C:1999:438.

¹²³⁰ Case C-307/97 *Saint-Gobain op cit.*, para. 63.

¹²³¹ Case C-307/97 *Saint-Gobain op cit.*, para. 58 (emphasis added).

¹²³² Case C-376/03 *D v Inspecteur van de Belastingdienst* [2005], EU:C:2005:424.

The CJEU observed in this respect that:

“[t]he fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. [...] A rule such as that laid down in [the DTT] cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance.”¹²³³

The Court did not, therefore, recognize an obligation on the Member States to unilaterally extend tax benefits under DTTs to nationals of non-signatory Member States.¹²³⁴

These cases are frequently invoked to substantiate a narrow reading of the principle of non-discrimination in Union law, i.e. a reading that endorses national treatment instead of establishing an intra-EU most favoured nation standard. It is this line of reasoning that AG Bot adopted in his opinion on CETA.¹²³⁵ Drawing on similarities between DTT and IIAs, this view supports the general proposition that intra-EU IIAs fall outside of the scope of Article 18 TFEU.¹²³⁶ A narrow understanding of the principle of non-discrimination is, indeed, supported by the case law of the CJEU.¹²³⁷ Investors from another Member States are not treated less favourable than national investors in the host state. The fact that foreign investors from a third country receive more beneficial treatment is, according to this line of reasoning, irrelevant. On the contrary, IIAs extend a higher level of protection to investors of a certain nationality than what is available in domestic law, and reverse discrimination is not precluded by EU law.

The analogy between DTTs and IIAs is not, however, entirely convincing. First of all, the context for the elimination of double taxation within the Union is very different from intra-EU investment protection. It is well established that Member States are at liberty to define the connecting factor for the allocation of their fiscal jurisdiction,¹²³⁸ including through DTTs.¹²³⁹ Article 293 EC even explicitly

¹²³³ Case C-376/03 *D op cit.*, paras 61-62.

¹²³⁴ Case C-376/03 *D op cit.*, para 63; Case C-374/04 *ACT Group Litigation op cit.*, para 94.

¹²³⁵ OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement) op cit.*, para. 204.

¹²³⁶ Dimopoulos (2011b), *op cit.*, 81-82; Wehland (2009), *op cit.*, 315-317.

¹²³⁷ The CJEU has, on occasion, defined the obligations stemming from Article 18 TFEU to mean that “persons in a situation governed by [EU] law and nationals of the Member State concerned to be treated *absolutely* equally”, See Case C-323/95 *David Charles Hayes and Jeannette Karen Hayes v Kronenberger GmbH* [1997], EU:C:1997:169, para 18, emphasis added.

¹²³⁸ Article 65(1)(a) TFEU.

¹²³⁹ Case C-336/96 *Gilly op cit.*, para. 24; Case C-374/04 *ACT Group Litigation op cit.*, para 81; Case C-307/97 *Saint-Gobain op cit.*; para 57; Case C-376/03 *D op cit.*, para 52; Case C-265/04 *Margaretha Bonanich v Skatteverket* [2006], EU:C:2006:51, para 49.

encouraged Member States to conclude such agreements in an intra-EU context.¹²⁴⁰ Even though the Article was not taken over into the Treaty of Lisbon, the abolition of double taxation remains an important objective that is duly reflected in the Court's case law.¹²⁴¹ The subject-matter of IIAs, on the other hand, regulate economic activities that broadly fall within the ambit of the free movement of capital and services, and the right of establishment on the internal market. The regulatory framework already in place, and in any case attainable by regulation on the Union level, is much more robust than with respect to direct taxation.

Second, the economic rationale underlying the elimination of double taxation is, thus, broadly in line with the aims of the internal market. In spite of the fact that a multilateral solution would be more favourable, there is little doubt that DTTs *de facto* contribute to the efficient allocation of production factors and, thus, remove barriers to the free movement of workers, establishment, services and capital.¹²⁴² The network of DTT is, furthermore, almost complete. In other words, whereas not everyone has access to equal benefits under DTTs, virtually everyone has access to benefits. The economic rationale of IIAs is different. This was briefly discussed in Chapter Two. Suffice it to recall, that the perceived benefits of attracting FDI by means of concluding IIAs are connected to economic development. Indeed, this could also be understood as removing barriers for investment activity and, thus, contribute to the free movement of production factors on the internal market. Yet, unlike DTT, the network of IIAs is far from complete. On the contrary, IIAs may provide incentives for companies on the internal market to establish corporate nationality in a third country where they can avail themselves of an additional layer of protection regarding their investments on the internal market, and, thus, exploit a competitive inequality. Viewed in this perspective, IIAs are liable to exacerbate disintegration.

Lastly, the fact that direct taxation falls largely under Member States competence alone, does not relieve an obligation to observe the general principle of non-discrimination.¹²⁴³

¹²⁴⁰ Case C-336/96 *Gilly op cit.*, para 30.

¹²⁴¹ Case C-540/11 *Daniel Levy and Carine Sebbag v Belgian State* [2012], EU:C:2012:581; Case C-336/96 *Gilly op cit.*, para. 16; for a discussion, see Luc De Broe, 'Relief of double taxation of cross-border dividends within the Union and the principle of loyal cooperation' (2012) 21(4) *EC Tax Review* 180-82.

¹²⁴² Kemmeren (2012), *op cit.*, 158.

¹²⁴³ Case C-298/05 *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt* [2007], EU:C:2007:754, paras. 46-47.

7.5.2 *The argument for the unilateral extension of benefits*

On other occasions the CJEU adopted a broader approach. The CJEU in *Matteucci*,¹²⁴⁴ for instance, faced the question whether a cultural convention that Belgium and Germany had concluded for the purpose of stimulating student exchange discriminated against EU nationals. Article IV of that convention stipulated that both contracting states "shall grant to *nationals of the other party* scholarships to enable them to undertake or continue studies or research in the other country or to complete their scientific, cultural, artistic or technical training".¹²⁴⁵ When Mrs Matteucci, an Italian national who spend most of her life including all of her education in Belgium, applied for the scholarship to take up further training in Berlin the relevant Belgian authorities refused to include her name in the list of applicants.

The question put before the CJEU was essentially whether the Treaties precluded Member States from reserving benefits administered under a bilateral cooperation agreement exclusively for their own nationals. And indeed, the Court concluded that Belgium was in breach of EU law because its relevant authorities administered applications in a manner that prevented Germany from paying out scholarships to migrant workers in Belgium with a nationality of another Member State.¹²⁴⁶ Although, the reasoning resembles the application of a national treatment standard, i.e. Mrs Matteucci was to be treated no less favourably than Belgium nationals, Belgium was effectively only an accessory to the violation. The scholarship in question was to be paid out by Germany. Indeed, had the Belgian authorities put her name on the list of applicants and Germany had had refused to pay out the scholarship for reason of her nationality, there is nothing in the reasoning of the CJEU that would suggest that Mrs Matteucci could not have brought the case on similar grounds against Germany. It was irrelevant, in other words, that the financial implications had to be borne by another Member State.¹²⁴⁷ The case, therefore, powerfully illustrates the requirement for Member States to unilaterally extend benefits granted under an intra-EU bilateral agreement to all EU nationals that are in a comparable situation.

In *Gottardo*¹²⁴⁸ the CJEU assessed an Italian-Swiss social security convention that required the relevant Italian authorities to take into account periods of work in Switzerland for the calculation of Italian old-age pension. Examining *Saint-Gobain* and *Matteucci* the Court observed that Member States are under a general obligation to apply their bilateral treaties in a manner that is consistent with EU law,

¹²⁴⁴ Case C- 235/87 *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* [1988], EU:C:1988:460.

¹²⁴⁵ Emphasis added.

¹²⁴⁶ Case C- 235/87 *Matteucci op cit.*, para. 23.

¹²⁴⁷ Case C- 235/87 *Matteucci op cit.*, para. 17.

¹²⁴⁸ Case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale* [2002], EU:C:2002:16.

irrespective of whether the agreement was concluded between Member States or between Member States and third countries.¹²⁴⁹ Although, the balance and reciprocity under bilateral agreements can, in certain circumstances, be invoked to establish an objective justification for differential treatment, this is generally not the case where the unilateral extension of benefits “in no way compromises the rights” of the other contracting party.¹²⁵⁰ These cases, and indeed already *Saint Gobain*,¹²⁵¹ support the general proposition that Member States are, in principle, precluded from differentiating between the recipients of benefits granted under an international agreement with third countries solely based on their nationality.

The point was brought home in the *Open Skies* cases.¹²⁵² These cases concerned international agreements between, on the one hand, a group of Member States, and, on the other hand, the US. The benefits under these agreements to airlines with ownership or effective control vested in one of these Member States. The CJEU firmly rejected the idea that Member States could, by virtue of an international agreement, create competitive conditions on the internal market for air transport that secured favourable conditions for their own nationals abroad.¹²⁵³ Consequently, an international agreement concluded between a Member State and a third country is incompatible with the general principle of non-discrimination in so far as it entitles either contracting party to withhold benefits accruing under that agreement from an economic operator with the nationality of one of the Member States, for no other reason than that ownership or control of that operator is vested in another Member State.¹²⁵⁴ These cases illustrate the focus of the CJEU on the relationship between economic operators on the internal market, notwithstanding its implications on a third country. However, the *Open Skies* judgments also reiterate a national treatment standard in EU law, that is to say the non-discrimination principle in international law ensures a level playing field on the internal market by which a Member State is prevented from treating economic operators with the nationality of another Member State less favourably than its own nationals.

7.6 The face of discrimination

In the years between 2012 and 2015 Spain introduced a number of legislative changes to its subsidies scheme for renewable energies that in effect eliminated all

¹²⁴⁹ Case C-55/00 *Gottardo op cit.*, para. 33.

¹²⁵⁰ Case C-55/00 *Gottardo op cit.*, para. 37.

¹²⁵¹ Case C-307/97 *Saint-Gobain op cit.*, para. 57-59.

¹²⁵² Joined cases C-466-469/98, C-471-472/98, C-475-476/98 *Infringement proceedings against Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the United Kingdom* [2002], EU:C:2002:631.

¹²⁵³ e.g. Case C-471/98 *Commission v. Belgium* [2002], EU:C:2002:628, paras. 137-42.

¹²⁵⁴ Case C-471/98 *Commission v. Belgium op cit.*, para. 142.

economic incentives for new and existing installations.¹²⁵⁵ These reforms have threatened the viability of a large number of energy investments in the country, and triggered numerous investment disputes under UNCITRAL, the SCC and ICSID. Whereas a large proportion of disputes are intra-EU disputes initiated under the Energy Charter Treaty,¹²⁵⁶ others were initiated by third country investors.¹²⁵⁷ Although Spain initially resisted liability, many disputes have since been decided in favour of the investor. The Commission has frequently intervened at various procedural stages throughout these proceedings to assert its position in intra-EU investment disputes. Remarkable is in this respect that, the Commission also asserted incidentally in its Decision on Spain's reformed state aid scheme for renewable energies¹²⁵⁸ that awards rendered under ECT proceedings would themselves amount to state aid.

“The Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid.”¹²⁵⁹

This conclusion leans heavily on the infamous *Micula* saga where the investment award was seen to have reinstated illegal state aid.¹²⁶⁰ The assessment of whether or not the payment of an investment award is indeed tantamount to state aid is beside the point for the present analysis. The Spanish renewable energy disputes shall merely serve as an illustration of the discriminatory effects of IIA beyond the intra-EU context.

¹²⁵⁵ Fabricio Fortese, 'Foreign investment arbitral claims continue to pile up on Spain, as government turns screws on energy sector' *Investment Arbitration Reporter* (5 December 2013) <<https://www.iareporter.com.ezproxy.ub.gu.se/articles/foreign-investment-arbitral-claims-continue-to-pile-up-on-spain-as-government-turns-screws-on-energy-sector/>>.

¹²⁵⁶ e.g. *Masdar Solar & Wind Cooperatif U.A. v. Kingdom of Spain* Final Award, 16 May 2018, ICSID Case No. ARB/14/1; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain* Final Award, 15 February 2018, SCC Case No. 2015/063; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* Final Award, 4 May 2017, ICSID Case No. ARB/13/36.

¹²⁵⁷ e.g. *JGC Corporation v. Kingdom of Spain*, ICSID Case No. ARB/15/27; *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/4; *Itochu Corporation v. Kingdom of Spain*, ICSID Case No. ARB/18/25.

¹²⁵⁸ C(2017) 7384 final, 10 November 2017, State aid SA.40348 (2015/NN) — Spain Support for electricity generation from renewable energy sources, cogeneration and waste.

¹²⁵⁹ State aid SA40348 (2015/NN), para. 165.

¹²⁶⁰ for an overview on the *Micula* arbitration, see Joel Dahlquist, 'Skiljedomen i den bilaterala investeringsstvisten *Micula* m.fl. mot Rumänien' (2014) 2014/15(1) *Juridisk Tidskrift* 183-96; Rovetta and Gambardella (2015), *op cit*; on the enforcement of intra-EU investment awards in the light of Union state aid rules, see Tietje and Wackernagel (2015), *op cit*; Wehland (2016), *op cit*.

The normative argument, thus, advocated rests on two propositions. First, it is assumed that there is indeed a positive correlation between restraint in political decision making and the risk of investment arbitration, i.e. regulatory chill. It is accepted, in other words, that political actors are likely to refrain from implementing regulatory changes that would expose them to investment arbitration. Alternatively, where individual decisions over the revocation, withdrawal or renewal of a license or benefit is concerned, the relevant authorities are likely to target market operators that are unlikely to seek cover under an IIA. The lack of empirical evidence for the existence of regulatory chill speaks for the difficulty in proving such a correlation, rather than for the absence of regulatory chill.¹²⁶¹ Economic operators on the internal market are, therefore, in a disadvantaged position compared to entities that can establish an element of foreign ownership or control, that brings the investment under the protective umbrella of an IIA.

Second, it is accepted if that the payment of an intra-EU investment awards potentially amounts to the reinstatement of illegal state aid, the payment of an investment award to a foreign investor in similar circumstances should have a similar effect. If an economic operator could receive, via its foreign investor, the payment of an award, but an EU-investor would be precluded from collecting illegally paid state aid, this would most certainly lead to discrimination, i.e. situations where two entities in comparable situations are treated differently. And yet, whereas there is considerable pressure on Member States to terminate their intra-EU BITs,¹²⁶² and disapply the ECT in Member State relations *inter se*,¹²⁶³ ISDS provisions remain the central pillar of EU foreign investment policy.

7.7 Interim conclusion

The CJEU has not interpreted Article 18 TFEU so as to preclude the Union from differentiating between third parties on the basis of their nationality in its international relations. It is not in principle problematic, therefore, that access to ISDS is made available exclusively to foreign investors with a third country nationality. The lack of an explicit endorsement of the MFN standard in EU law notwithstanding, international agreements concluded by the Union and its Member

¹²⁶¹ See *infra* Chapter 3.3.4.

¹²⁶² European Commission, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', IP/15/5198, 18 June 2015 accessed at <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>; the claim for a termination of intra-EU BITs was strengthened with the decision of the CJEU in its recent *Achmea* judgment (Case C-284/16 *Achmea op cit.*); the author of this study has discussed the compatibility of intra-EU BITs with the principle of non-discrimination elsewhere, see Dahlquist, Lenk and Rönnelid (2016), *op cit.*; and Lenk (2019), *op cit.*

¹²⁶³ The Commission maintains that the *Achmea* judgment is applicable *mutatis mutandis* to the application of the ECT in intra-EU relations, see e.g. Commission, 'Protection of intra-EU investments', *op cit.*

States with third countries cannot undermine the constitutional principles of EU law. They cannot, therefore, be used as instruments to circumvent Article 18 TFEU, in order to discriminate amongst economic operators on the internal market solely based on an element of ownership and control.

The present Chapter demonstrated that, taking into account the elusive nature of corporate nationality as the determining factor for the jurisdiction of an investor-state tribunal, EU IIAs have the effect of discriminating against economic operators on the internal market that cannot establish an element of foreign ownership or control. Unlike trade agreements IIA directly govern the conditions of economic operators on the domestic market by way of creating directly enforceable rights for foreign investors *viz* their operations on the internal market. This does not only privilege MNEs that can already avail themselves of their complex corporate structure to establish jurisdiction *ex post facto*, but creates incentives for economic operator to structure investments in a manner that places the operation under the protective umbrella of an EU IIAs.

With this being said, it transpires from this Chapter that the case law of the CJEU does not currently support the proposition that ISDS provisions in EU IIAs are in conflict with the general principle of non-discrimination. The continuous reiteration of a national treatment standard would suggest that it is irrelevant that the EU IIAs imposes a higher level of protection for third country investors provided that investors from a Member State other than the host country are not treated any less favourably than the host country's own nationals. Ultimately, this hinges on whether the CJEU considers the foreign investors and EU investors on the internal market to be in a comparable situation, or whether only comparable situation is that between a foreign investor investing in the EU and an EU investor investing abroad. Is this latter line of reasoning that appeals to AG Bot—supported by the majority of Member States, the Council and the Commission. There is, in any case, a normative argument to be made, i.e. that EU IIAs differentiate between economic operators on the internal market by providing access to ISDS only those operators that can establish a foreign element of ownership or control. In its assessment the CJEU ought to take account of the potentially detrimental effect that ISDS provisions may have for the internal market by incentivising economic operators to structure their investments artificially to obtain an additional layer of protection. Chapter 8.4 later discusses some of the specific safeguards included in the ICS, that apprehend a potential discriminatory effect.

PART IV
DISCUSSION AND CONCLUSIONS

8 AN APPRAISAL OF THE INVESTMENT COURT SYSTEM

The present Chapter evaluates the ICS in light of the legal and political constraints that have been identified in Chapters Five through Seven. It will assess to which extent the ICS represents a genuine reform initiative, that is to say an initiative that will be accepted by civil society, which is represented through the political actors involved in the ratification of EU IIAs. This Chapter, therefore, also assesses whether the ICS responds to the criticism against investor-state dispute settlement in a manner that will improve its legitimacy and democratic accountability. Moreover, considering that the ICS incorporates a firm commitment to multilateral ISDS reform, this Chapter investigates to what extent the ICS initiative is likely to contribute to the ongoing reform initiative in UNCITRAL.

This subsequent Section 8.1 elaborates on the consequences of mixity in the conclusion of EU IIAs with the ICS, and argues that the involvement of national parliaments exposes the ICS to wide array of political factors (). These factors include internal aspects, i.e. the decision-making in the Council, but also external aspects, including the criticism against investor-state arbitration that dominates the sentiment of civil society. Section 8.2 illustrates that the ICS responds to much of the criticism against the institutional and procedural features of investor-state arbitration. This section argues that while many of these changes improve the legitimating narrative tight to the reassertion of state control over ISDS, the ICS does not alleviate all of the underlying legitimacy concerns. This is above all visible in the empowerment of the contracting states, acting through the trade committee.

Other shortcomings relate more directly to constitutional constraints arising out of the EU legal order. Accordingly, this Chapter argues that the ICS does not provide for sufficient safeguards to ensure its compatibility with the principle of autonomy (Section 8.3). Lastly, having established in Chapter Seven that the ICS does not escape an evaluation in light of the principle of non-discrimination, the present Chapter argues that a potential violation can only be remedied with the establishment of a multilateral investment court, which the ICS effectively impedes (Section 8.4).

8.1 Implications of ‘mixity’ on the investment court system

Chapter Five elaborated in detail on the division of competence between the EU and its Member States with respect to ISDS provisions in Union agreements with third countries. It emerged from that discussion that the Union enjoys substantive treaty-making competence over ISDS, and may therefore, in principle, include the ICS in its IIAs with third countries. Considering, however, that this competence of the Union is shared with its Member States, the choice of concluding IIAs as mixed or EU-only agreements is not only an outcome of legal considerations. This section identifies policy factors that are weighing on this choice, and argues that in light of the prevailing political environment in the Council the future of the ICS is inevitably ‘mixed’. First, however, this Section analyses whether the effect of the procedural requirements for the initiation of disputes under before the ICS¹²⁶⁴ are subject to similar concerns as they were expressed by the CJEU in the *EUSFTA* opinion (Section 8.1.1). This is followed by a discussion of alternative legal bases for the conclusion of IIAs that include the ICS (Section 8.1.2). The remainder of this Section identifies policy factors and their implications on the conclusion of EU IIAs as mixed agreements (Sections 8.1.3 and 8.1.4).

8.1.1 *The fork in the investment court’s road*

Two core procedural features of the ISDS mechanism in the EU-Singapore FTA were crucial for the Court’s decision to reject in its *EUSFTA* opinion the exclusivity of Union competence.¹²⁶⁵ On the one hand, the CJEU pointed out that general consent renders the Union and its Member States impotent to oppose arbitration.¹²⁶⁶ On the other hand, the agreement required investor to withdraw all pending disputes before domestic courts and tribunals regarding the alleged treatment.¹²⁶⁷ The combined effect of general consent and the fork-in-the-road clause of the EU-Singapore FTA left it entirely to the whim of the investor to decide whether or not a dispute would come before a Member State court.¹²⁶⁸ The Court, thus, concluded that the ISDS mechanism in the draft EU-Singapore FTA “removes disputes from the jurisdiction of the courts of the Member States”, and cannot therefore be merely ancillary.¹²⁶⁹

Generalized consent is a core characteristic of investor-state arbitration, and the ICS does not break with this tradition. All post-Lisbon IIAs incorporate the general

¹²⁶⁴ See *supra* Chapters 4.3.1.2 and 4.3.1.3.

¹²⁶⁵ See *supra* Chapters 5.4.

¹²⁶⁶ Opinion 2/15 *EUSFTA op cit.*, para. 288 and 291.

¹²⁶⁷ *Ibid.*, para. 289.

¹²⁶⁸ *Ibid.*, para. 290.

¹²⁶⁹ *Ibid.*, para. 292.

consent of the respondent state, which is deemed to fulfil the requirements of Article 25 ICSID and Article II of the New York Convention.¹²⁷⁰ More importantly, dispute settlement before the ICS presupposes that investors withdraw all pending cases before domestic courts and tribunals, and waive the right to initiate disputes regarding the alleged treatment in the future.¹²⁷¹ Dividing trade from investment-related aspects into separate agreements, the Commission did not secure safeguards against these to specific concerns. A choice in favour of the ICS is, therefore, tantamount to removing the dispute permanently from the realm of the domestic judiciary—subject to the discretion of the investor alone. Treaty-making competence over the ICS is, therefore, likewise shared between the Union and its Member States.

8.1.2 *Finding an appropriate legal basis*

The approach taken by the CJEU in its *EUSFTA* opinion suggests that the Union's treaty-making competence for ISDS is not, as it is the case with all other investment related provisions of the EU-Singapore FTA, based in part on Article 207(1) TFEU, and in part on Article 65 TFEU. It does not, in other words, perpetuate the bifurcation of competence along the conceptual dividing line that separates direct from non-direct investment. However, all the while it is clear that ISDS is different, and falls therefore in its entirety under shared competences, the CJEU fails to provide any indication as to the appropriate legal basis for ISDS provisions.¹²⁷² Considering that the exercise of treaty-making competence presupposes a valid legal basis in the EU Treaties,¹²⁷³ this section advances a normative argument that presents Article 21 TEU, individually as well as in combination with Articles 65, 207, and 216(1) TFEU, as an alternative legal basis for the ICS.

Article 21 TEU stipulates that the Union's external action seeks to promote *inter alia* the rule of law, the principles of international law, and an international system based on good global governance.¹²⁷⁴ These objectives are all reflected in the Union's effort to contribute to ISDS reform, both bilaterally through its ICS and multilaterally within UNCITRAL.¹²⁷⁵ The introductory discussion on the evolution of ISDS furthermore illustrated that the removal of investment disputes from the realm of diplomacy, and the development of a rules-based system of dispute settlement, albeit ideologically rooted in neo-liberalism, is inspired by notions of

¹²⁷⁰ Article 8.25(1) CETA; Article 3.6(2) of the EU-Singapore IPA; Article 3.36(1) of the EU-Vietnam IPA; Article 9 of the EU-Mexico FTA (Investment Dispute Settlement).

¹²⁷¹ Articles 8.22(1)(f) and (g) CETA; Articles 3.7(1)(f)(i) and (ii) of the EU-Singapore IPA.

¹²⁷² For a discussion, see *supra* Chapter 5.1.3.

¹²⁷³ See *supra* Chapter 5.2.3.

¹²⁷⁴ Articles 21(1), 21(2)(c), (e), and (h) TEU.

¹²⁷⁵ See *supra* Chapter 4.4.

good governance.¹²⁷⁶ An improved dispute settlement system, such as the ICS that aims to create a court-like structure that attempts to increase the independence of adjudicators, enhance the consistency of awards, ensure democratic accountability, and commits to multilateral cooperation can only strengthen these values.

Indeed, with its *EUSFTA* opinion the Court signalled that it is prepared to resort to Article 21 TEU in order to justify a broad view on the substantive scope of the CCP. Article 207(1) TFEU stipulates explicitly that the CCP “shall be conducted in the context of the principles and objectives of the Union's external action”.¹²⁷⁷ This includes, in accordance with Article 21(2)(f) TEU, sustainable development, which “henceforth forms an integral part of the common commercial policy”.¹²⁷⁸ Treaty-making competence for the ICS would in a similar fashion be derived from Article 21 TEU, complementing Article 207(1) TFEU in as far as it concerns FDI, and in conjunction Article 216(1) TFEU and Article 63 TFEU with respect to portfolio investment. There is, of course, an inherent weakness to this line of reasoning, as it supports the general proposition that the Union’s treaty-making competence over the ICS is partly exclusive. This view is difficult to reconcile with the Court’s explicit and unequivocal statement that competence over ISDS cannot, in principle, be established on the same foundation as those provisions that are purely ancillary in nature.¹²⁷⁹ This section advocates that the CJEU ought to revisit this point, taking into account the institutional and procedural innovations incorporated in the ICS. A reformed ISDS system that responds to concerns over the legitimacy of investor-state arbitration ensures the effectiveness of substantive commitments (i.e. promoting the rule of law, the principles of international law, and good global governance in international investment law), and is, thus, ancillary to these commitments within the meaning of established case law.¹²⁸⁰

On the other hand, it appears that an important—if not the decisive factor—for rejecting treaty-making competence over ISDS based on Article 207(1) TFEU was the fork-in-the-road clause and its effect of removing investment disputes from the realm of the domestic judiciary. As the ICS does not remedy this aspect, the CJEU may not be prepared to change its view *vis-à-vis* the nature of treaty-making competence for the ICS. An alternative approach that respects the Court’s inclination towards shared competence over ISDS in principle, could rely on Article 21 TEU as the sole legal basis for the ICS. A broad and textual reading of Article 216(1) TFEU does in effect support a finding of treaty-making competence whenever it is necessary to attain one of the objectives set out in the Treaties.¹²⁸¹ The CJEU has yet to take a

¹²⁷⁶ See *supra* Chapter 2.1.1.1.

¹²⁷⁷ Read in conjunction with Articles 21(3) and 205(1) TFEU.

¹²⁷⁸ Opinion 2/15 *EUSFTA op cit.*, para. 147.

¹²⁷⁹ Opinion 2/15 *EUSFTA op cit.*, para. 292.

¹²⁸⁰ Opinion 1/76 *Inland Waterways op cit.*, para. 5; Opinion 1/78 *International Agreement on Natural Rubber op cit.*, para. 56; Case C-137/12 *Conditional Access Services op cit.*, paras. 70-71.

¹²⁸¹ See *infra* Chapter 5.3.2

stance on the use of Article 21 TEU as the sole legal basis for the Union's treaty-making competence. It should nonetheless be noted that treaty-making competence, thus established, would have to be shared unless it fulfils the requirements of Article 3(2) TFEU, and would not only explain the approach taken by the CJEU in its *EUSFTA* opinion but extend it to the ICS.

8.1.3 *The politics of mixed agreements*

Whatever the legal basis for the Union's treaty-making competence over the ICS, its nature would in any event be shared with the Member States, in as far as it relates to portfolio investment. Does this require future EU IIAs to be concluded as mixed agreements? This section analyses the consequences of shared competence for the form of EU IIAs. It is helpful to briefly recall at this point that it is in fact not necessary that all elements of an international agreement fall under exclusive treaty-making competence for the Union to conclude an international agreement alone. Only where an IIA covers aspects of exclusive Member State competence, is the formula of 'mixity' legally required (i.e. obligatory mixity). The choice to conclude an international agreement that is falling within the ambit of shared competences by as a mixed or EU-only agreement is a political decision that is taken by the Member States collectively in the Council.¹²⁸² Advocate General Sharpston observed in this context:

“[T]he Member States together (acting in their capacity as members of the Council) have the power to agree that the European Union shall act *or* to insist that they will continue to exercise individual external competence.”¹²⁸³

The conclusion of IIAs including the ICS is, therefore, exposed to policy preferences of the Member States. Procedurally, this political choice manifests itself through the application of Article 218(2) TFEU, which foresees the involvement of the Council at three stages before an international agreement comes into effect, i.e. the opening of negotiations, the signing, and the conclusion of an international agreement.

To view the choice between an EU-only agreement and 'mixity' as the answer to a purely legal question, thus, ignores the profoundly political implications of Member State participation in Union external relations.¹²⁸⁴ As Tridimas aptly summarizes:

“Approaching competence solely from a strictly legal perspective is liable to give a misleading impression. A great deal depends on the behaviour of the various political and institutional actors – for

¹²⁸² On facultative 'mixity' and facultative EU-only agreements, see *supra* Chapter 5.6

¹²⁸³ Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, para. 75

¹²⁸⁴ Rosas (2000), *op cit.*, 205-06.

example, the way the EU institutions perceive the limits to their powers, the extent to which the Member States may prefer to decide matters on EU level rather at the national level, the way powers are actually exercised, and the vicissitudes of the political game.”¹²⁸⁵

Even the occupation of a field internally, and, thus, the construction of implied exclusive treaty-making competence, is inherently dependent on a political choice—taken by the Member States collectively in their capacity as members of the Council—to adopt common rules internally.¹²⁸⁶

Yet, unlike Advocate General Sharpston,¹²⁸⁷ whose view also found supported in the opinion of Advocate General Wahl in Opinion 3/15 on the Marrakesh Agreement,¹²⁸⁸ the Court readily inferred that the investment chapter of the EU-Singapore FTA “cannot be approved by the European Union alone”.¹²⁸⁹ It seems far-fetched to assume that the Court’s intention was to obliterate facultative ‘mixity’ quite so casually.¹²⁹⁰ Indeed, the CJEU clarified in its *OTIF* judgment¹²⁹¹ that its conclusions in the *EUSFTA* opinion with respect to portfolio investment were without prejudice to the political discretion of Member States acting collectively in the Council.

“Admittedly, the Court found, in paragraph 244 of that Opinion, that the relevant provisions of the agreement concerned, relating to non-direct foreign investment, which fall within the shared competence of the European Union and its Member States, could not be approved by the Union alone. However, in making that finding, the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area.”¹²⁹²

¹²⁸⁵ Tridimas (2012), *op cit.*, 72-73.

¹²⁸⁶ Koutrakos (2015), *op cit.*, 106; Rosas notes that: “Member States are often unwilling to authorise the Community alone to conclude bilateral agreements containing competences.” See Rosas (2000), *op cit.*, 217.

¹²⁸⁷ Opinion of Advocate General Sharpston, Opinion 2/15 *EUSFTA op cit.*, paras. 74-75.

¹²⁸⁸ Opinion of the Advocate General Wahl, Opinion 3/15 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* [2017], 8 September 2016, EU:C:2016:657, paras. 118-23.

¹²⁸⁹ Opinion 2/15 *EUSFTA op cit.*, para. 244.

¹²⁹⁰ For initial reactions on this issue, see Thym (31 May 2017), *op cit.*; David Kleimann and Gesa Kübek, ‘The Singapore opinion or the end of mixity as we know it’, *Verfassungsblog*, 23 May 2017 <accessed at <http://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/>>; Ankersmit (18 May 2017), *op cit.*

¹²⁹¹ Case C-600/14 *OTIF op cit.*

¹²⁹² Case C-600/14 *OTIF op cit.*, para. 68.

Put differently, 'mixity' is no necessary corollary of a finding of shared competence; this remains a political decision that is taken by the Member States in the Council.

These decision-making powers of the Council in accordance with Article 218 TFEU, and consequently the exposure of the ICS to the Member States' policy preferences over ISDS, is not without constraints. Take, for instance, the Commission's prerogative to initiate legislation,¹²⁹³ which extends to the negotiation and conclusion of international agreements.¹²⁹⁴ Accordingly the Commission proposes the opening of negotiations, the signing and the conclusion of an international agreement. The Council, acting by qualified majority,¹²⁹⁵ endorses or rejects the Commission's proposal.¹²⁹⁶ Should the Member States, acting collectively in their capacity as members of the Council, decide to change the proposal they will have to do so unanimously.¹²⁹⁷ It is therefore easier to follow the Commission than to go against it, which provides the Commission with significant influence over the form that an EU IIA will take. And yet, the Commission is well aware of the prevailing political environment.

In the case of CETA, the Commission perceived the agreement as falling in its entirety under exclusive Union competence. Yet, the proposal to sign and conclude the agreement envisaged joint participation by the Member States. Trade Commissioner Malmström justified that decision with pragmatism:

"From a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a 'mixed' agreement, in order to allow for a speedy signature."¹²⁹⁸

Malmström's statement reflected the political climate in the Council that had already debated CETA and emphasized the view amongst Member States that it should be signed and concluded as a 'mixed' agreement.¹²⁹⁹ 'Mixity', thus, an instrument to invigorate the overall legitimacy of CETA. Although the Commission considers exclusivity to be vital for an effective and efficient foreign trade and investment policy it is nonetheless sensitive to the political realities, and so is, as illustrated by its judgement in the *OTIF* case,¹³⁰⁰ the CJEU.

¹²⁹³ Article 17(2) TEU.

¹²⁹⁴ Article 218(3) TFEU empowers the Commission to recommend the opening of negotiations, with the exception of agreements that relate principally or exclusively to CFSP.

¹²⁹⁵ Article 218(8) TFEU.

¹²⁹⁶ Articles 218(2), (5) and (6) TFEU.

¹²⁹⁷ Article 293(1) TFEU.

¹²⁹⁸ European Commission Press Release (5 July 2016) *op cit*.

¹²⁹⁹ Council of the European Union, 'Outcome of the 3463rd Council meeting on Foreign Affairs and Trade Issues', 13 May 2016 accessed at <<http://data.consilium.europa.eu/doc/document/ST-8737-2016-INIT/en/pdf>>.

¹³⁰⁰ Case C-600/14 *OTIF op cit*.

The national parliaments in the Member State urged (former) President of the Commission Karel de Gucht already in 2014 to pursue trade and investment agreements as mixed agreements. In a joint letter to de Gucht the chairs of the relevant committees in the national parliaments urged the conclusion of TTIP and CETA as mixed agreements, stressing the “important role [that] national parliament have in the democratic decision making process of the EU”.¹³⁰¹ The lobbying of the Commission to approach the post-Lisbon deep and comprehensive trade and investment agreements as mixed agreements not only reflects a political preference of the Member States to exercise shared competence over investment and ISDS at the international level individually. More importantly, it illustrates the important role of the Commission in this political play.

Commission President Jean-Claude Juncker was reported to have advocated the splitting of Union trade and investment agreements already as early as April of 2017.¹³⁰² Indeed, in light of the *EUSFTA* opinion it was hardly sustainable to hold the view that the Union enjoys exclusive treaty-making competences over the scope of traditional investment agreements covering aspects of non-direct investment and ISDS. It is not surprising, therefore, that the essential role of mixed agreements as policy instrument for the Union’s foreign investment policy was sealed in the aftermath of the *EUSFTA* opinion. Inviting the clarity that the CJEU provided over the division of competences in the area of foreign investment, the Commission immediately excluded investment protection and ISDS from its recommendation to the Council to authorize negotiations with Australia and New Zealand.¹³⁰³ In early 2018 the Member States deliberated in the Council on the consequences of the *EUSFTA* opinion for the future of the Union’s foreign trade and investment policy.¹³⁰⁴ In its conclusion the Council politically endorsed the strategic split of trade from investment aspects. Harnessing the efficiency benefits of concluding EU-only agreements the new strategy intends to include all areas falling under shared

¹³⁰¹ Tweede Kamer Der Staten-Generaal, 'Letter in the framework of the political dialogue: the role of national parliaments in free trade agreements', 25 June 2014.

¹³⁰² Hans Van Der Burchard, 'Juncker proposes fast-tracking EU trade deals' *Politico* (4 September 2017) <<https://www.politico.eu/article/juncker-proposes-fast-tracking-eu-trade-deals/>>.

¹³⁰³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A balanced and progressive trade policy to harness globalization', 13 September 2017 accessible at <<https://publications.europa.eu/en/publication-detail/-/publication/4a4b13f2-e3a6-11e7-9749-01aa75ed71a1/language-en/format-PDF>> 7; Commission, 'Recommendation on FTA with Australia' (2017), *op cit*; Commission, 'Recommendation on FTA with New Zealand' (2017), *op cit*; note that the impact assessments on Australia and New Zealand emphasized the need for a uniform system of investment protection and a modernization of ISDS, see Commission, 'Impact assessment on the FTA with Australia' (2017), *op cit*, 7 and 10; Commission, 'Impact assessment on the FTA with New Zealand' (2017), *op cit*, 7 and 10.

¹³⁰⁴ Council, 'Draft Council conclusions on the negotiation and conclusion of EU trade agreements (2018), *op cit*.

competence into a separate IPA.¹³⁰⁵ Yet, whereas trade and investment agreements should in principle be negotiated as separate deals, this may depend on the nature and content of the agreement. In particular, the Council considers that association agreement should be mixed.¹³⁰⁶ This explains perhaps why the negotiating directives for the modernization of the association agreement with Chile, which was proposed around the same time as the FTAs with Australia and New Zealand, include a comprehensive chapter on investment protection and the ICS.¹³⁰⁷

Previous discussions have already alluded to the fact that the Commission also decided to separate the investment chapters from the EU-Singapore FTA and the EU-Vietnam FTA, and proposed the signing and conclusion of parallel IPAs featuring the ICS.¹³⁰⁸ In light of these observations it is safe to assume that the future prospects of the ICS is tied to the conclusion of mixed agreements.

8.1.4 *The signing, conclusion and provisional application of Union agreements*

Mixed agreements require the involvement of national parliaments at the stage of ratification. In addition to the consent of the European Parliament, and the indirect influence on the Member States' voting pattern in Council, mixed agreements also require direct parliamentary approval in the Member States.¹³⁰⁹ A concomitant constraint on the conclusion of IPAs as mixed agreement is, therefore, the looming risk of non-ratification in one of the Member States.¹³¹⁰ This is well exemplified at the case of CETA. Only days before CETA was scheduled to be signed in Brussels, it emerged that the Belgian national parliament was unable to follow suit. Without the consent of all three regional parliaments, the Belgian national parliament was unable to authorize the signing of CETA. With its refusal, the regional parliament of Wallonia effectively held the signing of CETA hostage. Only after having reached

¹³⁰⁵ *Ibid.*, para. 4.

¹³⁰⁶ *Ibid.*, para. 3.

¹³⁰⁷ Council of the European Union, 'Directives for the negotiation of a Modernised Association Agreement with Chile' (13553/17 ADD 1), 22 January 2018 accessible at <<https://www.consilium.europa.eu/media/32405/st13553-ad01dc01en17.pdf>>.

¹³⁰⁸ OJ L 279/1, Council Decision (EU) 2018/1676 of 15 October 2018 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; European Commission, 'Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part' (COM(2018) 693 final), 17 October 2018 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0693>>.

¹³⁰⁹ David Kleimann and Gesa Kübek, 'The signing, provisional application, and conclusion of trade and investment agreements in the EU: The case of CETA and Opinion 2/15' (2018) 45(1) *Legal Issues of Economic Integration* 13-46, 22-25.

¹³¹⁰ For a comprehensive overview over this issue, see Van Der Loo and Wessel (2017), *op cit*; Kleimann and Kübek (2018), *op cit.*, 33-36.

a deal that required *inter alia* that CETA was put before the CJEU in order to obtain an evaluation of the agreement in light of the principles of autonomy and non-discrimination could the deadlock be resolved.¹³¹¹

Another relevant aspect to consider in this respect is the consistent practice of the Union to apply trade and investment agreements provisionally, i.e. before the ratification is formally concluded. In the case of mixed agreements in particular, the additional parliamentary involvement at the Member State level could prolong the ratification with several years.¹³¹² The Council decision on the provisional application of CETA excluded all aspects that did not undeniably fall under exclusive external EU competence.¹³¹³ As such the decision excluded *inter alia* investment protection and the ICS and in so far as it applies to the CETA investment chapter, it does so only with respect to FDI.¹³¹⁴

This is at odds with past practice of the Council. Kleimann and Kübeck point out that Member States have consistently voted in the Council to provisionally apply all provisions of FTAs, including those falling under shared competence.¹³¹⁵ The EU-Korea FTA¹³¹⁶ exemplifies this point. During the five years it took to complete ratification, the agreement was applied provisionally in its entirety. The relevant Council decision only made reservation with respect to provisions that were purportedly subject to exclusive Member State competence.¹³¹⁷ No reservations were made with respect to the capital movement provisions of the EU-Korea FTA, which clearly applied to portfolio investment.¹³¹⁸ Indeed, the provisional application, much like the decision on the form of an international agreement, is determined by political considerations, rather than the application of legal norms and principles. Member States are at liberty to act internationally through the provisional application of a mixed agreement prior to having their national parliament approve the deal.¹³¹⁹ The decision to exclude large parts of the CETA

¹³¹¹ , 'Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l'Etat fédéral et les Entités fédérées pour la signature du CETA', 27 October 2016, accessible at <http://liege.mpoc.be/doc/europe/-AECG-CETA/Belgique_Declaration-pour-la-signature-du-CETA_27-oct-2016.pdf>.

¹³¹² Kleimann and Kübek (2018), *op cit.*, 24.

¹³¹³ Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

¹³¹⁴ Council Decision 2017/38 on the provisional application of CETA, Article 1(1)(a).

¹³¹⁵ Kleimann and Kübek (2018), *op cit.*, 26-28.

¹³¹⁶ OJ L 127/6, 14 May 2011, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

¹³¹⁷ Council Decision 2011/265 on the provisional application of the EU-Korea FTA.

¹³¹⁸ Article 8.2(2)(c) of the EU-Korea FTA.

¹³¹⁹ Notably, although Article 218(5) TFEU reserves no role for the EP, it was in fact invited to vote on the provisional application of CETA, see European Parliament, 'CETA: MEPs back EU-Canada

investment chapter from provisional application reflects a political compromise and, yet again, illustrates the deep rifts amongst Member States over *inter alia* the ICS. Indeed, the Commission initially proposed the provisional application of CETA in its entirety,¹³²⁰ but faced vigorous opposition during debates in the Council.¹³²¹

8.1.5 *Interim conclusion: A 'mixed' future for the investment court system*

This section demonstrated that the ICS still has the effect of removing investment disputes from domestic judiciaries. The Court's conclusion in its *EUSFTA* opinion that ISDS provisions fall in its entirety outside of exclusive treaty-making competences is, therefore, likely to apply also to the ICS. Although shared competence does not, in principle, exclude the possibility to conclude future IIAs as EU-only agreements, this section argued that the prevailing political environment renders 'mixity' the most likely scenario. This exposes the future of the ICS to the political preferences of the Member States. The Wallonia compromise illustrates, in this context, not only that the Member States are divided over controversial issues such as ISDS, but also that the national and even regional parliaments emerge as powerful actors. As a mixed agreement, IIAs with provisions on ICS are subject to scrutiny in the EP but also 38 parliaments on Member State level.¹³²² As a consequence, the Commission is unlikely to be successful in the implementation of its ICS initiative unless it is perceived, by the relevant political actors in the Member States, as a genuine reform initiative, that is to say that it responds to the concerns over the legitimacy of traditional investor-state arbitration.

8.2 The investment court system as a reform initiative

The intense criticism against investor-state arbitration has prompted a range of political reactions, with some states pulling out of ISDS while others, including the Union, engage in progressive structural, substantive and procedural reforms.¹³²³ This study has established that the Union is competent to conclude IIAs with the ICS,¹³²⁴ but also that it has to be sensitive to the concerns of the EP as well as national parliaments. Indeed, any agreement including provisions on the ICS that is

trade agreement', 15 February 2017 accessed at <<http://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement>>.

¹³²⁰ European Commission, 'Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part' (COM(2016) 470 final), 5 July 2016 accessible at <<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-470-EN-F1-1.PDF>>.

¹³²¹ Kleimann and Kübek (2018), *op cit.*, 31.

¹³²² Kleimann and Kübek (2018), *op cit.*

¹³²³ For a discussion, see *supra* Chapter 3.3.

¹³²⁴ For a discussion, see *supra* Chapter 5.

negotiated by the Commission will have to obtain parliamentary approval in all Member States in addition to the EP.¹³²⁵ This can only be achieved, it is argued in this section, if the ICS responds to the criticism against investor-state arbitration that dominates civil society. There is, in other words, a “need to address the concerns of ‘civil society’ in the face of the perceived threats of globalization.”¹³²⁶

The present section elaborates briefly on the role of perceptions for the overall legitimacy of the ICS, and argues that these perceptions although difficult to measure are reflected in the general criticism against investor-state arbitration (Section 8.2.1). This is followed by an analysis of the ICS that addresses structural features, i.e. the selection of arbitrators (Section 8.2.2) and their independence (Section 8.2.3) and the establishment of an appeals body (Section 8.2.4), and procedural features, i.e. the cost of proceedings (Section 8.2.5), as well as parallel proceedings, frivolous claims and transparency (Section 8.2.6). Lastly, this section takes a closer look at the power of the trade committee (Section 8.2.7). This section argues that although the ICS does in fact address the criticism, a closer look at the concrete policy choices reveals that it fails to resolve the underlying shortcomings.

8.2.1 Preliminary remarks: perceptions of legitimacy

As a term, ‘legitimacy’ lends itself to being (ab)used as an expression to give credibility and moral creed to what would be otherwise little more than general expression of subjective preferences.¹³²⁷ Indeed, as Christopher A. Thomas points out:

“Political actors may call something legitimate or illegitimate not because they have made a considered philosophical reflection on whether that thing aligns strictly with a particular normative framework, but rather because they like or do not like it and are grasping for an authoritative way to express that emotion.”¹³²⁸

The central claim of the present section is that legitimacy¹³²⁹ cannot be conceived of as a purely objective standard, but is instead highly dependent on perceptions of a dominant legitimating community; a claim that is often implicit in scholarship

¹³²⁵ For a discussion, see *supra* Chapter 8.1.4.

¹³²⁶ Marise Cremona, ‘Rhetoric and reticence: EU external commercial policy in a multilateral context’ (2001) 38(2) *Common Market Law Review* 359-96, 360.

¹³²⁷ Daniel Bodansky, ‘Legitimacy’ in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford handbook of international environmental law* (OUP: 2008) 705-23, 705

¹³²⁸ Christopher A. Thomas, ‘The uses and abuses of legitimacy in international law’ (2014) 34(4) *Oxford Journal of Legal Studies* 729-58, 732.

¹³²⁹ Franck analytically developed legitimacy as a concept in political science and is widely considered a pioneer in this field, see Thomas M. Franck, *The Power of Legitimacy among Nations* (OUP: 1990); for a discussion of the ‘legitimacy crisis’ of investor-state arbitration see *supra* Chapter 3.3.5.

engaging with criticism of ISDS, but which is seldom explicitly substantiated. In other words, conceptions of normative legitimacy (sometimes referred to as formal, or objective legitimacy) must be distinguished from social legitimacy (also referred to as empirical,¹³³⁰ *de facto*, or descriptive legitimacy).¹³³¹

Normative legitimacy relates to pre-determined and ascertainable frames of reference,¹³³² and is easily conflated with legal validity as it relates primarily to the internal legitimacy of a rule, set of rules, body or institution within a given legal order.¹³³³ Normative legitimacy, however, also entails elements of moral justifiability, including concerns over *inter alia* ethics and justice.¹³³⁴ The normative legitimacy of ISDS is, thus, dependent on the normative standards of a particular social group. Those who view ISDS strictly in terms of commercial arbitrations (i.e. dispute settlement between private parties) are likely to adopt different assumptions about the moral legitimacy of an investment tribunal than communities that perceive its role as norm-creators in a public law paradigm.¹³³⁵

Social legitimacy, on the other hand, reflects the beliefs of a social group over standards of normativity.¹³³⁶ In the spirit of Lord Chief Justice Hewart's famous remark in *R v Sussex Justices*, that "[j]ustice should not only be done, but should manifestly and undoubtedly be seen to be done"¹³³⁷, perceptions of legitimacy constitute a defining quality of the legitimacy of any institution. Actors with a vested interest can strengthen, shape or establish these perceptions through processes of legitimation, i.e. actions that induce communities to belief in the legitimacy of a given object.¹³³⁸ The actors dominating the narrative of legitimation (i.e. the legitimating

¹³³⁰ Bodansky (2008), *op cit.*, 709.

¹³³¹ Arthur Isak Applbaum, 'Legitimacy in a bastard kingdom' (2004), Center for Public Leadership Working Paper 04-05 accessible at <http://dspace.mit.edu/bitstream/handle/1721.1/55927/CPL_WP_04_05_Applbaum.pdf?sequence=1> 76; Allen Buchanan and Robert O. Keohane, 'The Legitimacy of global governance institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in international law* (Springer: 2008) 25-62, 25; Silje Aambo Langvatn and Theresa Squarrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals' in Nobuo Hayashi and Cecilia M. Baillet (eds), *The Legitimacy of International Criminal Tribunals* (CUP: 2017) 41-65, 43.

¹³³² For a discussion on this, see Applbaum (2004), *op cit.*, 76-80; Thomas further differentiates between legal and moral legitimacy as two qualitatively different elements of normative legitimacy, see Thomas (2014), *op cit.*, 735.

¹³³³ Thomas (2014), *op cit.*, 735-37.

¹³³⁴ Thomas (2014), *op cit.*, 736.

¹³³⁵ For instance Kulick with his Global Public Law Theory and Van Harten with respect to Global Administrative Law, see Andreas Kulick, *Global Public Interest in International Investment Law* (CUP: 2012); Van Harten and Loughlin (2006), *op cit.*; more generally on this discussion see, Van Harten (2008), *op cit.*; Chester Brown, 'Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press: 2010).

¹³³⁶ Thomas (2014), *op cit.*, 741.

¹³³⁷ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

¹³³⁸ Thomas (2014), *op cit.*, 742.

communities) do not necessarily overlap with the communities that are affected by the legitimacy of an institution (i.e. subjects of legitimacy),¹³³⁹ thus perpetuating the inherent disconnect of social from normative legitimacy. Thomas observes in this respect that “as the result of a conscious effort to influence beliefs about what is normatively justified, or as the product of the unconscious replication of pervasive legitimacy narratives” legitimating communities might create, what he calls, ‘false legitimacy’.¹³⁴⁰ There is, of course, likewise a risk for ‘false illegitimacy’, i.e. where the dominant legitimating narrative is based on perceptions over the lack legitimacy despite existing qualities of normative legitimacy.

Thomas further illustrates that subjects of legitimacy may, in time, become legitimating communities. The legitimating community of the WTO, for instance, was initially comprised solely of technocrats with direct access to relevant agents in the international trading system, but steadily diversified to include public interest groups and social movements as the multilateral trading system moved into areas more directly associated to domestic regulatory policy.¹³⁴¹ He argues that a relative shift in influence and power between overlapping and competing legitimating communities will trigger a change in the social legitimacy of international institutions. A similar development can be observed in the context of ISDS.

Investment arbitration used to be the exclusive domain of specialist lawyers and political agents with relatively coherent and stable expectations at the system. Some of the historical developments discussed in earlier Chapters of this study illustrated periodic shifts and struggle between competing legitimating communities. Consider only the resistance of development countries with the Calvo doctrine or the push for a NIEO in the 1970s.¹³⁴² Some degree of divergence in states’ expectations at ISDS are also reflected in the failed attempts to establish a multilateral framework for the regulation of foreign investment.¹³⁴³ These variations, however, were quickly followed by realignment behind the dominant paradigm of bilateralism that more effectively exploits power imbalances, and further entrenched Western dominance.

However, as the impact of ISDS on the domestic regulatory policy space of Western states became more tangible, civil society started to exert considerable pressure on relevant political agents. The involvement of NGOs and the increase in scholarly interest in recent years, thus, led to changes in the balance between legitimating communities that provoked a reorientation of policy preferences.¹³⁴⁴ The concomitant diversification of a plethora of relevant interests and views likewise redefines the social legitimacy of ISDS, which now challenges the prevailing neo-

¹³³⁹ *Ibid.*, 747-48.

¹³⁴⁰ *Ibid.*, 741-42.

¹³⁴¹ *Ibid.*, 749.

¹³⁴² For a discussion see *supra* Chapter 2.1.2.

¹³⁴³ For a discussion see *supra* Chapter 2.2.2.

¹³⁴⁴ David W. Rivkin, ‘Towards a new paradigm in international arbitration: The town elder model revisited’ (2008) 24(3) *Arbitration International* 375-86.

liberal ideological pedigree. Adjudicators are no longer conceived of as merely settling a dispute by interpreting and applying the relevant legal norms but as generating normativity and engaging in a form of judicial law-making.¹³⁴⁵

Perceptions over the legitimacy of an institution matter a great deal. Future ISDS reform proposals should therefore intend to strengthen the social legitimacy of ISDS without being locked into a paradox of 'false legitimation' that perceives the legitimacy crisis of investor-state arbitration merely as an image problem. Indeed, normative and social legitimacy, albeit qualitatively different conceptions of legitimacy, are inextricably intertwined. Bodansky notes in this respect:

“On the one hand, to some degree, descriptive legitimacy seems conceptually parasitic on normative legitimacy since beliefs about legitimacy are usually beliefs about whether an institution, as a normative matter, has a right to rule. People justify, criticize, and persuade on the basis that an institution is actually legitimate (or illegitimate). On the other hand, some may argue that normative legitimacy depends on descriptive legitimacy. It has an intrinsically normative quality and depends on people's belief. An institution would not be legitimate if no one thought it so.”¹³⁴⁶

Social legitimacy is, thus, likely to improve if formal qualities of normative legitimacy are strengthened.¹³⁴⁷ Social legitimacy is also likely to improve if the narratives of normative legitimacy by competing legitimating communities are sufficiently pervasive.¹³⁴⁸ As power relationships between the various legitimating communities are likely to change over time,¹³⁴⁹ institutional reflexivity, i.e. “resources, procedures, and willingness” to adapt to new situations, becomes a fundamental element of a mixed conception of legitimacy.¹³⁵⁰

It is therefore unavoidable that the ICS, as an institutional ISDS reform proposal, must strike a balance between perceptions of legitimacy and formal qualities of normative legitimacy.

¹³⁴⁵ This is central to von Bogdandy and Venzke's public law theory of adjudication, see Armin von Bogdandy and Ingo Venzke, *In whose name?: A public law theory of international adjudication* (Oxford University Press: 2014) 105 and 108.

¹³⁴⁶ Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP: 2013) 321-41, 327.

¹³⁴⁷ Langvatn and Squatrito (2017), *op cit.*, 46.

¹³⁴⁸ Thomas (2014), *op cit.*, 741-42.

¹³⁴⁹ Thomas (2014), *op cit.*, 748.

¹³⁵⁰ Langvatn and Squatrito (2017), *op cit.*, 54.

8.2.2 *Deviating from the principle of party autonomy*

The principle of party autonomy emerged constitutes as a fundamental principle of investment arbitration.¹³⁵¹ It is not surprising, therefore, that there have been strong claims rejecting the abandonment of party appointed arbitrators in ISDS reform. It has been argued that this would go against a fundamental pillar of arbitration, frustrate the parties' expectations, and, ultimately, erode the legitimacy of the system.¹³⁵² This is because the untarnished reputation of an international judge notwithstanding, the profile may not correspond to the expectations of investors,¹³⁵³ and thus alienate a core constituency of the investment treaty regime. These arguments reflect the normative foundations of party autonomy that focuses on the individual's freedom of 'self-ordering'.¹³⁵⁴

“The risk would exist that arbitrators progressively move from their current culture of services providers, close to the needs and requirements of the users, to a culture of arbitral public servants or, even worse, of arbitral politicians. No one has to gain from such an evolution.”¹³⁵⁵

But even in private (international) law, to which the historical origins of the principle are confined, party autonomy presents only a valid claim in as far as there is no justification to override it.¹³⁵⁶ Accepting, however, that investment arbitration reaches beyond the confined character of commercial arbitration into the realm of public law, there is in principle no imperative reason that would justify such an attachment to party autonomy.

The ICS clearly attempts to remove party-appointed adjudicators from the institutional architecture of ISDS, but it achieves this only to a limited degree. At the same time as the investor is effectively removed from the adjudicator selection process, the respondent state acquires more influence. This is not in itself

¹³⁵¹ For a discussion, see *supra* Chapter 3.2.2.

¹³⁵² e.g. Brower and Schill (2009), *op cit.*, 494; James H. Carter, 'The Culture of Arbitration and the Defence of Arbitral Legitimacy' in David D. Caron, *et al.* (eds), *Practicing virtue: inside international arbitration* (Oxford University Press: 2015) 97-105; Giorgetti (2013), *op cit.*, 462-74.

¹³⁵³ Eduardo Zuleta, 'The challenges of creating a standing international investment court' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the investor-state dispute settlement system: Journeys for the 21st century* (Brill Nijhoff: 2015) 403-23, 421.

¹³⁵⁴ For an overview over the normative foundations of the principle of party autonomy in international private law, see Alex Mills, *Party autonomy in private international law* (Cambridge University Press: 2018) 66 *et seq.*

¹³⁵⁵ Alexis Mourre, 'Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration', *Kluwer Arbitration Blog* <accessed at <http://arbitrationblog.kluwerarbitration.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/>>.

¹³⁵⁶ Mills (2018), *op cit.*, 71.

contentious. Indeed, a move away from arbitration and towards a judicial structure where adjudicators are appointed by the state brings about the descent of party autonomy.¹³⁵⁷ In the context of the ICS, however, remains a two-fold problem.

On the one hand, the nomination of ICS members guarantees the respondent state a near-direct influence over the composition of individual divisions. This is because the principle of national affiliation that so profoundly characterizes the ICS requires that one of the three members on the Tribunal and Appeal Tribunal division is always affiliated with the respondent state. Although, the removal of investors from the adjudicator selection process responds to criticism regarding the influence of investors over the dispute settlement process, it cannot alleviate the underlying concern. At its core, the criticism against party appointments reflects a belief that an investment arbitrator will cater for the interests of the party that appointed her.¹³⁵⁸ There remains, therefore, an inherent risk that ICS members could unduly favour the interests of the state. It is helpful to recall at this point that in ICSID neither the state nor the investor has an influence over the appointment of the *ad hoc* annulment Committee, this is the prerogative of the Chairman of the ICSID Administrative Council.¹³⁵⁹ The ICS, on the other hand, restores indirect state control over the composition of Appeal Tribunal divisions.

On the other hand, the nomination of ICS members is exposed to political interests in two respects. First, the identification of potential ICS members at Union level is by its very nature impenetrable. There is little chance that the public will gain insight into how candidates were selected and who was considered. Of course, before submitting their proposals for nomination in the respective trade committees, the Commission might have to acquire a Council decision that itself will be accessible for the public. Yet, the selection process is likely to be subject to informal processes that does not require parliamentary involvement. Second, the exception of the EU-Singapore IPA, which incorporates a system of direct nomination of national members,¹³⁶⁰ the contracting parties will generally have to reach a compromise regarding their national ICS members in the trade committee.¹³⁶¹ The Commission, therefore, has to negotiate with its trading partners in order to have its nominations appointed to the ICS. Moreover, a political negotiation is the standard for third-country national members in all ICS formations. This political negotiation is further disguised through the (yet) uncertain decision-making process in the intergovernmental committee.

It cannot simply be assumed that the Union's nominations to the ICS would exclusively represent defensive interests, but neither can the representation of the respondent states' interests—which are dominant in a state-oriented appointment

¹³⁵⁷ Zuleta (2015), *op cit.*, 421.

¹³⁵⁸ Zuleta (2015), *op cit.*, 421.

¹³⁵⁹ Article 52(3) ICSID.

¹³⁶⁰ For a discussion, see *supra* Chapter 4.2.1.1.

¹³⁶¹ For a discussion, see *supra* Chapter 4.2.5.1.

process of international adjudicators such as the one established with the ICS—be denied.¹³⁶² And yet, the selection of ICS members is not purely an aspect of ‘foreign policy’, and there is therefore no convincing reason that it should be confined to the prerogative of the executive that largely escapes parliamentary control.¹³⁶³ Unless it is assured that the selection process is transparent, deliberative and participatory at both levels (i.e. the identification of potential candidates as well as their appointment through the trade committee), the nomination of ICS members could fall prey to political interests and lobbying.¹³⁶⁴ The ICS is thereby likely to be perceived as merely protecting the interest of the state, that have a material interest in the outcome of the case. It is not, in other words, an organ that is acting for the protection of a universal order, responsive to concerns that transcend the narrow relationship of the disputing parties.¹³⁶⁵ From this perspective it is somewhat surprising that the ICS has abandoned a system of party appointed adjudicators, only to replace it with an absolute dominance of the executive.

Brower and Rosenberg furthermore defend party autonomy as an essential element of the perceived legitimacy of the arbitration system.¹³⁶⁶ The authors criticize pre-established lists of arbitrators as creating an “artificial barrier to entry” for prospective candidates.¹³⁶⁷ This concern is somewhat ironic considering the empirical evidence that establishes that the existing entry barriers to become an ICSID arbitrator are already formidable.¹³⁶⁸ It is true, perhaps, that party-appointments facilitate the international competition between arbitrators. However, whereas some argue that this competition reinforces rather than diminishes the legitimacy of ISDS,¹³⁶⁹ it was already discussed earlier in this study that the reputational investment of arbitrators leading to this competition is heavily criticised, and that the group of investment arbitrators as an epistemic community is impenetrable and self-serving.¹³⁷⁰ In fact, despite creating an entry barrier in the form of a permanent roster of adjudicators, the ICS incentivises the nomination of adjudicators with a different professional background and, thus, contributes to greater diversity in the field of investment arbitration.

In sum, the ICS responds to the criticism voiced against the influence of private investors over the selection of adjudicators by removing the investor’s influence and markedly enhancing the influence of the respondent state.

¹³⁶² Mackenzie and Sands (2003), *op cit.*, 278.

¹³⁶³ von Bogdandy and Venzke (2014), *op cit.*, 168.

¹³⁶⁴ Alvarez Zárate (2018), *op cit.*, 2785; Howse (2017), *op cit.*, 225.

¹³⁶⁵ von Bogdandy and Venzke (2014), *op cit.*, 171-72.

¹³⁶⁶ Brower and Rosenberg (2013), *op cit.*, 13-14.

¹³⁶⁷ Brower and Rosenberg (2013), *op cit.*, 21-2.

¹³⁶⁸ Puig (2014), *op cit.*, 407; Tom Ginsburg, ‘The culture of arbitration’ (2003) 36(4) *Vanderbilt Journal of Transnational Law* 1335-46, 1344.

¹³⁶⁹ Carter (2015), *op cit.*, 102-03.

¹³⁷⁰ For a discussion, see *supra* Chapter 3.3.1.

8.2.3 *The independent judiciary*

In order to respond to criticism over the impartial and biased investment arbitrator, the ICS would have to address, on the one hand, the method of selection of arbitrators to individual disputes, and, on the other hand, the tenure of adjudicators and their remuneration. In literature, these factors have been identified as particular indicators for institutional and procedural legitimacy of adjudicative bodies.¹³⁷¹ This is why it has been argued that independence and impartiality is particularly poorly institutionalized in arbitration proceedings that are owned entirely by the parties.¹³⁷²

Generally speaking, ICS members are selected to hear an investment dispute by the President of, respectively, the Tribunal or Appeal Tribunal “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members to serve”, thus, emulating the WTO AB.¹³⁷³ Be that as it may, the preceding section already alluded to the effect that the principle of national affiliation has on the influence of the respondent state over the composition of individual divisions. It should for present purposes be observed that the ICSID Convention prevents the nomination of arbitrators that share the nationality of the disputing parties.¹³⁷⁴ Similarly, the UNCITRAL arbitration rules firmly discourage the appointing authority to nominate nationals of either disputing party.¹³⁷⁵ The ICS, however, explicitly encourages the national affiliation of adjudicators. It was proposed that an ICSID-type nationality requirement could have unduly limited the pool of potential ICS members.¹³⁷⁶ The participation of the Union in the ICS would indeed exclude nationals of all 28 Member States from being appointed to the ICS. Yet, the ICS does not simply tolerate nationals of *inter alia* the respondent state from sitting as ICS members, but establishes an affiliation with both contracting states to the IIA. Consequently, although the method by which ICS members are assigned to Tribunal and Appeal Tribunal divisions purports to remove both disputing parties from exercising influence, the indirect representation of the respondent state on the division fails to alleviate concerns over the ability of ICS members to deliberate and adjudicate without influence from national governments.

¹³⁷¹ von Bogdandy and Venzke (2014), *op cit.*, 161; Gus Van Harten, ‘The European Commission and UNCTAD reform agendas: Do they ensure independence, openness, and fairness in investor-state arbitration?’ in Steffen Hindelang and Markus Krajewski (eds), *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (Oxford University Press: 2016) 128-41; Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter, ‘Legalized dispute resolution: Interstate and transnational’ (2000) 54(3) *International Organization* 457-88, 460.

¹³⁷² von Bogdandy and Venzke (2014), *op cit.*, 163.

¹³⁷³ For a discussion, see *supra* Chapter 4.2.2.

¹³⁷⁴ Puig (2014), *op cit.*

¹³⁷⁵ Giorgetti (2013), *op cit.*, 450.

¹³⁷⁶ Baetens (2017), *op cit.*, 448.

With respect to the tenure of members, it is often the prospect of re-election that taints the impartiality of an individual adjudicator.¹³⁷⁷ The highly politicized appointment process in combination with relatively short length of tenure compared with national judges raises concerns as to “whether individual judges are influenced by the need to secure re-election, particularly toward the end of their term.”¹³⁷⁸ It should also be observed that ICS members are appointed on a part-time basis until the trade committee exercises its powers to convert appointments into full-time positions.¹³⁷⁹ Although the appointment of part-time members is sensible in light of the inappreciable future workload, a mixture of part-time and *ad litem* members with a consistent body of full-time members as is the practice in many other international courts and tribunals¹³⁸⁰ could increase the perception of impartiality of the ICS overall. This is the case particularly considering that full time positions restrain ICS members from engaging in any other gainful activity.

Another important indicator for the impartiality of adjudicators is the size and structure of fees. Regarding the retainer fee it has been suggested that the initial TTIP proposal was insufficient to guarantee the independence of the ICS judges.¹³⁸¹ This is particularly the case for the Tribunal members, that are paid only a fraction of the equivalent of the WTO AB member. None of the ICS formations currently specifies the retainer fee but leaves this decision to be taken by the trade committee. Yet it is worth pointing out that it is indeed doubtful whether 2,000€ retainer fee could guarantee the financial independence of ICS Tribunal members. It must be acknowledged that the retainer fee and daily fees are paid by the Contracting Parties jointly into an account managed by the ICSID Secretariat.¹³⁸² In case one Party fails to pay the fees, the other Party may elect to cover while the arrears remain payable with appropriate interests.¹³⁸³ This approach isolates the remuneration of ICS members from economic incentives in a particular outcome of the dispute.¹³⁸⁴ ICS

¹³⁷⁷ Howse (2017), *op cit.*, 226; Zuleta (2015), *op cit.*, 410.

¹³⁷⁸ Mackenzie and Sands (2003), *op cit.*, 279.

¹³⁷⁹ For a discussion, see *supra* Chapter 4.2.3.

¹³⁸⁰ Mackenzie and Sands (2003), *op cit.*

¹³⁸¹ Deutscher Richterbund, 'Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015' (Nr. 04/16), February 2016 accessible at <https://www.bmw.de/Redaktion/DE/Downloads/S-T/stellungnahme-deutscher-richterbund-zur-errichtung-eines-investitionsgerichts-fuer-ttip.pdf?__blob=publicationFile&v=6>.

¹³⁸² Notably, the EU-Vietnam IPA and the proposed EU-Mexico FTA apportion the costs of the ICS between the Contracting Parties in accordance to their level of economic development, see Articles 3.38(15) and 3.39(15) EU-Vietnam IPA, and Articles 11(13) and 12(13) EU-Mexico FTA (Investment Dispute Settlement).

¹³⁸³ Article 8.27(13) CETA; Articles 3.9(13) and 3.10(12) EU-Singapore IPA; Articles 3.38(15) and 3.39(15) EU-Vietnam IPA; Articles 11(13) and 12(13) EU-Mexico FTA (Investment Dispute Settlement).

¹³⁸⁴ Zuleta (2015), *op cit.*, 409.

members are, in other words, publicly funded. Their remuneration is guaranteed whether or not the ICS is active.¹³⁸⁵

The professional qualifications for Tribunal and Appeal Tribunal members could lead to a diversification in the pool of adjudicators of investment disputes. Although investment arbitrators are often academics of high repute with significant experience as practicing lawyers in international law and are, thus, well within the range of eligible candidates,¹³⁸⁶ the prioritization of general knowledge and experience in public international law over specific knowledge in investment law or even investment arbitration practice favours a different epistemic community. The effect of these professional qualifications, the more limited economic prospects, and restrictive ethical requirements that target the so-called phenomenon of ‘double hatting’ appear to cater for academics and retired judges as the stereotypical ICS member.¹³⁸⁷ Although this might improve the diversity of adjudicators, it also risks alienating investors as prospective users. For the success of the ICS it is therefore important to strike a balance between nominating members with a personal and professional background that convinces investors of that their dispute is heard by adjudicators with the requisite knowledge and expertise.¹³⁸⁸

Indeed, the ICS raises the bar with respect to ethical requirements. Although the idea that legitimacy could be improved through the mere proclamation of ethical standards has been criticised as a ‘mirage’ for not removing informal institutional structures of self-regulation,¹³⁸⁹ clear guidelines and conflict of interest rules certainly improve the social legitimacy of the ICS. The approach to conflicts of interest is similar to traditional practice in investment arbitration, i.e. through the imposition of strict disclosure requirements.¹³⁹⁰ CETA incorporates in this respect the IBA Guidelines, which establishes an objective appearance-based test. This is designed to guarantee that the adjudicator is not only free of actual conflicts of interests, but also covers situations of mere appearances of conflict. The agreements with Singapore, Vietnam and Mexico provide their own, significantly less detailed, code of conduct that similarly addresses actual impropriety or bias as well as the mere appearance thereof.¹³⁹¹ Although the effectiveness of the IBA Guidelines has come under criticism as being insufficient in the context of investor-state

¹³⁸⁵ Commission, ‘Impact assessment on multilateral reform of investment dispute resolution’ (2017), *op cit.*, 37.

¹³⁸⁶ Giorgetti (2013), *op cit.*, 454.

¹³⁸⁷ For a discussion, see *supra* Chapter 4.2.1.2.

¹³⁸⁸ Omar E. García-Bolívar, ‘Permanent investment tribunals: The momentum is building up’ in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the investor-state dispute settlement system: Journeys for the 21st century* (Brill Nijhoff: 2015) 394-402, 397.

¹³⁸⁹ Jan Paulsson and J. Paulsson, *The Idea of Arbitration* (Oxford University Press: 2013)

¹³⁹⁰ Giorgetti (2013), *op cit.*, 453.

¹³⁹¹ For a discussion, see *supra* Chapter 4.2.1.3.

arbitration,¹³⁹² it is important to evaluate these standards in light of the procedures for challenging ICS members. As opposed to common practice in ICSID proceedings, where challenges against an arbitrator are decided by the remaining fellow arbitrators on the panel,¹³⁹³ challenges against an ICS member for reasons of unethical behaviour are decided by the President of respectively the Tribunal or Appeal Tribunal.¹³⁹⁴ States retain some influence over the process as the trade committees are empowered to relieve members entirely from their appointment.¹³⁹⁵ This provides for a robust mechanism for challenges against ICS members that further alleviates presumptions over bias and partiality of ICS members.¹³⁹⁶

Upon appointment, members must also refrain from acting in any other conflicting position, be that as counsel, arbitrator, party-appointed expert, or witness in any other dispute.¹³⁹⁷ Notably, this does not preclude ICS members from acting as arbitrators in similar proceedings. This is of course important for the organization of the ICS where, depending on the case load, members might find themselves adjudicating several disputes at the same time. It may, however, also open the possibility that ICS members sit as arbitrators on investor-state arbitration panels for as long as their appointment to the ICS has not been transformed into full-time employment. Whereas ethical constraints and professional qualifications of prospective ICS members display a general predisposition towards academics and retired judges, the opportunity to accept future appointments as arbitrators outside of the ICS might incentivise career arbitrators to serve as ICS members. While this is not in itself problematic, it is counterintuitive to the otherwise restrictive approach on to ‘double hatting’.

Indeed, structurally addressing this issue is commendable because in addition to reducing actual conflicts, it also has broader systemic effects on the social legitimacy of the ICS.¹³⁹⁸ Howse describes this systemic risk of ‘double hatting’ as follows:

“An arbitrator may well see a fellow arbitrator or counsel in a case as someone before whom they might appear as counsel in a different case or who might, as counsel, be in a position to recommend their

¹³⁹² Howse observes that in many cases business relationships that could have given rise to perception of conflict were insufficient to challenge investment arbitrators, see Howse (2017), *op cit.*, 228.

¹³⁹³ Article 58 ICSID, under certain circumstances the Chairman of the Administrative Council will adopt a decision.

¹³⁹⁴ Article 3.11(3) EU-Singapore IPA; Article 3.49(3) EU-Vietnam IPA; Article 13(3) EU-Mexico FTA (Investment Dispute Settlement); notably CETA endows the President of the ICJ to hear challenges against sitting ICS members, see Article 8.30(3) CETA.

¹³⁹⁵ For a discussion, see *supra* Chapter 4.2.5.1.

¹³⁹⁶ Titu (2016a), *op cit.*, 14.

¹³⁹⁷ For a discussion, see *supra* Chapter 4.2.1.3.

¹³⁹⁸ Titu (2016a), *op cit.*, 13.

appointment in future cases. In such a system, genuine independence of justice is illusive.¹³⁹⁹

Seen in this light, it is a pity that the ICS does not regulate the appointment of ICS members as arbitrators on several parallel disputes as this might well leave an impression that their adjudicative function is motivated in part by a desire to secure future appointments outside of the ICS.

Lastly, the predisposition of the ICS towards academics does not itself avoid issue-conflicts and the creation of economic incentives. Academics that have expressed firm opinions about legal issue that are relevant to a dispute on which they are serving as adjudicator do not further a perception of objectivity and impartiality. On the contrary an ICS member's preconceived conceptions, albeit expressed in academic fora, may well be subject to challenges for issue-conflicts.¹⁴⁰⁰ Furthermore, as long as ICS members are appointed on a part-time basis, their income from the position as ICS member is depending in part from the allocation of disputes. Though comparably small amounts, an ICS member that is assigned to a division is earning more than an inactive ICS member. The retainer fee that was already discussed at the beginning of this section plays an important role in this respect. The lower the retainer fee, the larger is the relative increase in income by acting on a division, and, as a corollary, the larger the economic incentive to create an environment that motivates investors to initiate disputes before the ICS. Arguably, the ICS further aggravates this *problematique* in as far as it creates economic incentive that are much more lucrative for academics and retired judges who could quite easily increase their regular income manifold by acting as member of an ICS Tribunal or Appeal Tribunal.¹⁴⁰¹

8.2.4 Coherence, consistency and accountability

Predictability is tantamount to ensure the legitimacy of the ICS as it allows participants to anticipate the consequences of their actions.¹⁴⁰² It was in this context suggested that achieving determinacy and coherence would automatically alleviate more specific legitimacy concerns.¹⁴⁰³ A coherent and consistent body of awards is, therefore, instrumental to stabilizing the expectations of investors *vis-à-vis* the ICS, and enabling states to regulate without the risk of facing litigation. The ICS addresses

¹³⁹⁹ Howse (2017), *op cit.*, 228.

¹⁴⁰⁰ Günther J. Horvath and Roberta Berzero, 'Arbitrator and counsel: The double-hat dilemma' (2013) 10(4) *Transnational Dispute Management* 1-19, 2; for a case example, see *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India* [2013], Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña of 30 September 2013, PCA Case No. 2013-09, para. 64.

¹⁴⁰¹ Waibel and Wu (2017), *op cit.*, 6.

¹⁴⁰² Zuleta (2015), *op cit.*, 413-14; Goldhaber (2004), *op cit.*

¹⁴⁰³ Franck (2005), *op cit.*, 1586.

these concerns with the establishment of an appellate mechanism, which represents a reoccurring theme in literature on ISDS reform.¹⁴⁰⁴

The establishment of an Appeal Tribunal is indeed likely to improve the consistency of awards, provided that it does not simply complement the Tribunal's award with an additional award. The institutional design of the ICS leaves risk for the Appeal Tribunal to engage in *de novo* review. On the one hand, the scope of review extends to factual issues, which might invite the Appeal Tribunal to conduct a completely new review.¹⁴⁰⁵ On the other hand, the risk of two complementary awards is exacerbated by an inconsistent use of the power to remand. There is no stipulation as to the power of the Appeal Tribunal to refer matters back to the Tribunal in CETA or the proposed EU-Mexico FTA, whereas the EU-Singapore Appeal Tribunal refers all matters back. An appeal concerning the appreciation of relevant facts that is conducted without remand, will result in two separate awards.¹⁴⁰⁶ The EU-Singapore formation therefore reflects an integrated approach where all final awards are issued by the Tribunal, safeguarding the integrity of the proceedings. That is to say that under the where both awards are adopted by two different tribunals. However, the power of remand needs to be balanced against the delay and increase in costs of proceedings it may cause as the initial ICS Tribunal division needs to be re-established and additional proceedings need to be initiated.¹⁴⁰⁷ The EU-Vietnam ICS, therefore, appears to reflect a cost-benefit compromise. By furnishing the EU-Vietnam Appeal Tribunal with extensive powers to complete the legal analysis, the end of the appeals process produces an enforceable award.

Neither CETA, nor the IPAs with Singapore and Vietnam, or the proposed EU-Mexico FTA suggest that ICS awards create binding precedent on future divisions. On the contrary, awards are described as binding between the disputing parties and in respect of that particular case.¹⁴⁰⁸ This formulation suggests to narrow the effect of ICS awards to the particular dispute and the parties involved. The Appeal Tribunal will nonetheless contribute to the overall legitimacy of the ICS in as far as

¹⁴⁰⁴ Gabriel Bottini, 'Reform of the investor-state arbitration regime: The appeal proposal' in *Reshaping the investor-state dispute settlement system: Journeys for the 21st century* (Brill Nijhoff: 2015) 455-73, 472; Franck (2005), *op cit.*, 1606; David A. Gantz, 'An appellate mechanism for review of arbitral decisions in investor-state disputes: Prospects and challenges' (2006) 39(1) *Vanderbilt Journal of Transnational Law* 39-76, 54-57; Howse (2017), *op cit.*, 210; Mauro Rubino Sammartano, 'The fall of a taboo: review of the merits of an award by an appellate arbitration panel and a proposal for an international appellate court' (2003) 20(4) *Journal of International Arbitration* 387-92, 392; yet the added value an an appeals mechanism is not generally accepted, see e.g. Ten Cate (2012), *op cit.*, 1201-03.

¹⁴⁰⁵ For similar problems in the context of the WTO AB, see *infra* Chapter 3.2.2.

¹⁴⁰⁶ Howse (2017), *op cit.*, 234-35.

¹⁴⁰⁷ Baetens (2017), *op cit.*, 442.

¹⁴⁰⁸ Article 8.41(1) CETA; Article 3.22(1) EU-Singapore IPA; Article 3.57(1)(a) EU-Vietnam IPA; Article 31(1) EU-Mexico FTA (Investment Dispute Settlement).

it strives to treat like cases alike, the Appeal Tribunal has the potential to enhance coherence and consistency through the creation of a *jurisprudence constante*.¹⁴⁰⁹

It should be acknowledged at this point that the bilateral nature of the ICS poses a risk for further fragmentation as it institutionalizes diverging interpretations of similar standards of investment protection, and conflicting applications of IIAs in similar cases.¹⁴¹⁰ This risk should not, however, be exaggerated. Considering that EU IIAs geographically resemble more a regional than bilateral agreement, every ICS Appeal Tribunal is liable to increase coherence across a significant number of otherwise bilateral relationships. This is also true for the interpretation of the grounds for annulment under ICSID, which are incorporated into the ICS appeals process. It was argued that this could perpetuate already diverging interpretations rendered by ICSID annulment committees.¹⁴¹¹ This concern is, of course, valid, albeit but another expression of the general limitation of the ICS appeals mechanism, i.e. that it is unable to contribute to coherence and consistency beyond the remits of an individual agreement.

Lastly, the lack of a permanent secretariat must be criticized. The arbitration of investment disputes often involves the support of a secretary that is deeply involved in the deliberations and drafting of procedural orders and even awards. That secretary is not part of the ICSID Secretariat, which limits its support to purely administrative matters, but is chosen by the arbitrators directly. Leaning on the ICSID Secretariat, therefore, the ICS divisions will enjoy no legal support.¹⁴¹² There is, however, a significant advantage with the establishment of a permanent secretariat that is, similar to the Secretariat of the WTO AB, involved at all stages of the dispute resolution process, i.e. the creation of an institutional memory. Through its involvement in legal research, procedural support to the Tribunal and Appeal Tribunal, and the review of the quality of decisions, a permanent secretariat would positively impact on the coherence and consistency of ICS awards by way of ensuring continuity.¹⁴¹³ This is all the more important in light of the short tenure periods of ICS members on some of the ICS formations, and their replacement as a group rather than progressively.¹⁴¹⁴ That being said, the costs associated with the creation of a permanent secretariat must be proportionate in light of the case load of the ICS formation.¹⁴¹⁵

¹⁴⁰⁹ Howse (2017), *op cit.*, 233.

¹⁴¹⁰ For the effect of this on the process of multilateral reform, see *infra* Chapter 8.4.

¹⁴¹¹ Baetens (2017), *op cit.*, 444.

¹⁴¹² See *supra* Chapter 4.2.4.

¹⁴¹³ Howse (2017), *op cit.*, 227-28.

¹⁴¹⁴ See *supra* Chapter 4.2.1.1.

¹⁴¹⁵ Zuleta (2015), *op cit.*, 418; Yoshi Kodama, 'Dispute settlement under the draft Multilateral Agreement on Investment: the quest for an effective investment dispute settlement mechanism and its failure' (1999) 16(3) *Journal of International Arbitration* 45-88, 60.

8.2.5 *Cost of proceedings*

It is clear that, as a general rule, the losing party will bear the cost of proceedings.¹⁴¹⁶ Although the ICS does not further specify this, it is prudent to assume that this does not include the Tribunal and Appeal Tribunal fees, considering that the ICS is in principle funded jointly by the contracting parties.¹⁴¹⁷ The Commission has also pointed out that the policy choices reflected in the ICS safeguard that investors are not discouraged from initiating disputes.¹⁴¹⁸ Some confusion is created, however, as the text of the ICS differentiates between the costs of proceedings and other reasonable costs, including legal representation and assistance. This drafting suggests that, indeed, all costs incurred in the course of the proceedings are born by the losing party. While this would not include the retainer fee, which is payable irrespective of whether or not the ICS is active, it certainly includes the daily fees and, where applicable, the additional fees payable to the President and Vice President of the Tribunal and Appeal Tribunal.¹⁴¹⁹

Another, more nuanced, view would be to suggest that while fees are excluded from the cost of the proceedings born by the losing party, it includes all additional costs incurred by the Tribunal. This view is supported by a footnote to the relevant provision in the EU-Vietnam IPA, which clarifies that ‘costs of the proceedings’ shall include “(a) the reasonable costs of expert advice and of other assistance required by the Tribunal, and (b) the reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Tribunal.”¹⁴²⁰ The differentiation between cost of the proceedings and other reasonable costs should be read in the light of the trade committees’ power to cap the maximum amount for legal representation and assistance through supplemental rules on costs. Arguably, this would not include costs incurred by the Tribunal or Appeal Tribunal and, thus, relieves the ICS members from economic pressure in the exercise of their adjudicative function.

On average, the ICS attempts to achieve a better allocation and minimization of costs, which benefits above all respondent states. Much like traditional investor-state arbitration, the ICS, extends generalized consent to all investors, thus, relieving the respondent state of any control over the initiation of disputes. A system where each party bears its own costs places responding states at an inherent disadvantage, because they incur considerable costs for legal representation and assistance without

¹⁴¹⁶ Article 8.39(5) CETA; Articles 3.21(1) and (2) EU-Singapore IPA; Article 3.53(4) EU-Vietnam IPA; Article 29(5) EU-Mexico FTA (Investment Dispute Settlement).

¹⁴¹⁷ Titi (2016a), *op cit.*, 11.

¹⁴¹⁸ Commission, 'Impact assessment on multilateral reform of investment dispute resolution' (2017), *op cit.*, 37.

¹⁴¹⁹ See *supra* Chapter 4.2.1.4.

¹⁴²⁰ Footnote to Article 3.53(4) EU-Vietnam IPA.

the ability to assess their financial exposure beforehand.¹⁴²¹ Under the ICS, the respondent state will only face costs if the award is in favour of the investor. Additionally, the costs incurred in such a case are limited, because legal fees are likely to be capped and the resources traditionally spent on researching arbitrator profiles do not accrue in a system where adjudicators are appointed.¹⁴²² This should discourage investors from initiating frivolous claims.¹⁴²³ Yet, the ‘loser pays’ principle only operates properly once the Appeal Tribunal yields the expected benefits, leading to coherence and consistency in ICS awards.¹⁴²⁴ In the short and medium term, neither investors nor responding states will be able to evaluate the financial risk of engaging in ICS proceedings in order to adjust their behaviour accordingly.

Another important point in this respect is that the EU-Vietnam and proposed EU-Mexico ICS Tribunal may order the investor to provide security for costs,¹⁴²⁵ whereas this is generally required before an appeal is lodged.¹⁴²⁶ Like the ‘loser pays’ principle, this complements safeguards against frivolous claims, which are discussed in more detail below. It has, however, also been argued that cost order might have the effect of discouraging some respondent states from appealing ICS Tribunal awards.¹⁴²⁷

8.2.6 *Other aspect: parallel proceedings, frivolous claims and transparency*

The ICS clearly addresses the issue of parallel claims. Accordingly, the investor is under all ICS formations required to withdraw all pending proceedings concerning the disputed treatment, and declare abstention from any future legal action. The ICS cannot, therefore, be used as an addition to domestic proceedings but merely as a procedural alternative. Moreover, the ICS Tribunal has the power to reject claims that are manifestly without legal merit,¹⁴²⁸ and claims unfounded as a matter of law.¹⁴²⁹ In combination with the ‘loser pays’ principle and the imposition of cost orders this provides an important and effective mechanism to swiftly reject frivolous

¹⁴²¹ Susan D. Franck, ‘Rationalizing costs in investment treaty arbitration’ (2011) 88(4) *Washington University Law Review* 769-852, 788.

¹⁴²² UNCTAD, ‘Reform of investor-state dispute settlement: in search of a roadmap’ (2013), *op cit.*

¹⁴²³ Titii (2016a), *op cit.*

¹⁴²⁴ Franck (2011), *op cit.*, 847.

¹⁴²⁵ Article 3.48 EU-Vietnam IPA; Article 22 EU-Mexico FTA (Investment Dispute Settlement).

¹⁴²⁶ Article 3.19(5) EU-Singapore IPA; 3.54(6) EU-Vietnam IPA; notably an order for security for costs is optional under the proposed EU-Mexico FTA, see Article 30(4) EU-Mexico FTA (Investment Dispute Settlement).

¹⁴²⁷ Baetens (2017), *op cit.*, 454.

¹⁴²⁸ Article 8.32 CETA; Article 3.14 EU-Singapore IPA; Article 3.44(1) EU-Vietnam IPA; Article 17 EU-Mexico FTA (Investment Dispute Settlement).

¹⁴²⁹ Article 8.33 CETA; Article 3.15 EU-Singapore IPA; Article 3.45 EU-Vietnam IPA; Article 18 EU-Mexico FTA (Investment Dispute Settlement).

claims, and protect respondent states from unnecessary costs resulting from unmeritorious claims.¹⁴³⁰ Similarly, an expedited procedure is available upon appeal, where the appeal is “manifestly unfounded”.¹⁴³¹ This protects both disputing parties and enhances the equality of arms in the proceedings before the ICS.

With respect to transparency it must be acknowledged that the ICS establishes a high standard. It generally endorses the UNCITRAL Transparency Rules and complements these with an extended list of documents to be published.¹⁴³² The general requirement that hearings shall be open to the public is to be welcomed, although, given the permanent nature of the ICS, it is unclear why the appropriate logistical arrangements should be decided by the Tribunal in consultation with the disputing parties. It has furthermore been suggested that an ‘open door’ policy would be insufficient to satisfy the civil society demands for procedural transparency as the cost of traveling would disperse interested stakeholders from attending the hearings. Instead, online broadcasting of hearings should be facilitated.¹⁴³³

8.2.7 *Authoritative interpretations*

Customary international law furnishes states with certain means to influence the interpretation of agreements to which they are a contracting party.¹⁴³⁴ Accordingly, Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties stipulate that subsequent agreements and subsequent practice need to be taken into account in the interpretation of an international agreement. State parties are, therefore, at liberty to agree on the interpretation of certain aspects of the investment agreement without being exposed to the political risk that is inherent in constitutional ratification procedures that formal amendment or modification of the agreement could entail.¹⁴³⁵ Both, subsequent agreement and subsequent practice are based on

¹⁴³⁰ Although Franck is critical about the imposition of access barriers to ISDS, she concedes that cost orders can be an effective deterrent to frivolous claims, see Franck (2005), *op cit.*, 1592

¹⁴³¹ Article 3.19(2) EU-Singapore IPA; Article 3.54(2) EU-Vietnam IPA; Article 30(2) EU-Mexico FTA (Investment Dispute Settlement).

¹⁴³² Articles 8.36(1) and (4) CETA; Articles 3.46(1), (2) and (4) EU-Vietnam IPA; Article 19(10) EU-Mexico FTA (Investment Dispute Settlement); notably the EU-Singapore makes no reference to the UNCITRAL Transparency Rules although the UNCITRAL Secretariat is to act as repository for all documents, see Article 5 of Annex 8 to the EU-Singapore IPA.

¹⁴³³ Howse (2017), *op cit.*, 235.

¹⁴³⁴ Thomas W. Wälde, 'Interpreting investment treaties: experiences and examples' in Christina Binder, et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press: 2009) 724-81, 765.

¹⁴³⁵ Kirsten Schmalenbach and Oliver Dörr, *Vienna convention on the law of treaties a commentary* (Springer: 2012) 554-55; for an example of subsequent agreement through the exchange of diplomatic notes, see Johnson and Razbaeva, *op cit.*

objective proof of the shared understanding amongst the contracting parties with respect to the meaning of certain aspects of the agreement.¹⁴³⁶

It is not uncommon to formalize this procedure in international agreement,¹⁴³⁷ including by delegation to a treaty body.¹⁴³⁸ In the case of the ICS this was achieved by way of delegating the authority to adopt interpretations of the IIA to the respective trade committee.¹⁴³⁹ In the context of human rights treaties, Mechlem observed that the delegation of interpretative powers to expert bodies protects against political opportunism and has, therefore, a depoliticizing effect.¹⁴⁴⁰ Indeed, one may presume that the further away from the political center of bilateral relations the power to adopt authoritative interpretations is exercised, the less influence will political interests exert over the interpretation.¹⁴⁴¹ On first sight, the narrative of 'depoliticization' is reminiscent of the international investment law discourse, where depoliticization is ideologically rooted in the emergence of ISDS as a principal element of modern IIAs.¹⁴⁴² This raises the question whether the trade committee's power to adopt authoritative interpretations should be perceived of as an attempt to increase the legitimacy of the ICS.

Under CETA the technical work lies with the specialized sub-committee, while the decision-making authority rests with the trade committee. Under both the EU-Singapore IPA and the EU-Vietnam IPA the power to adopt interpretations falls entirely on the trade committee. In all its formations, therefore, the adoption of authoritative interpretations is a result of the exercise of state control. The ICS, thus,

¹⁴³⁶ Johnson and Razbaeva, *op cit*; on the role of human rights bodies as 'producers' of subsequent practice, see Kerstin Mechlem, 'Treaty bodies and the interpretation of human rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905-48, 920-21; for a comprehensive overview, see e.g. Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9(3) *The Law & Practice of International Courts and Tribunals* 443-494; Irina Buga, *Modification of treaties by subsequent practice* (Oxford University Press: 2018) 53 *et seq*; for a discussion of authoritative interpretations in the context of the IMF, see Eric J Pan, 'Authoritative interpretation of agreements: Developing more responsive international administrative regimes' (1997) 38(2) *Harvard International Law Journal* 503-35; for a discussion of authoritative interpretations in the WTO context, see Claus-Dieter Ehlermann and Lothar Ehring, 'The authoritative interpretation under Article IX:2 of the Agreement establishing the World Trade Organization: Current law, practice and possible improvements' (2005) 8(4) *Journal of International Economic Law* 803-24.

¹⁴³⁷ e.g. Article 21.1 and 21.2(e) US-Australia FTA of 2005; Article 832 Canada-Colombia FTA of 2011; Article 30(3) US Model BIT of 2012.

¹⁴³⁸ e.g. Article 1131 NAFTA; Article 10.23 CAFTA-DR.

¹⁴³⁹ Articles 8.30(3) in combination with 8.44(3)(a) and 26.1(5)(e) CETA; Articles 3.13(3) and 4.1(4)(f) EU-Singapore IPA; Articles 3.42(5) and 4.1(4)(c) EU-Vietnam IPA.

¹⁴⁴⁰ Mechlem (2009), *op cit*, 912.

¹⁴⁴¹ On the delegation of interpretive authority to joint administrative commissions for the purpose of enhancing procedural legitimacy, see Anne van Aaken, 'Delegating Interpretative Authority in Investment Treaties: the Case of Joint Administrative Commissions' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff: 2015) 21-47, 33.

¹⁴⁴² For a discussion, see *supra* Chapters 2.2.2 and 2.3.

employs joint interpretations as instruments that facilitate the development of the agreement through politically negotiated solutions.¹⁴⁴³ Considering that the depoliticizing or, put differently, legitimizing effect of authoritative interpretations only occurs where interpretive authority is delegated away from political actors, this is clearly not the case for the ICS. Likewise, efficiency benefits accompanied with the delegation of decision-making power to treaty bodies is also premised on a limited, rather than elevated role of the State. Although decision-making in the trade committee circumvents lengthy and costly political negotiations in the course of formal amendment and modification of the IIA, the exercise of interpretive authority by plenary bodies nonetheless requires a compromise in the emergence of a political consensus.¹⁴⁴⁴

Subsequent agreement and subsequent practice have in literature been described as forms of authentic interpretation, “a particularly reliable means of interpretation, endowed with binding force and a potentially higher status in the interpretative process”.¹⁴⁴⁵ This is also true for authoritative interpretations adopted by the trade committee, the binding nature of which is explicitly stipulated in the IIA.¹⁴⁴⁶ This is not to say, however, that an interpretation of the trade committee has the effect of determining the outcome in a particular case. Interpretation, by its very nature, cannot affect the constitutive instruments in the same manner as modification or amendment, but merely narrows the range of acceptable interpretations.¹⁴⁴⁷ This view is also supported by the conclusions of the International Law Commission, which confirmed that joint interpretive declarations, despite being authoritative, do not outrank other means of interpretation under the VCLT.¹⁴⁴⁸ In other words, an authoritative interpretation redefines the boundaries of interpretive flexibility within which the ICS Tribunal and Appeal Tribunal exercise their jurisdiction. The experience under NAFTA, where the joint interpretive declaration of the Free Trade

¹⁴⁴³ Pan (1997), *op cit.*, 518.

¹⁴⁴⁴ Indeed, Pan recognizes that plenary bodies charged with authoritative interpretations may avoid formalized political processes of treaty amendment and modification, but would not eliminate the political barrier of having to build consensus, see Pan (1997), *op cit.*, 527.

¹⁴⁴⁵ Buga (2018), *op cit.*, 53.

¹⁴⁴⁶ Articles 8.30(3) in combination with 8.44(3)(a) and 26.1(5)(e) CETA; Articles 16(4) in combination with 34(2)(b) Investment Chapter, Articles 3.13(3) and 4.1(4)(f) EU-Singapore IPA; Articles 3.42(5) and 4.1(4)(c) EU-Vietnam IPA.

¹⁴⁴⁷ On the line between interpretation and amendment, see Michael Ewing-Chow and Junianto J. Losari, 'Which is to be the master? Extra-arbitral interpretive procedures for IIAs' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff: 2015) 91-114, 107-12.

¹⁴⁴⁸ United Nations, 'Report of the International Law Commission on its sixty-fifth session' (UN Doc. A/68/10), 6 May to 7 June 2013 and from 8 July to 9 August 2013 .

Commission is accepted as one of the relevant aspects in interpreting the FET standard, further supports this position.¹⁴⁴⁹

In light of the above, the trade committee emerges as a platform to exercise political control over the IIA, rather than an attempt to enhance the legitimacy and efficiency of the ICS. It provides the contracting parties with a means to narrow the scope of plausible interpretations in order to reflect as well as possible the development of political preference over time. Although this could easily be perceived of as an improper tactic to escape liability for the violation of rights that were designed for the protection of private individuals,¹⁴⁵⁰ it is first and foremost a policy choice.¹⁴⁵¹ As Crawford observed:

“[T]here is a certain tendency to believe that investors own bilateral investment treaties, not the States parties to them. So, for example, when the NAFTA provides for interpretation of its provisions by a Commission of States parties, this is regarded as somehow an infringement on the inherent rights of investors under the NAFTA. That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question the application of reason as they see fit.”¹⁴⁵²

Whereas the pursuit of political self-interest through the adoption of sovereign-protective interpretation of an IIA is not in principle problematic, the two IPAs with Singapore and Vietnam, and the envisaged EU-Mexico FTA bestow the trade committee with the power to determine the specific date from which that

¹⁴⁴⁹ For the reactions to the FTC's interpretation by investment tribunals, compare the inclusive approach in *ADF Group Inc. v. United States* Award, 9 January 2003, ICSID No. ARB(AF)/00/1, para. 177; *Pope & Talbot Inc. v. The Government of Canada*, Interim Award of 26 June 2000 *op cit.*, paras. 23, 24 and 47; at the heart of the conflicting position is the effect of the interpretation that is perceived as an interpretation by some, and a modification of the agreement by others, for reactions in scholarship see Guillermo A. Alvarez and William W. Park, ‘The new face of investment arbitration: NAFTA chapter 11’ (2003) 28(2) *The Yale Journal of International Law* 365-407, 397-98; Charles H. Brower II, ‘Why the FTC Notes of Interpretation constitute a partial amendment of NAFTA’ (2006) 46(2) *Virginia Journal of International Law* 347-63, 353-55; Todd Weiler, ‘NAFTA investment law in 2001: As the legal order starts to settle, the bureaucrats strike back’ (2002) 36(2) *International Lawyer* 345-53, 347.

¹⁴⁵⁰ Johnson and Razbaeva, *op cit.*, 11; Brower II (2006), *op cit.*, 354; George Nolte, ‘Jurisprudence under special regimes relating to subsequent agreements and subsequent practice’ in George Nolte (ed), *Treaties and subsequent practice* (Oxford University Press: 2013), 237; on the principle of good faith as a limit the interpretive sovereignty over IIAs, see Wälde (2009), *op cit.*, 767.

¹⁴⁵¹ Roberts observes that the exercise of interpretive authority that was explicitly preserved to the contracting parties, as it was the case with the NAFTA FTC, is not a violation of the investor's rights under the IIA, but these rights were qualified from the beginning, see Roberts (2010), *op cit.*, 208.

¹⁴⁵² James Crawford, ‘A consensualist interpretation of Article 31(3) of the Vienna Convention’ in George Nolte (ed), *Treaties and subsequent practice* (Oxford University Press: 2013) 29, 31.

interpretation shall have binding effect.¹⁴⁵³ Exercising this power to influence the outcome of pending disputes would, however, frustrate the investor's legitimate expectations,¹⁴⁵⁴ and violate fundamental procedural guarantees of due process¹⁴⁵⁵ and equality of arms.¹⁴⁵⁶

Consequently, in as far as the power to adopt authoritative interpretations is employed transparently, as an instrument of democratic oversight that holds the ICS accountable and prevent its interpretations from going astray, the trade committee could indeed enhance the legitimacy of the ICS; not least because its influence on determining the meaning of the IIA would contribute consistency. If it is, however, perceived as an instrument to further political goals with unfettered discretion and in disregard of due process, it could quickly erode the legitimacy the ICS a judicial means of dispute settlement.¹⁴⁵⁷

8.2.8 *Interim conclusion*

It emerges from the discussions in this section that the ICS does indeed address many of the features for which traditional investor-state arbitration has come under criticism. Moving to a system of judicial appointment the ICS alleviates perceptions of bias stemming from ties between the adjudicator and the investor, who is entirely removed from the selection process. This represents a marked improvement from investor-state arbitration and should reinvigorate the social legitimacy of the ICS. The independence and impartiality of ICS members is further strengthened by the introduction of tenured positions and a fee structure that stabilizes the appointment of the ICS members and makes them less susceptible to economic incentives in the outcome of a dispute. The imposition of a stringent professional and ethical requirements is likely to attract individuals from a diverse background and but is unlikely to appeal to career arbitrators or arbitration lawyers. This is the result of a combination of factors, including limited economic prospects and restrictions on other gainful activity throughout their term as ICS member.

The establishment of an Appeal Tribunal with far-reaching powers to review the initial award, will also undoubtedly improve the coherence and consistency of dispute settlement by working towards a *jurisprudence constante*. Moreover, the ICS limits the costs of proceedings for the disputing parties and achieves a fair allocation

¹⁴⁵³ Articles 3.13(3) and 4.1(4)(f) EU-Singapore IPA; Article 3.43(5) EU-Vietnam IPA; Article 3.42(5) EU-Mexico FTA (Investment Dispute Settlement).

¹⁴⁵⁴ Roberts (2010), *op cit.*, 208.

¹⁴⁵⁵ Dolzer and Schreuer (2012), *op cit.*, 89-90; Tomoko Ishikawa, 'Keeping interpretation in investment treaty arbitration 'on track': The role of State Parties' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff: 2015) 115-49, 142.

¹⁴⁵⁶ UNCTAD, 'Interpretation of IIAs: What states can do' (IIA Issue Note No. 3, December 2011) accessible at <https://unctad.org/en/Docs/webdiaeia2011d10_en.pdf> 4.

¹⁴⁵⁷ Franck (2005), *op cit.*, 1604-06.

of costs that is born by the losing party. At the same time, the ‘loser pays’ principle and the possibility of cost orders provide an effective deterrent on frivolous claims and unmeritorious claims and appeals. The ICS also imposes a high level of transparency and alleviates the risk of parallel proceedings. Lastly, the power of the trade committee to adopt authoritative interpretations is vital in managing the normative content of IIAs in accordance with the expectations of the contracting parties, and exercise democratic oversight.

Its improvements notwithstanding, the present section also identified a number of shortcomings. The removal of the party autonomy principle, for instance, does not exclude the state from exerting indirect influence over the selection of adjudicators. Even more problematic is the fact that two out of three ICS members are explicitly affiliated with either contracting party to the IIAs. The potential pool of ICS members is also subject to concerns. A system that caters for academics and retired judges, though perhaps changing the model-type adjudicator in investor-state disputes, will not automatically instil the ICS with legitimacy. Academics have in the past been subject to challenges with respect to issue conflicts arising out of preconceived opinions about legal standards, and are not, therefore, naturally without bias. On the contrary, their economic incentive in the system may be more tangible than that of a career arbitrator or commercial lawyer as the relative gains are much larger for an academic or retired national judge. This is the case particularly for as long as the appointment is on a part-time basis and the retainer fee for Tribunal members is at a level that insufficient to guarantee judicial independence.

The benefits of the Appeal Tribunal on the coherence and consistency of ICS awards is furthermore limited by its bilateral nature, which risks perpetuating the existing fragmentation in international investment law because it institutionally entrenches potentially diverging interpretations under different ICS formations. With respect to security for costs, it also remains to be seen whether this will have dissuaded respondent states from appealing awards in complex cases with a high litigious value. The trade committee also risks becoming a platform for political opportunism. The potential to use authoritative interpretations in order to determine the outcome of ongoing disputes undermines the judicial independence of the ICS tribunals, i.e. their ability to adjudicate without governmental interference.

Whether or not these features will materialize as contentious issues depends to large extent on the concrete implementation of the ICS. Civic society will therefore only perceive the ICS as more legitimate in as far as the heightened influence of the state feeds into the legitimating narrative of democratic accountability. Although the balance between investors and respondent states in the nomination of ICS members was not seen to reflect desirable standards of legitimacy, leaving the power to appoint adjudicators exclusively in the hands of the contracting states does not necessarily improve the normative legitimacy of ISDS. Even less so in a system that excludes the public from participating in the selection process, and partly represents

affiliations with the respondent states on individual panels without extending the same privilege to private individual whose rights are being litigated. It is therefore important to ensure that the process for the involvement of the contracting states through the trade committee—with respect to the selection and nomination of ICS members, and more importantly by the adoption of authoritative interpretations—is exercised openly, participatory and with democratic accountability.

8.3 The investment court system in light of the principle of autonomy

The present study concluded in Chapter Six that ISDS provisions in EU IIAs come within the purview of the principle of autonomy. Furnishing foreign investors with direct standing before an international tribunal in disputes against the Union or one of its Member States, ISDS provisions establish a system that is separate of, and independent from, the system of judicial remedies established by the Treaties. In the process of adjudicating a dispute, these tribunals inevitably face questions over the interpretation of EU law. Providing the investor with absolute discretion over the choice of the procedural avenue, ISDS provisions effectively remove the CJEU from disputes that would otherwise come before it via the domestic courts of the Member States. It transpires from recent case law that judicial dialogue between domestic courts and the CJEU, established under Article 267 TFEU, is central to ensure compliance with the principle of autonomy.¹⁴⁵⁸ Wherever an international court or tribunal “may be called on” to interpret or apply EU law,¹⁴⁵⁹ the CJEU will inquire whether its judicial prerogatives remain intact. That is to say whether the nature of the law established by the Treaties,¹⁴⁶⁰ and incidentally the autonomy of EU law, are preserved.¹⁴⁶¹ It is for the domestic courts and the CJEU jointly to ensure the full application of EU law, and the judicial protection of the rights of individuals under that law.¹⁴⁶²

Not only does the ICS remove disputes from the domestic judiciary, it is also unable to request a preliminary reference from the CJEU of its own motion. Considering that the ICS fails to incorporate a mechanism that ensures the involvement of the CJEU in questions over the interpretation of EU law, it must be investigated whether the ICS provides other safeguards that prevent the ICS from examining EU law. This section evaluates whether the ICS was designed to alleviate

¹⁴⁵⁸ Case C-284/16 *Achmea op cit.*, para. 37; Opinion 2/13 *Accession to the ECHR op cit.*, para. 176; Opinion 1/09 *European Patents Court op cit.*, para. 84.

¹⁴⁵⁹ Case C-284/16 *Achmea op cit.*, para. 42.

¹⁴⁶⁰ Opinion 1/09 *European Patents Court op cit.*, para. 85.

¹⁴⁶¹ see to that effect in particular Case C-284/16 *Achmea op cit.*, para. 37; Opinion 2/13 *Accession to the ECHR op cit.*, para. 176.

¹⁴⁶² Opinion 1/09 *European Patents Court op cit.*, para. 68; Opinion 2/13 *Accession to the ECHR op cit.*, para. 175; Case C-284/16 *Achmea op cit.*, para. 36.

these shortcomings, and argues that although many of the pertinent issues were addressed there may still lie challenges ahead. To be sure, this section is not a look into the crystal ball, it is not, in other words, an attempt to predict the outcome of the currently pending Opinion 1/17. Rather it is intended to provide some indications as to how the principle of autonomy shapes the policy preferences that are reflected in the institutional design of the ICS.

The present section will briefly recall the opinion of AG Bot (Section 8.3.1), before analysing whether the explicit removal of all domestic law from the scope of the applicable law will prevent the ICS tribunals from engaging in an interpretation of EU law (Section 8.3.2). Second, this Section investigates whether the institutional and procedural features of the ICS alleviate the need to involve the CJEU in the resolution of investor-state disputes (Section 8.3.3). This is followed, third, by an assessment of the right of the Commission to determine the correct respondent to a dispute (Section 8.3.4). Lastly, this Section discusses two remaining safeguards, i.e. the state aid exception (Section 8.3.5) and the exclusion of direct effect (Section 8.3.6).

8.3.1 *The opinion of Advocate General Bot*

In his opinion on the compatibility of CETA with *inter alia* the principle of autonomy, AG Bot advances four arguments in support of his view that the ICS is compatible with the principle of autonomy.¹⁴⁶³ First, the lack of direct effect of CETA limits the interaction of the investment protection regime under CETA and the EU legal order, which he describes as “co-existing legal systems”.¹⁴⁶⁴ Second, the limited jurisdiction of ICS tribunals under CETA, the nature of its adjudicative activity and the type of award, which is limited to monetary compensation, ensures that there is as little as possible interference with EU law.¹⁴⁶⁵ Third, the CETA tribunals are circumscribed in their approach to domestic law, which guarantees that the interpretation of the CJEU is followed,¹⁴⁶⁶ and, where there is no prevailing interpretation, that an interpretation is only binding between the disputing parties.¹⁴⁶⁷ The correct interpretation of EU law is furthermore supported by the power of the Union and Canada to correct misinterpretations by means of issuing authoritative interpretations,¹⁴⁶⁸ as well as through the establishment of an appeals body.¹⁴⁶⁹ Fourth, the system that reserves to the Commission the power to determine the respondent to an investment dispute relieves the ICS tribunal from

¹⁴⁶³ See also *supra* Chapter 6.3.2.

¹⁴⁶⁴ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, paras. 63 and 94.

¹⁴⁶⁵ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, paras. 117-27 and

¹⁴⁶⁶ *Ibid.*, paras. 134-40.

¹⁴⁶⁷ *Ibid.*, para. 143.

¹⁴⁶⁸ *Ibid.*, para. 144.

¹⁴⁶⁹ *Ibid.*, paras. 148-53.

pronouncing on the division of competences between the Union and its Member States.¹⁴⁷⁰ These issues are addressed throughout the remainder of the present Section.

8.3.2 *The interpretation of EU law as a matter of fact*

The applicable law in all ICS formations is confined to the IIA as interpreted in light of the VCLT and other rules and principles of international law as applicable between the parties.¹⁴⁷¹ It is undisputed that the Treaties are international agreements in accordance with the definition provided in Article 2(1)(a) VCLT.¹⁴⁷² They cannot, however, plausibly be conceived of as forming part of the corpus of international legal rules and principles applicable between the parties. The Treaties are binding on the Member States only, and no rights and obligations can be derived for third countries. And yet, acting through entities on the internal market, investors have undoubtedly subjected themselves to the legal framework that governs economic activity on the internal market, including domestic as well as EU law. The ICS explicitly reduces the role of domestic law to considerations of fact. The relevant provision in CETA endows the ICS Tribunal with authority to “consider, as appropriate, the domestic law of a Party as a matter of fact”.¹⁴⁷³ The EU-Vietnam IPA requires the ICS Tribunal and Appeal Tribunal to “take into consideration, as matter of fact, any relevant domestic law of the disputing Party”.¹⁴⁷⁴ The proposed EU-Mexico FTA stipulates that the Tribunal “shall consider, when relevant, the domestic law of a Party as a matter of fact”.¹⁴⁷⁵ Similar remarks were incorporated in a footnote to the applicable law clause of the EU-Singapore IPA.¹⁴⁷⁶ In previous chapters, this Study already alluded to the illusionary line between law and fact.¹⁴⁷⁷ The present section further illustrates that the ICS tribunals are inevitably at risk to cross this line in the exercise of their adjudicative function.

It is helpful, in this respect, to draw a brief comparison with the WTO dispute settlement system, and in particular the workings of the AB that served as a model

¹⁴⁷⁰ *Ibid.*, para. 161.

¹⁴⁷¹ Article 8.31(1) CETA; Article 3.13(2) of the EU-Singapore IPA; Articles 3.42(2) and (4) of the EU-Vietnam IPA; Article 15(2) EU-Mexico FTA (Investment Dispute Resolution).

¹⁴⁷² Burgstaller (2009), *op cit.*, 192; Alexander Orakhelashvili, ‘The idea of European international law’ (2006) 17(2) *European Journal of International Law* 315-47, 344; Trevor Hartley, ‘International law and the law of the European Union: A reassessment’ (2002) 72(1) *British Year Book of International Law* 1-35, 10.

¹⁴⁷³ Article 8.31(2) CETA.

¹⁴⁷⁴ Article 3.42(2) of the EU-Vietnam IPA.

¹⁴⁷⁵ Article 15(3) EU-Mexico FTA (Investment Dispute Resolution).

¹⁴⁷⁶ Footnote 7 to Article 3.13(2) of the EU-Singapore IPA: “For greater certainty, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact [...]”

¹⁴⁷⁷ See *supra* Chapter 6.5.1.

for the ICS.¹⁴⁷⁸ In order to appreciate why such a comparison is helpful suffice it to cite Ehlermann, former member of the AB, who observed “that the determination of the meaning of municipal law of WTO Members can be a delicate task”, that may “place panels and the Appellate Body before difficult choices”.¹⁴⁷⁹ It is argued in this study that the ICS tribunals’ jurisdiction should be assessed taking due account of these experiences.

In the context of WTO dispute settlement, it is established practice that panels are competent to engage in an evaluation of domestic law whenever they are asked to review the compatibility of a domestic measure with WTO commitments. The issue first arose in *India – Patents* when the AB was asked to determine whether the panel had overstepped its jurisdiction. India claimed that instead of interpreting Indian law, the panel should have accepted, as a matter of fact, the domestic law as it was established by the disputing parties.¹⁴⁸⁰ Observing that domestic law may become relevant to the dispute as evidence of compliance with international obligations,¹⁴⁸¹ the AB concluded that “[t]here was simply no way for the Panel to make this determination [of compliance] without engaging in an examination of Indian law.”¹⁴⁸² This view has since been confirmed by the AB.¹⁴⁸³ In much the same fashion as the WTO panel, the ICS Tribunal is primarily concerned with assessing the compliance of measures adopted by a Member State with the substantive standards of investment protection under the IIA. It is naïve to suppose that the ICS Tribunal could carry out such an assessment without engaging in an examination of domestic law, which, as it was already established above, stands in complex relationship with EU law.¹⁴⁸⁴ This already follows from the fact that domestic law in the Member States is always subject to Treaty conform interpretation, but does not exclude the possibility that secondary EU law may directly be relevant to an investment dispute. In as far as IIAs with third countries are concerned, EU law is subsumed as relevant domestic law. In the examination of domestic law, the ICS Tribunal will inevitable face question over the interpretation and, indeed, the application of EU law.

The issue of domestic law also becomes relevant on the level of appeal. As a general rule, the AB is only competent to review questions of law, whereas domestic

¹⁴⁷⁸ For a detailed introduction to the ICS, see *infra* Chapter Four.

¹⁴⁷⁹ Claus-Dieter Ehlermann, ‘Six years on the bench of the “World Trade Court”: Some personal experiences as member of the Appellate Body of the World Trade Organization’ (2002) 36(4) *Journal of World Trade* 605–39, 623

¹⁴⁸⁰ *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* WTO AB Report, 17 December 1997, WT/DS50/AB/R, para. 64

¹⁴⁸¹ *Ibid.*, para. 65.

¹⁴⁸² *Ibid.*, para. 66.

¹⁴⁸³ *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WTO AB Report, 23 August 2001, WT/DS184/AB/R, para. 200.

¹⁴⁸⁴ For a discussion, see *supra* Chapter 6.5.2.

law is a fact established by the panel.¹⁴⁸⁵ To what extent the AB may consider domestic law, therefore, goes to the jurisdiction of the AB as it defines the scope of review.¹⁴⁸⁶ Yet, it transpires from AB practice that a WTO panel's evaluation of domestic law in light of WTO commitments is "a legal characterization"¹⁴⁸⁷ that comes within the AB's scope of review. This view was more recently confirmed in *DSC for China – Auto Parts*.¹⁴⁸⁸

"The Appellate Body has reviewed the meaning of a Member's municipal law, on its face, to determine whether the legal characterization by the panel was in error, *in particular* when the claim before the panel concerned whether a specific instrument of municipal law was, as such, inconsistent with a Member's obligations. We recognize that there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements."¹⁴⁸⁹

Examining the relevant domestic law, the AB will consider all available materials that "form part of the effective operationalization of the legislation."¹⁴⁹⁰

This practice of the AB has sparked criticism and calls for reform. The USTR, for instance, remarks that:

"In a WTO dispute, the key fact to be proven is what a Member's challenged measure does (or means), and the law to be interpreted and applied are the provisions of the WTO agreements. But the Appellate Body consistently asserts that it can review the meaning of a Member's domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for Appellate Body review."¹⁴⁹¹

This is, of course, not entirely correct. Formally, the WTO AB does, indeed, engage with domestic law as a matter of fact. In a recent concept paper on WTO reform, the Commission therefore addressed this issue by proposing a clarification to Article

¹⁴⁸⁵ Article 17.6 DSU.

¹⁴⁸⁶ It is important to note that in the context of the WTO AB this is a jurisdictional question, see Palmetier and Mavroidis (2004), *op cit.*, 46-47.

¹⁴⁸⁷ *United States - Section 211 Omnibus Appropriations Act of 1998* WTO AB Report, 2 January 2002, WT/DS176/AB/R, para. 105.

¹⁴⁸⁸ *China - Measures Affecting Imports of Automobile Parts* WTO AB Reports, 15 December 2008, WT/DS339/AB/R; WT/DS340/AB/R; WT/DS342/AB/R.

¹⁴⁸⁹ *China - Auto Parts*, WTO AB Reports *op cit.*, para. 25, references omitted and emphasis added.

¹⁴⁹⁰ *United States - Countervailing Measures Concerning Certain Products from the European Communities* WTO Panel Report, 8 January 2003, WT/DS212/R, para. 7.139.

¹⁴⁹¹ US Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program, 28.

17.6 of the DSU, explicitly denominating domestic law as a matter of fact.¹⁴⁹² This reflects the approach that the Commission has adopted with respect to the ICS. The Appeal Tribunals in all ICS formations are explicitly empowered with determining “manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law”.¹⁴⁹³ In the context of the AB, this would do little to sway the US’s concerns as it would not prevent the AB from reviewing domestic law as evidence of compliance.¹⁴⁹⁴

This brief excursion into the WTO dispute settlement system was meant to illustrate how permeable the line between fact and law in the appreciation of domestic law appears to be in practice. It constitutes a tightrope that the WTO panels and the AB inevitably have to walk in the exercise of their adjudicative function.¹⁴⁹⁵ Whether or not the ICS Tribunals and Appeal Tribunals are susceptible to crossing this line ultimately depends on whether they draw inspiration from the WTO dispute settlement system regarding this question or whether they approach this it more restrictively. Suffice it to note at this point that an explicit limitation of domestic law to a matter of fact, does in itself prevent the ICS tribunals from engaging in an examination of EU law.

It is important to recall at this point that the CJEU is less troubled with binding itself to the jurisdiction of an international tribunal, in as far as this relates to the interpretation of the international agreement.¹⁴⁹⁶ Rather the Court is concerned with the erosion of the uniform interpretation and application of EU law. It is argued here that the emergence of diverging interpretations of EU law arising, on the one hand, out of the jurisprudence of the CJEU, and, on the other hand, from the awards rendered by the ICS tribunals is sufficient to put the uniformity of EU law at risk.

It is true that the ICS is primarily tasked with assessing the effects of measures adopted under domestic law and EU law in the particular context of the IIAs. However, as AG Bot also acknowledged, the post-Lisbon IIAs purport to strike a balance between the investors interest and public policy. In order for the disputing parties to rely on EU law in order to invoke a public policy purpose, it is indispensable that the ICS tribunal furnished with power to examine EU law.¹⁴⁹⁷ It is irrelevant in this respect whether a tribunal conducts its interpretation of the Treaties or a provision of secondary Union law as an element of the factual matrix

¹⁴⁹² EU concept paper, pt. Iv.

¹⁴⁹³ For a discussion, see *supra* Chapter 4.3.4.

¹⁴⁹⁴ The EU reform paper was briefly discussed at the WTO Public Forum where US Ambassador Shae rejected the ideas directed to the reform of the AB system, although Amb. Shae did not explicitly address the proposal with respect to the review of municipal law. Audio of Session 111 of the World Public Forum of October 4, 2018 is available at <https://www.wto.org/audio/pf18session111.mp3>.

¹⁴⁹⁵ Palmetier and Mavroidis (2004), *op cit.*, 129.

¹⁴⁹⁶ For a discussion, see *supra* Chapter 6.2.5.

¹⁴⁹⁷ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 130-33.

or a point of law. Ultimately, the ICS tribunals is liable to choose between several plausible interpretations of Union law, a choice that has legal implications for the Union and its Member States in as far as they are obligated to comply with their international commitments.

8.3.3 *The prevailing interpretation of the Court of Justice*

The ICS lays out explicitly how the Tribunal and Appeal Tribunal have to establish domestic law as fact. Accordingly, “the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party.”¹⁴⁹⁸ Although only the EU-Vietnam IPA explicitly refers to the Appeal Tribunal, it is safe to assume that the applicable law clause in CETA and the EU-Singapore IPA similarly apply upon appeal. Behind this stipulation appears to be an intention to keep the ICS tribunals from interpreting EU law. In other words, in establishing the meaning of domestic law, including EU law, the ICS tribunals are bound to accept the meaning of that law as it is established by the CJEU. This approach is not uncommon in international law. The Permanent Court of Justice, for instance, noted that:

“Though bound to apply municipal law when circumstances so require [...] the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law.”¹⁴⁹⁹

And there lies the crux of the matter. Determining the prevailing interpretation of the CJEU requires the ICS to make an important choice between all available interpretations. However, in its *ECHR* opinion the CJEU observed that:

” The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.”¹⁵⁰⁰

Consequently, wherever a provision of Union is open to more than one plausible interpretation, the ICS Tribunal will have to exercise a choice that “would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.”¹⁵⁰¹ Similar to the ICS, the

¹⁴⁹⁸ Article 8.31(2) CETA; with slight linguistic variations also fn 7 to Article 3.13(2) of the EU-Singapore IPA and Article 3.43(3) of the EU-Vietnam IPA.

¹⁴⁹⁹ PCIJ, *Case concerning the Payment in Gold of Brazilian Loans Contracted in France* 12 July 1929, Series A, No. 21, 124; see also *Elettronica Sicula S.p.A (United States v Italy)*, 1989 I.C.J. 15, 62.

¹⁵⁰⁰ Opinion 2/13 *Accession to the ECHR op cit.*, para. 245.

¹⁵⁰¹ *Ibid.*, para. 246.

EEA Agreement upon revision included a provision that required the Joint Committee to keep “under constant review the development of the case-law of the Court of Justice”.¹⁵⁰² This was certainly instrumental in crafting a dispute settlement mechanism that was compatible with the Treaties. It should be noted, however, that this safeguard merely complemented the preliminary reference mechanism that empowered the Joint Committee to request from the CJEU a binding interpretation of relevant provisions of EU law.¹⁵⁰³ Furthermore, the CJEU also observed that by letting an international court or tribunal determine whether or not the CJEU has already ruled on the same question of law “would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice”.¹⁵⁰⁴ Obliging the ICS tribunals to follow the prevailing interpretations of Union law is, therefore, insufficient to safeguard the autonomy of the Union legal order.

This conclusion is not called into question by the fact that the ICS explicitly stipulates that “any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.”¹⁵⁰⁵ It is true that the Court in its second *EEA* opinion observed that a similar stipulation “constitutes an essential safeguard which is indispensable for the autonomy of the Community legal order”.¹⁵⁰⁶ Yet again, in the case of the EEA Agreement this provision was complementary to the preliminary reference mechanism. Nor is this conclusion affected by the fact that all post-Lisbon IIAs make it explicit that the ICS tribunals shall not have jurisdiction to determine the legality of a contested measure in light of domestic law.¹⁵⁰⁷ Suffice it to emphasize that the CJEU was not convinced by similar stipulations in the draft accession agreement to the ECHR. In its *ECHR* opinion the CJEU, thus, arrived at the conclusion that an assessment of compatibility is in effect tantamount to an assessment of validity in light of the ECHR, irrespective the fact that the ECtHR “rules on whether there has been a violation of the Convention and not on the validity of an act”.¹⁵⁰⁸ Lastly, it must be

¹⁵⁰² Opinion 1/92 *Second EEA Agreement op cit.*, para. 21.

¹⁵⁰³ Opinion 1/92 *Second EEA Agreement op cit.*, paras. 34–35.

¹⁵⁰⁴ Opinion 2/13 *Accession to the ECHR op cit.*, para. 239.

¹⁵⁰⁵ Article 8.31(2) CETA; with slight linguistic variations also fn 7 to Article 3.13(2) of the EU-Singapore IPA and Article 3.43(3) of the EU-Vietnam IPA.

¹⁵⁰⁶ Opinion 1/92 *Second EEA Agreement op cit.*, para. 24.

¹⁵⁰⁷ Article 8.31(2) CETA; with slight linguistic variations also fn 7 to Article 3.13(2) of the EU-Singapore IPA and Article 3.43(3) of the EU-Vietnam IPA; Article 15(4) EU-Mexico FTA (Investment Dispute Resolution).

¹⁵⁰⁸ , 'Fifth negotiating meeting between the CDDH ad hoc negotiating group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Appendix 1, Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' accessible at <https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf> para. 63; the Court itself relied on para. 66 of that report to substantiate its conclusions, see Opinion 2/13 *Accession to the ECHR op cit.*, para. 242.

noted that the trade committee's power to adopt authoritative interpretations is insufficient to correct divergences in interpretations, because it does not allow the Union to unilaterally align the interpretations of the ICS with EU law—this requires a political compromise.¹⁵⁰⁹

Consequently, although the ICS clearly attempts to minimize the interference of ICS tribunals in the interpretation of EU law, this does not alleviate the necessity, in light of recent case law, to involve the CJEU in questions over the interpretation of EU law.

8.3.4 Identifying the respondent to a dispute

Treaty amendments and internal regulatory developments are liable to affect the scope of the Union's exclusive external competence over the course of time.¹⁵¹⁰ Yet, international agreements and international institutional frameworks, do not generally adjust to changes in the division of competences between the Union and its Member States.¹⁵¹¹ Nor is the division of competences always obvious, and corresponds seldom in a straight-forward manner to the provisions of an international agreement.¹⁵¹² This is why earlier Chapter alluded to mixed agreements as helpful and pragmatic foreign trade and investment policy instruments.¹⁵¹³ 'Mixity', thus, ensures the effective participation of the Union and its Member States in all areas of international law, irrespective their internal division of competences.¹⁵¹⁴ However, 'mixity' likewise increases the risk that an adjudicative body, established under a mixed agreement, will find itself having to examine the division of competences between the Union and its Member States in order to determine the correct respondent to a dispute.^{1515, 1516}

The exercise of international jurisdiction over the division of competences, however, constitutes an irreconcilable interference with the principle of autonomy of the EU legal order.¹⁵¹⁷ This Section investigates whether, in light of the definition of 'contracting party', this risk is present also in the context of the ICS (Section 8.3.4.1), whether the mechanism envisaged in the ICS offers a robust safeguard

¹⁵⁰⁹ Advocate General Bot observes that the political decision-making in the trade committee insulates the Union from having to accept interpretations that are incompatible with EU law. Yet, he fails to acknowledge that this works both ways. See Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 146.

¹⁵¹⁰ For an overview over the division of competences, see Chapter Five.

¹⁵¹¹ Thym (2009), *op cit.*, 338.

¹⁵¹² Temple Lang (1986), *op cit.*, 162.

¹⁵¹³ See *supra* Chapter 8.1.

¹⁵¹⁴ Thym (2009), *op cit.*, 338.

¹⁵¹⁵ Opinion 1/91 *EEA Agreement op cit.*, para. 34; Opinion 2/13 *Accession to the ECHR op cit.*, para. 224.

¹⁵¹⁶ Kuijper and Paasivirta (2013), *op cit.*, 57.

¹⁵¹⁷ For a discussion of the relevant case law, see *supra* Chapter 6.2.

(Section 8.3.4.2), and discusses the prevailing policy preferences of Member States, which this mechanism clearly reflects (Section 8.3.4.3).

it also increases the level of complexity in the implementation of an international agreement. Particularly, where a specific link between competence and responsibility is created through, for instance, a declaration of competence.¹⁵¹⁸ Generally speaking, joint participation of the Union and its Member States in an international agreement indicates to third parties that the responsibility for the implementation of the agreement is divided between the Union and its Member States.¹⁵¹⁹ As Advocate General Mischo observed:

“[T]he very fact that the Community and its Member States had recourse to the formula of a mixed agreement announces to non-member countries that that agreement does not fall wholly within the competence of the Community and that, consequently, the Community is, *a priori*, only assuming responsibility for those parts falling within its competence.”¹⁵²⁰

Although the present section is not primarily concerned with the attribution of international responsibility,¹⁵²¹ but focuses instead on the issues concerning the identification of the correct respondent to an investment dispute.

8.3.4.1 The contracting party

CETA as well as the IPAs with Singapore and Vietnam define contracting party as “the Union or its Member States, or the Union and its Member States, within their respective areas of competence”.¹⁵²² The agreement, thus, indicates separate responsibility of the Union and its Member States in accordance with their internal division of competences.¹⁵²³ The respondent to a dispute is likewise defined as

¹⁵¹⁸ Heliskoski (2013), *op cit.*, 196-200.

¹⁵¹⁹ Heliskoski (2001), *op cit.*, 48.

¹⁵²⁰ Opinion of Advocate General Mischo, Case C-13/00 *Commission v Ireland (Berne Convention)* [2001], EU:C:2001:643, para. 30.

¹⁵²¹ The author discussed this elsewhere, see Lenk (2016), *op cit.*; for a comprehensive overview consider also Eileen Denza, 'Responsibility of the European Union in the Context of Investment' in Malcolm David Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union : European and International Perspectives* (HART Publishing: 2013) 215-32; Angelos Dimopoulos, 'The involvement of the EU in investor-state dispute settlement: A question of responsibilities' (2014) 51(6) *Common Market Law Review* 1671-720; Frank Hoffmeister, 'Litigating against the European Union and its member states - Who responds under the ILC's draft articles on international responsibility of international organizations?' (2010) 21(3) *European Journal of International Law* 723-47; Kuijper and Paasivirta (2013), *op cit.*; Pantaleo (2016b), *op cit.*

¹⁵²² Article 1.1 CETA; Article 1.2(12) of the EU-Singapore IPA; Article 1.2(n) of the EU-Vietnam IPA.

¹⁵²³ Dimopoulos (2011a), *op cit.*, 255.

”either the Member State of the European Union, or the European Union”.¹⁵²⁴ This would suggest that ICS Tribunals, deciding on their jurisdiction over a particular dispute, have to examine the allocation of competences between the Union and its Member States in violation of the principle of autonomy.¹⁵²⁵

An institutional separation of the scope of jurisdiction as it was pursued in the second EEA draft agreement certainly avoids these problems,¹⁵²⁶ but is entirely impractical in the context of Union IIAs as it reduces the scope of application of ISDS to disputes brought by EU investors against third countries.¹⁵²⁷ The Union has also frequently used *ex ante* declarations of competence, which set out in clear terms the parts of the agreement that fall under Union competences and the parts that fall under Member State competences.¹⁵²⁸ However, these types of declarations are of limited value as they insufficiently capture the intricacies of the division of competences, and above all its evolutionary nature.¹⁵²⁹ In the context of mixed EU IIAs, the ICS would have to determine whether the dispute concerns direct or non-direct investment, which the CJEU defined by reference to its own case law.¹⁵³⁰ It would also require the Union to update these declarations continuously as the reach of Union competence develops—something the Union has so far notoriously disregarded.¹⁵³¹

Instead, the ICS reserves for the Commission the powers to determine the respondent to a dispute. Accordingly, the claimant investor must request a

¹⁵²⁴ Article 8.1 CETA; Article 3.1(2)(e) of the EU-Singapore IPA; Article 3.2(f) of the EU-Vietnam IPA.

¹⁵²⁵ Heliskoski (2001), *op cit.*, 19; For an opposing view, see Herrmann (2014), *op cit.*

¹⁵²⁶ Opinion 1/92 *Second EEA Agreement op cit.*, paras. 13 and 19; the CJEU subsequently confirmed this in Opinion 1/00 *ECAA op cit.*, para. 6.

¹⁵²⁷ Such an approach would most certainly also have to meet reciprocal demands by the other contracting party during the negotiation of the agreement, rendering the entire mechanism practically obsolete, see Hindelang (2013), *op cit.*, 196-97.

¹⁵²⁸ e.g. OJ L179/1, 23 June 1998, Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof; OJ L124/3, 17 May 2005, Annex, Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters; OJ L 299/25, 28 October 2006, Annex, Council Decision 2006/730/EC of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade.

¹⁵²⁹ Andrés Delgado Casteleiro, ‘EU declarations of competence to multilateral agreements: A useful reference base?’ (2012) 17(4) *European foreign affairs review* 491-510, 494; Esa Paasivirta and Pieter Jan Kuijper, ‘Does one size fit all?: The European Community and the responsibility of international organizations’ (2005) 36(1) *Netherlands Yearbook of International Law* 169-226, 176.

¹⁵³⁰ For a discussion, see Chapter 5.5.

¹⁵³¹ Heliskoski (2013), *op cit.*, 206.

determination from the Union prior to initiating a claim before the ICS.¹⁵³² This idea is not entirely novel but resembles the approach taken for the ECT.¹⁵³³ However, whereas the ECT mechanism remains optional for investors, a request for the determination of the respondent to an investment claim under EU IIAs constitutes a mandatory procedural requirement.¹⁵³⁴ The agreements themselves remain scarce on detail regarding how that determination is carried out. This procedure is instead governed internally by Regulation 912/2004 setting up a framework for the attribution of financial responsibility arising out of investor-state disputes.¹⁵³⁵

8.3.4.2 The Financial Responsibility Regulation

The Regulation clearly indicates that the Commission is responsible for administering the investor's request.¹⁵³⁶ This, indeed, reflects the general position in EU law, i.e. that the Commission enjoys an executive prerogative over the implementation of international agreements and the representation (including in legal proceedings) of the Union externally.¹⁵³⁷ It is somewhat surprising, therefore, that rather than following the division of competences between the Union and its Member States, the Financial Responsibility Regulation operates on a *prima facie* presumption that Member States are by default the respondent to investor-state dispute.¹⁵³⁸

As a consequence, the Financial Responsibility Regulation provokes instances where Member States act as the respondent in disputes relating to FDI, which comes under the exclusive competence of the Union, creating discrepancies between external competence and external representation. This is acknowledged by the Commission:

“[T]he Union should, in principle, act as respondent in any dispute concerning an alleged violation of a provision of an international agreement falling within the Union's exclusive competence, even if such violation arises from a Member State's action, it may be possible, as provided expressly in Article 2(1) TFEU, to empower a Member State to act as respondent in appropriate circumstances given the potential for significant demands (even temporary) on the Union

¹⁵³² Article 8.21(1) CETA; Article 3.32(2) of the EU-Vietnam IPA; Article 3.5(2) of the EU-Singapore IPA.

¹⁵³³ OJ L 69/115, 09 March 1998, Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty.

¹⁵³⁴ Tietje and Wackernagel (2015), *op cit.*, 239.

¹⁵³⁵ Regulation 912/2011 .

¹⁵³⁶ Article 8(1) of Regulation 912/2014.

¹⁵³⁷ Article 17(1) TEU.

¹⁵³⁸ Article 9(1) of Regulation 912/2014.

budget and on Union resources were the Union to act as respondent in all cases.”¹⁵³⁹

Member States are allowed to act in an area of exclusive competence, provided they have been authorized to do so in accordance with the Article 2(1) TFEU. The provision is, however, directed at legislative activity exercised by the Member State instead of the Union.¹⁵⁴⁰ An example in the context of the Union’s foreign investment policy is Regulation 1219/2002 that empowers Member States to maintain existing BITs with third countries and, under certain circumstances conclude new agreements.¹⁵⁴¹ Such an authorization is qualitatively different, however, from the Member States’ general obligation to implement Union law.¹⁵⁴²

This is notwithstanding the Member States’ strict obligation to represent the Union’s interests when acting internationally in an area of exclusive Union competence.¹⁵⁴³ ¹⁵⁴⁴ This is qualitatively distinct from situation where Member States act in the implementation of a mixed agreement covering areas of shared competences,¹⁵⁴⁵ which is governed by the duty of sincere cooperation under Article 4(3) TEU, and the principle of unity in external relations¹⁵⁴⁶ as a specific expression thereof.¹⁵⁴⁷ As Heliskoski noted

“[T]he duty of cooperation provides, alongside the rules concerning the existence and exercise of the Community’s external competence, an important conceptual framework for analysis of the position of the Community and the Member States under mixed agreements.”¹⁵⁴⁸

¹⁵³⁹ COM (2012) 335 final, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, pt. 1.2.

¹⁵⁴⁰ Friedrich Erlbacher, ‘Recent case law on external competences of the European Union: How Member States can embrace their own Treaty’ (2017), CLEER Papers 2017/2 accessible at <https://www.asser.nl/media/3485/cleer17-2_web.pdf> 21.

¹⁵⁴¹ For a discussion of Regulation 1219/2002, see *supra* Chapter 5.3.3.2.

¹⁵⁴² Opinion of Advocate General Bot, Case C-66/13 *Green Network SpA v Autorità per l’energia elettrica e il gas* [2014], EU:C:2014:156, para. 79.

¹⁵⁴³ Case C-399/12 *Germany v Council (OIV)* [2014], EU:C:2014:2258, para. 52.

¹⁵⁴⁴ Case C-45/07 *Commission v Greece (IMO)* [2009], EU:C:2009:81, para. 23.

¹⁵⁴⁵ Case C-246/07 *European Commission v Kingdom of Sweden (PFOS)* [2010], EU:C:2010:203, para. 72.

¹⁵⁴⁶ Case C-246/07 PFOS *op cit.*, para. 73; Opinion 2/91 ILO Convention *op cit.*, para. 36; Ruling 1/78 Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty - Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports [1978], EU:C:1978:202, paras. 34-36; Opinion 1/94 WTO Agreements *op cit.*, para. 108.

¹⁵⁴⁷ Notably, this may include instances where a common strategy is agreed on union level, see Case C-246/07 PFOS *op cit.*, para. 103.

¹⁵⁴⁸ Heliskoski (2001), *op cit.*, 67.

Consequently, with respect to FDI the Member States are under a strict obligation to represent the interests of the Union, whereas they are under a duty to cooperate in as far as they are exercising their own competence over portfolio investment.

It is pivotal, therefore, to determine on a case-by-case basis whether Member States are acting as respondent within the framework of the ICS in their own capacity, or as representative of the Union. However, under the Financial Responsibility Regulation only a decision identifying the Union as a respondent to an investment dispute must be taken in the form of an implementing act.¹⁵⁴⁹ The structure of the Financial Responsibility Regulation, and in particular its general organising principle, i.e. that Member States are by default respondent to investment dispute curtails the powers of the Commission, by providing Member States with a tacit authorization to represent the Union internationally.

This is quite extraordinary, considering that the Treaty endows the Commission generally with extensive powers of representation. The CJEU, thus, confirmed that the Council has no involvement in the submissions made by the Commission to an international tribunal in the context of legal proceedings. International legal representation does not, therefore, fall within the purview of Article 218(9) TFEU, which stipulates that the Council shall adopt a decision “establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects”.¹⁵⁵⁰ Nor was the Court convinced that this type of submission is covered by Article 16(1) TEU, which reserves for the Council a policy-making prerogative. Unlike policy decision, the CJEU observed that “considerations relating to [ITLOS] jurisdiction [...] and the admissibility of the questions put to it”¹⁵⁵¹ are “characteristic of participation in proceedings before a court”.¹⁵⁵² The Financial Responsibility Regulation effectively reverses this dynamic, allocating *prima facie* respondent status with the Member States. This view is supported by explicit stipulations in the Regulation that require the Commission to take all appropriate means to enable Member States to prepare an effective defence,¹⁵⁵³ consult Member States on its positions before submission¹⁵⁵⁴ to the ICS tribunal, and generally respect the Member States’ interests throughout the proceedings.¹⁵⁵⁵

¹⁵⁴⁹ Article 9(2) of Regulation 912/2014.

¹⁵⁵⁰ Case C-73/14 *Council v Commission (ITLOS)* [2015], EU:C:2015:663, paras. 66-67.

¹⁵⁵¹ Case C-73/14 *ITLOS op cit.*, para. 72.

¹⁵⁵² *Ibid.*, para. 73.

¹⁵⁵³ Article 10(2) OJ L 55/13, 28 February 2011, Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

¹⁵⁵⁴ Article 9(6) Regulation 182/2011.

¹⁵⁵⁵ Articles 9(6) and 11(1)(a), see also recital 14 Regulation 182/2011.

It should be noted, however, that the duty of cooperation extends to inter-institutional relations as per Article 13(3) TEU.¹⁵⁵⁶ Advocate General Sharpston observed in this respect that the Commission must act in international bodies in a manner so as not to “render the principle of sincere cooperation ineffective and [make] it impossible for the Council to contribute (if it wished to do so).”¹⁵⁵⁷ In the *ETS* judgment¹⁵⁵⁸ the CJEU observed that “cooperation is of particular importance for the Union’s activity at international level, as such action triggers a closely circumscribed process of concerted action and consultation between the EU institutions”.¹⁵⁵⁹ Although the extent of the procedural obligations imposed on the Commission in international action arising out of the duty to cooperate is not yet entirely clear,¹⁵⁶⁰ the CJEU has recognized an obligation to consult the Council before, adopting a position regarding the jurisdiction of an international tribunal.¹⁵⁶¹ The same considerations should apply to the Commission when it is responding to a request by a foreign investor on behalf of the Union. Such a determination has a direct influence on the jurisdiction of the ICS Tribunal, and potentially concerns a tacit authorization of Member States to represent the Union in international adjudication regarding a dispute, the subject-matter of which falls within the ambit of the Union’s exclusive competences.

The decision to assign respondent status to the Union, on the other hand, is much more formalized. Such a decision is preceded by “a full and balanced factual analysis and legal reasoning”.¹⁵⁶² Regulation 182/2011¹⁵⁶³ specifying the Commission’s implementing powers furthermore stipulates that implementing acts in the field of the common commercial policy are generally subject to an examination procedure.¹⁵⁶⁴ Thus, the Commission must obtain and duly consider the opinion of the Committee for Investment agreements before adopting a decision.¹⁵⁶⁵ The Council and the European Parliament shall be informed at all stages, but do not participate in the adoption a decision that determines the Union’s respondent status.

¹⁵⁵⁶ Hillion (2018), *op cit.*, 124, and discussion in 135-41.

¹⁵⁵⁷ Opinion of Advocate General Sharpston, Case C-660/13 *Council of the European Union v European Commission* [2015], EU:C:2015:787, para. 135.

¹⁵⁵⁸ Case C-425/13 *European Commission v Council of the European Union* [2015], EU:C:2015:483.

¹⁵⁵⁹ Case C-425/13 *Greenhouse Gas Emissions Trading Scheme op cit.*, para. 64.

¹⁵⁶⁰ Hillion (2018), *op cit.*, 152-53.

¹⁵⁶¹ Case C-73/14 *ITLOS op cit.*, para. 86.

¹⁵⁶² Article 9(2) of Regulation 912/2014.

¹⁵⁶³ Regulation 182/2011.

¹⁵⁶⁴ Article 2(2)(b)(iv) Regulation 182/2011.

¹⁵⁶⁵ Articles 9(2) and 22(2) Regulation 912/2011; in conjunction with Article 4 Regulation 182/2011.

Lastly, it should be pointed out that if the Commission fails to inform the investor of the correct respondent within the requisite time period,¹⁵⁶⁶ the investor shall make a determination herself. Such a determination should appoint the respondent status to the actor that has afforded the contested treatment. In other words, the Member State is the appropriate respondent to dispute unless it was afforded by the Union.¹⁵⁶⁷ It is somewhat unclear what this could entail. A claim initiated on the basis of an administrative measure taken by a national authority in one of the Member State is unlikely to identify a Union act as the contested measure, even if the Member State acted in the implementation of Union law and enjoyed no discretion.¹⁵⁶⁸ It appears that only a challenge against a regulatory act as such, or a decision adopted by one of the Union institutions would provoke a determination of the Union as the respondent to the dispute by the investor.

8.3.4.3 Effects of determinations

A determination, once communicated to the investor, is binding on the ICS Tribunals.¹⁵⁶⁹ Where the investor had to determine the investor on the basis of the residual powers, the Union and its Member States are precluded from challenging the jurisdiction of the ICS tribunal for wrongful determination of the respondent.

“[N]either the European Union, nor the Member State of the European Union may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to [a determination of the respondent] or identified on the basis of the application of [residual powers of the investor].”¹⁵⁷⁰

Whereas this insulates the ICS tribunal from having to examine this question, it is also liable to bind the Union to a determination that is not taken in accordance with the Financial Responsibility Regulation.

The binding effect is less obvious, however, for disputes initiated before the EU-Singapore ICS. Although the determination of the respondent is regulated in the relevant provision governing the notice of intent the identification of the respondent is not a formal requirement of that notice,¹⁵⁷¹ nor is a claim to be “submitted” by

¹⁵⁶⁶ The time frame for the Commission to determine the respondent is 50 days in case of CETA (Article 8.31(4) CETA), and two month, respective 60 days in the case of the IPAs with Singapore and Vietnam (Article 3.5(2) of the EU-Singapore IPA; Article 3.32(2) of the EU-Vietnam IPA).

¹⁵⁶⁷ Article 8.31(4) CETA; Article 3.5(3) of the EU-Singapore IPA; Article 3.32(3) of the EU-Vietnam IPA.

¹⁵⁶⁸ The present author has elaborated on this issue elsewhere, see Lenk (2016), *op cit*.

¹⁵⁶⁹ Article 8.31(7) CETA; Article 3.32(6) of the EU-Vietnam IPA.

¹⁵⁷⁰ Article 8.31(6) CETA; Article 3.5(4) of the EU-Singapore IPA; Article 3.32(5) of the EU-Vietnam IPA.

¹⁵⁷¹ Article 3.5(1) of the EU-Singapore IPA.

the investor to the ICS Tribunal based on such a determination. This shortcoming is exacerbated by a lack of any stipulation as to the binding effect of that determination on the ICS Tribunal. Whereas there is no risk that the CETA or EU-Vietnam ICS Tribunal itself would ordinarily engage in an evaluation of the ‘correctness’ of the determination, there is considerably more leeway for the ICS Tribunal under the EU-Singapore IPA.

Furthermore, whereas the Union and its Member States are prevented from challenging the jurisdiction of the ICS tribunal invoking the wrongful determination of the respondent, no such procedural proscription applies to the investor. It would also be disconcerting if the ICS Tribunal were prevented from reviewing the determination of the respondent in cases where the investor glaringly disregarded the restraints on her residual power. Such a result would indeed be at odds with the purpose and objective of this very mechanism.

8.3.4.4 Balancing autonomy concerns and diverging political interests

The framework set up by the Financial Responsibility Regulation is nonetheless unbalanced. Even though it purports to apply without prejudice to the division of competences¹⁵⁷² it cannot be denied that it facilitates primarily the role of Member States as respondent in investment disputes, irrespective of whether the subject-matter concerns direct or non-direct investment.¹⁵⁷³ This suggests that the drafting of the Regulation more generally reflects a struggle between the Member States’ policy preferences and the Commission’s objective to establish a coherent European foreign investment policy. This would be supported by the political rifts between the Commission and its Member States regarding the exercise of shared competences that were discussed earlier in Section 8.1.

A comparison of the Commission’s initial draft proposal,¹⁵⁷⁴ and the final version of the Financial Responsibility Regulation also supports this view. First, Articles 8(2)(c) and (d) of the initial proposal reserved broad powers for the Commission to assume the respondent status in cases where “it is likely that similar claims will be brought under the same agreement against treatment afforded by other Member States and the Commission is best placed to ensure an effective and consistent defence” as well as where “the dispute raises unsettled issues of law which may reoccur in other disputes under the same or other Union agreements concerning

¹⁵⁷² Article 1(1) Regulation 182/2011.

¹⁵⁷³ Notably, Article 22(2) of Regulation 912/2014 also simplifies the role of Commission as it identifies the advisory opinion (Article 4 of Regulation 187/2011) procedure for determinations made in accordance with Article 9(2) of that Regulation, unlike the more onerous examination procedure (Article 5 of Regulation 187/2011) that is generally assigned to implementing acts in common commercial policy (Article 2(2)(iv) of Regulation 187/2011).

¹⁵⁷⁴ Proposal for a financial responsibility regulation.

treatment afforded by the Union or other Member States”.¹⁵⁷⁵ These powers were curtailed in the final version of the Regulation, significantly reducing the discretionary element of the Commission’s power to assign the respondent status to the Union.¹⁵⁷⁶

Neither the initial proposal, nor the amendments adopted by the European Parliament¹⁵⁷⁷ make reference to the requirement that the Commission shall consult with Member States in its representation of the Union before the ICS. On the contrary, the initial proposal explicitly reinforced the principle of unity in external representation, requiring Member States to align their defence with a particular position of the Commission with respect to a particular point of law “or other elements having a Union interest”.¹⁵⁷⁸ These provisions were abolished in the final version of the regulation,¹⁵⁷⁹ which stands in stark contrast to the general proposition that the Commission enjoys an institutional prerogative in external representation of the Union *vis-à-vis* commercial matters.¹⁵⁸⁰ This was also how the Commission initially perceived its role within a Union’s investment policy, i.e. responding to all investor-state cases.¹⁵⁸¹ As such, this set-up is quite different from the arrangement in the WTO, where the joint participation of the Union and its Member States also requires close cooperation, but where the Commission takes a leading role in the WTO dispute settlement system.¹⁵⁸²

¹⁵⁷⁵ Markus Burgstaller, ‘Dispute settlement in EU international investment agreements with third states: Three salient problems’ (2014) 15(3-4) *The Journal of World Investment & Trade* 551-69, 568.

¹⁵⁷⁶ Fecák (2016), *op cit.*, 244-45.

¹⁵⁷⁷ OJ C 55/196, 12 February 2016, Amendments adopted by the European Parliament on 23 May 2013 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party (COM(2012)0335 — C7-0155/2012 — 2012/0163(COD)).

¹⁵⁷⁸ Article 9(2), see also Article 9(3) that required Member States to challenge awards where the position of a tribunal was not reflecting the position of the Union.

¹⁵⁷⁹ Fecák (2016), *op cit.*, 244-45.

¹⁵⁸⁰ Article 17(1) TEU.

¹⁵⁸¹ Commission, ‘Towards a comprehensive European international investment policy’ (2010), *op cit.*, 10.

¹⁵⁸² Andres Delgado Casteleiro, ‘The ‘Odd Couple’: The Responsibility of the EU at the WTO’ in Malcolm David Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union : European and International Perspectives* (HART Publishing: 2013) 233-55, 252 and 254; Garcia Marín Durán, ‘The EU and its Member States in WTO Dispute Settlement: A ‘Competence Model’ or a Case Apart for Managing International Responsibility?’ in Marise Cremona, Anne Thies and Ramses A. Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing: 2017) 237-73, 238; Piet Eeckhout, ‘The EU and its Member States in the WTO—Issues of Responsibility’ in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press: 2006) 449-64, 453; Frank Hoffmeister, ‘The European Union and the peaceful settlement of international disputes’ (2012) 11(1) *Chinese Journal of International Law* 77-105, 92-93; for a discussion of the role of the Commission in the initiation of disputes, see Stijn Billiet, ‘The EC and WTO Dispute

8.3.4.5 Interim Conclusion

The determination of the respondent in disputes before an ICS Tribunal clearly addresses one of the salient conflicts between the jurisdiction of ICS tribunals and the principle of autonomy of the EU legal order. Reserving for the Commission the power to assess this question internally, provides three important safeguards. First, the central organizing principle of the Financial Responsibility Regulation attributes the respondent status to the actor that afforded the treatment, effectively denominating the Member States as *prima facie* respondent to investment disputes. With this approach the ICS severs the link between responsibility and competence that the definition of contracting party appears to suggest. This does not only emerge from the relevant provisions of the Financial Responsibility Regulation, which constitutes domestic law in as far as the ICS Tribunal is concerned, but is equally reflected in the residual power of the investor to determine the proper respondent.

Second, the Commission's determination constitutes a legal act subject to review by the Union courts. This ensures that the complete system of judicial remedies under the Treaties remains intact. Relevant questions concerning the division of competences are, thus, appropriately addressed before the CJEU.¹⁵⁸³ It should, however, be noted that while the implementing act is certainly subject to judicial review by the EU Courts, the CJEU has little oversight over the Member State's position before the ICS. Noteworthy is also that the CJEU has yet to strike down a legal act adopted by a Union institution based solely on a violation of the inter-institutional duty of cooperation.¹⁵⁸⁴

Third, in dealing with the determination of the respondent internally, in accordance with the Financial Responsibility Regulation, also ensures that the principles of sincere cooperation and unity in international representation find application. Indeed, this appears to be the primary safeguard for the determination of the respondent status internally as it informs both, the Member States' engagement as respondent before the ICS as well as the Commission's response to a request from a foreign investor.

These observations are, however, subject to two significant caveats. On the one hand, albeit that an incorrect determination may, thus, be challenged internally, this will not prevent the decision from gaining validity in international law. An ICS is likely to have already seized jurisdiction over a dispute on the basis of that declaration, before a challenge in the Union courts has finally been decided. On the other hand, the residual power of the investor to determine the respondent where the Commission failed to do so escapes the Union courts entirely.

Settlement: The initiation of trade disputes by the EC' (2005) 10(2) *European foreign affairs review* 197-214, 238.

¹⁵⁸³ This effect was also acknowledged by AG Bot, see Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 161.

¹⁵⁸⁴ Hillion (2018), *op cit.*, 138.

Be that as it may, although there are some remote eventualities that could invite the ICS Tribunal to review the determination of the investor, this is unlikely to involve considerations on the division of competences within the Union. It should also be remembered that, while it is not implausible to assume that an investor has preferences regarding the respondent to their claim, a challenge of the Commission's determination before the ICS Tribunal could only lead to the dismissal of the dispute. Refusing jurisdiction over a dispute is ultimately in the interest of both, the Member State and the Union as respondent party, and cannot, therefore, lead to undermining the autonomy of the Union legal order.

The above discussion reveals that the mechanism for the determination of the respondent to investor-state disputes indeed alleviates concerns that the ICS Tribunal would ordinarily exercise jurisdiction over the division of competences between the Union and its Member States, undermining the autonomy of the EU legal order. The internal framework for managing that question, however, equally reflects a struggle of diverging policy preferences. The Member States' reluctance to relinquish control over investor-state disputes clashes openly with the Commission's vision of a single respondent mechanism as the hallmark of a comprehensive foreign investment policy.

8.3.5 *The state aid exception*

All post-Lisbon IIAs effectively exclude state aid from their scope of protection. In other words, neither a decision to discontinue state aid, nor requiring an investor to reimburse state aid gives rise to financial responsibility by the host state, always provided that the host state acted in compliance with an order from a competent authority. This issue clearly responds to the problem that arose in the recent *Micula* arbitration¹⁵⁸⁵ where the enforcement of an intra-EU investment award was perceived to amount to a reinstatement of illegal state aid.¹⁵⁸⁶ The underlying problem is, indeed, not confined to the intra-EU context, but is easily transferred to dispute arising on the basis of an EU IIA with third countries, because the investment of a foreign investor is like any other economic entity on the internal market subject to EU state aid rules. The enforcement of an award of damages that is intended to reimburse the investor for unpaid state aid with respect to her investment would amount to a reinstatement of illegal state aid. More importantly, however, this scenario is not confined to EU state aid rules but covers the entire field of competition rules. Where damages are awarded for treatment that was

¹⁵⁸⁵ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* Final Award, 11 December 2013 (ICSID Case No. ARB/05/20); Dahlquist (2014), *op cit*; Rovetta and Gambardella (2015), *op cit*; Wehland (2016), *op cit*.

¹⁵⁸⁶ For a comprehensive overview of the conditions that need to be fulfilled for an award to amount to illegal state aid, see Tietje and Wackernagel (2015), *op cit*.

adopted in compliance with EU competition rules, the investment of a foreign investor would receive a competitive advantage on the internal market.

Such a risk also exists with respect to commercial arbitration, but can be remedied by national courts that have the power to refuse the enforcement of awards that undermine EU public policy.¹⁵⁸⁷ The CJEU in its *Achmea* judgment confirmed, that this option is not available in investment arbitration, or is in any case insufficient to safeguard the autonomy of the EU legal order.¹⁵⁸⁸ This is certainly also true for the ICS that produces awards that are automatically enforceable, and that shall not be subject to challenges or review before domestic courts. In other words, although the exclusion of state aid from the scope of protection of the IIA is sensible, it is paradigmatic of a systemic defect of the ICS, i.e. that it disturbs the equality of competitive opportunities.¹⁵⁸⁹

8.3.6 *The exclusion of direct effect*

All of the EU IIAs explicitly exclude the direct effect of the agreement, subject to a stipulation that this shall not affect the enforcement of awards in accordance with the relevant provisions of the agreement. In other words, although investors retain the rights to enforce the awards directly before the competence domestic authorities, they do not enjoy direct effect and cannot, therefore, be invoked by investors before domestic courts in an unrelated context. Arguably, this limits the effect of ICS awards on the interpretation of EU law and, consequently, the need for an involvement of the CJEU in investment disputes before the ICS.¹⁵⁹⁰ Indeed, Thym observes international commitments can only prevail over sources of secondary EU law in case of conflict, if the international commitment is directly applicable.¹⁵⁹¹ However, it was already established above that the general principle, which requires the CJEU and domestic courts to interpret domestic law and secondary Union law as far as possible in light of international commitments does not presuppose that these commitments enjoy direct effect in the Union legal order.

This is exacerbated by the effort to create a court-like system that is working towards the creation of *jurisprudence constante*. Whereas fragmentation and normative

¹⁵⁸⁷ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999], EU:C:1999:269; for a discussion of the case, see Assimakis P. Komninos, 'Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, Judgment of 1 June 1999, Full Court' (2000) 37 *Common Market Law Review* 459; Robert B. Von Mehren, 'The Eco-Swiss case and international arbitration' (2003) 19(4) *Arbitration International* 465-70; Konstanze Von Papp, 'Clash of 'autonomous legal orders': Can EU Member State courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ' (2013) 50(4) *Common Market Law Review* 1039-81.

¹⁵⁸⁸ Case C-284/16 *Achmea op cit.*

¹⁵⁸⁹ For a more detailed discussion, see *infra* Chapter 8.4.1.

¹⁵⁹⁰ Schill (2015), *op cit.*, 385.

¹⁵⁹¹ Thym (9 March 2018), *op cit.*

plurality is an inherent, albeit criticized, feature of investor-state arbitration. The ICS is designed with an expectation that the consistency of its output will lend legitimacy to the institution. It is therefore accepted that ICS awards are an important feature that will determine the normative meaning of EU IIAs, and provide a basis on which investors can build reasonable expectations. While the exclusion of private rights therefore caters for norm conflicts, it cannot restrict the indirect effect that ICS awards gain on the interpretation of secondary EU law, which should be interpreted in a manner consistent with IIAs.

8.3.7 *Interim conclusion*

It transpires from this section that the ICS indeed incorporates a number of safeguards in order to minimize the ICS tribunals' interference with EU law. The denomination of EU law as domestic law, combined with explicit assurances that the ICS tribunal cannot pronounce on the validity of EU law, and that the awards will not have direct effect, limits the potential contact points. And where an examination of EU law becomes relevant the ICS is bound to follow the CJEU. Additionally, state aid, an area of law that has proven prone to investment challenges, is excluded from the substantive scope of protection. Assigning to the Commission the power to determine the respondent to an investment dispute, further, relieves the ICS from having to pronounce on the division of competences within the Union. On balance, therefore, it must be acknowledged that the ICS establishes a robust safety net.

But a potential conflict with the principle of autonomy is much less technical and much more principled. Because EU law is so intricately woven into the fabric of the internal market, it is nearly impossible to escape an examination of EU law, be that directly or indirectly. And although an exclusion of direct effect can shut some of the potential effects out, it cannot guard against the automatic enforcement of ICS awards that allows investors to bring awards into effect even where these conflict with EU law, without the involvement of domestic courts or the CJEU. This is exacerbated by the indirect effect that investment awards have on the interpretation of secondary EU law. Ironically, this risk is more obvious with the ICS than with traditional investor-state arbitration, because the creation of a two-tier system is motivated by the creation of a *jurisprudence constante*. Every ICS award, therefore, defines the normative meaning of the IIA. This cannot be ignored when domestic courts or the CJEU have to interpret secondary EU law in light of the IIAs.

8.4 The investment court system and the principle of non-discrimination

Chapter Seven of this Study concluded that ISDS provisions in EU IIAs fall, in principle, within the purview of Article 18 TFEU. Although a narrow reading of the Court's case law would not suggest that these provisions are incompatible with the general principle of non-discrimination, they nonetheless undermine the effective application of EU law on the internal market. That Chapter, therefore, suggested a normative argument for the application of Article 18 TFEU to ISDS provisions, which takes account of the illusive nature of corporate nationality as a gateway for economic operators on the internal market to gain access to ISDS under an EU IIAs. This Section briefly revisits these points and evaluates to what extent the ICS addresses concerns that EU IIAs may incentivise economic operators on the internal market to structure their operations as foreign investments, i.e. to vest ownership or control with a foreign entity. Two particular issues need to be discussed.

Two particular features of the IC are relevant in this respect. On the one hand, the exclusion of EU state aid rules from the scope of protection of EU IIAs may safeguard the effective application of EU law, and, on the other hand, the definition of investor purports to preclude the use of corporate special purpose vehicles solely for the purpose of gaining access to protection under an IIA (Section 8.4.2). If the CJEU, however, finds that EU investors and foreign investors are in a comparable situation regarding their investment on the internal market, the only viable way forward is the establishment of a multilateral investment court. This is why this section also investigates whether the ICS is likely to facilitate multilateral negotiations, or hinder such a process (Section 8.4.2).

8.4.1 *The effective application of EU law*

It was already discussed previously in this Chapter that the ICS incorporates safeguards that exclude state aid from the scope of protection of the IIAs.¹⁵⁹² This has not only the effect of limiting interferences with EU law, but incidentally also affects the normative argument presented in Chapter Seven of this study.¹⁵⁹³ Indeed, state aid is a paradigmatic case that illustrates the risk that an ICS award could lead to discrimination between two economic operators on the internal market. This was reportedly also acknowledged by the Belgium government in the context of the *CETA* opinion.¹⁵⁹⁴ Whereas EU IIAs effectively forecloses the risk that the ICS tribunals, by way of a monetary award, reverse a Commission state aid decision,

¹⁵⁹² See *supra* Chapter 8.3.6.

¹⁵⁹³ See in particular *supra* Chapter 7.6.

¹⁵⁹⁴ Opinion of Advocate General Bot, Opinion 1/17 *CETA op cit.*, para. 190.

similar risks still exist with respect to other areas of EU competition law such as fines imposed on the basis of Articles 101 and 102 TFEU.

More importantly, in case that the application of EU competition law has a detrimental effect on the economic viability of an operation, or where an interpretation from the CJEU leads to a change in the application of domestic law or secondary EU law with an effect of business operations, the ICS offers monetary damages where no such remedy may be available to EU investors in a comparable situation. Contrary to what AG Bot suggests, this cannot be called into question by the broad political commitments that EU IIAs make *vis-à-vis* proscribing anti-competitive behaviour.¹⁵⁹⁵ These commitments fall outside of the ICS. Forming part of the FTA, they are most likely to be included in a separate agreement for most post-Lisbon EU IIAs.¹⁵⁹⁶ Nor does the power of the trade committee to adopt authoritative interpretations provide an efficient procedural guarantee.

The ICS does, indeed, address the risk of circumventing EU competition rules in as far as these concern state aid. This appears primarily appear to be a reaction to the recent *Micula* arbitration, and fails to dissolve the underlying concern, i.e. that the ICS poses a risk to the effective application of EU law to economic operators on the internal market.

In addition to the state aid carve out, the ICS also limits the scope of creative corporate structuring by narrowing the definition of an investor. In Chapter 7.4, this study demonstrated that EU IIAs may incentivise MNEs to structure investments on the internal market in a manner that situates ownership or control outside of the Member States. Schill points out that states can avail themselves of a variety of policy choices to prevent MNEs from exploiting corporate structures for the sole purpose of gaining access to an IIAs.¹⁵⁹⁷ All post-Lisbon IIAs require, for this reason, that an eligible investor must not only be incorporated, established or otherwise organised in accordance with the laws and rules of the home state, but must also have substantial business activities there.¹⁵⁹⁸ The ICS is, therefore, empowered to lift the corporate veil in order to establish whether the foreign investor is merely a corporate vehicle for the sole purpose of gaining access to investment protection under an EU IIA. Although this will not eliminate the risk that economic operators on the internal market may try to restructure their activity as a foreign investment, it significantly mitigates the conditions under which such an artificial arrangement would be successful.

In sum, the ICS achieves a fair balance although it cannot alleviate the concerns entirely. It is important to note at this point, that the existence of BITs between the EU and third countries, not to mention the number of DTT, already motivate

¹⁵⁹⁵ *Ibid.*, para. 216.

¹⁵⁹⁶ See discussion *supra* Chapter 8.1.

¹⁵⁹⁷ Schill (2009), *op cit.*, 222-23.

¹⁵⁹⁸ Article 8.1 CETA; Article 1.2(5) EU-Singapore IPA; Article 1.2(c) EU-Vietnam IPA; Article 3 EU-Mexico FTA (Investment).

economic operators to engage in creative corporate structures. The ICS does not appear to elevate that risk-

8.4.2 *The investment court system: Stepping stone or stumbling block?*

The preceding sub-section is premised on the CJEU staying loyal to its national treatment standard for the application of the principle of non-discrimination. If, on the other hand, the CJEU finds with its *CETA* opinion that EU investors have a right to access the ICS on the same basis as foreign investors, the most sustainable solution would be the negotiation of a multilateral investment court. In light of the overview of the ongoing multilateral reform process, and the Union's firm commitment to the creation of a multilateral investment court,¹⁵⁹⁹ this section now turns to the prospects of the ICS as a stepping stone, or stumbling block to multilateral ISDS reform. In other words, having established that multilateralism is the only appropriate way forward, does the ICS have the potential to pave the way for a multilateral investment court? It must be acknowledged outright that the ICS will act as a precursor for future negotiations. Indeed, the central role of the ICS for the Union's foreign investment policy and its institutional design inevitably predetermine the Commission's policy preferences and expected outcomes of multilateral negotiations.

It transpires from the discussions in Chapter 4.4.3 that such a convergence is already visible in the submissions made by the Union in the context of the UNCITRAL deliberations. It has furthermore become clear that the Commission would accept nothing other than the ICS in any of its future IIAs. Indeed, it's very commitment to multilateralization is premised on the incorporation of the ICS in all its future agreements. The Commission would effectively have to retract from the ICS as a role model should the multilateral consensus not endorse the creation of a multilateral investment court, or a body like the IIT. This dependency prejudices negotiations on multilateral ISDS reform in as far as it imposes an institutional design on the rest of the world and attempts to legitimize the multilateral investment court, thus created, through a forced multilateral consensus.¹⁶⁰⁰ As the ICS itself incorporates a strong commitment for the EU and its trading partners to pursue a multilateral investment court, the Union already utilizes the ICS in order to shape that consensus for the establishment of a standing mechanism for the adjudication of investment disputes—one ICS at a time.

The bilateral nature of the ICS is also likely to lead to further fragmentation in the investment treaty regime as the multiplicity of such arrangements would cement diverging trends in interpretation through institutionalization.¹⁶⁰¹ It was already

¹⁵⁹⁹ For a discussion, see *supra* Chapter 4.4.

¹⁶⁰⁰ Alvarez Zárata (2018), *op cit.*, 2769-70.

¹⁶⁰¹ Titi (2016a), *op cit.*, 28.

pointed out earlier that the ICS will only have a positive impact on the coherence and consistency of awards within the context of a particular ICS formation.¹⁶⁰² It cannot, however, guarantee that different ICS tribunals render similar interpretations of identical investment standards, or apply different IIAs consistently to a similar set of facts. With the institutionalization of ISDS, the ICS also institutionalizes its concomitant lines of interpretations.

Lastly, it should also be acknowledged that the very success of an ICS formation may stand in the way of replacing it with a multilateral system.¹⁶⁰³ There are arguably few political incentives to exchange a well-functioning ICS with the uncertainties of a new multilateral investment court. This is exacerbated by the involvement of the trade committee in the transitional process that necessarily exposes this question to the political interests of both Contracting Parties.

8.5 Interim conclusion

Treaty-making competence for the ICS is shared. This does not, however, presuppose that future IIAs are concluded as mixed agreements. On the contrary, this Chapter illustrated that ‘mixity’ as a legal formula for the conclusion of agreements that fall within the ambit of shared competences is primarily a reflection of diverging political preferences in the Member State. This is also visible with respect to the workings of the Financial Responsibility Regulation that assigns a central role for the Member States, as opposed to the Commission, in the legal representation of the Union before the ICS.

The ‘mixed’ future of EU IIAs has another effect. Its exposure to national parliaments at the stage of ratification presupposes that the ICS is perceived in the Member States as a genuine reform initiative. That is to say that concerns in civil society over the lack of legitimacy of investor-state arbitration resonate in the institutional and procedural design of the ICS. This Chapter was able to show that the ICS, as a reform initiative, is guided by a simple organizing principle. No influence for the investor, more influence for the state. Although this, indeed, responds to calls for more state control over ISDS, it raises concerns over the lack of safeguards against the abuse of such broad powers. This is perhaps most concerning in respect to the possibility of the trade committee to determine the date from which an authoritative interpretation shall be binding on the state. It is also reflected, however, in the affiliation of ICS members with the contracting states. This being said, the reform effort is laudable in that it facilitates greater diversity on the arbitration panel, achieves a fair allocation of costs, is likely to enhance coherence—albeit merely within the bilateral setting of the IC, and creates a stable

¹⁶⁰² For a discussion, see *supra* Chapter 8.2.8.

¹⁶⁰³ Schill (25 November 2015), *op cit.*

institutional infrastructure that attempts to address concerns over the impartiality of arbitrators by removing economic incentives and relieves the pressure to seek re-appointment. After all, this is not only the most concrete reform proposal yet, it is also the one that is closest to become reality.

This will not, however, only depend on whether the ICS can be sold politically to the EP and the national parliaments. The institutional and procedural features of the ICS must also address certain concerns over the incompatibility of ISDS with *inter alia* the principle of autonomy and the principle of autonomy. This Chapter was able to show that the principle of autonomy does, indeed, impose significant constraints on the ICS initiative. The restrictive case law of the CJEU and the potential for ICS tribunals to examine EU law, renders the prior involvement of the CJEU a *sine qua non* to protect the integrity of the EU legal order under the shield of autonomy.

With respect to the principle of non-discrimination, the findings in this Chapter does not unequivocally support the proposition that the ICS will undermine the effective application of EU law. A risk remains with respect to EU competition rules, or circumstances where the application of EU law may result in sudden changes to the economic viability of an investment. The risk cannot be excluded that foreign investors could in these cases bring an action for monetary damages before the ICS, which is unavailable to EU investors in a comparable situation. On the other hand, the ICS safeguards against creative corporate structuring for the purpose of gaining access to ISDS. Most problematic is, however, the fact that the ICS is at risk to stand in the way for a truly multilateral solution, acting as a stumbling block for the UNCITRAL negotiations.

The life and future of the ICS remain in the balance. For now, however, it represents a fascinating insight into the policy preferences of the Commission, the Union and the Member States. It is now for the CJEU to make the next move, before the national parliaments are asked to decide on whether to give CETA the green light—or not.

9 CONCLUSIONS

The Union emerged over the course of recent years as an actor in structural ISDS reform processes, both with its bilateral ICS as well as multilaterally through its participation in ongoing deliberations in UNCITRAL. This study revealed four principal factors that constrain the Union's capacity as an ISDS reform actor, namely the Member States, civil society, constitutional principles of the EU legal order, and the Commission's own policy preferences. First, in light of the *EUSFTA* opinion, this study was able to show that the shared nature of treaty-making competence over ISDS influences the Union's capacity to participate in ISDS reform primarily by subjecting the Commission's reform proposal to a political choice that is taken by the Member States collectively in the Council. The mixed nature of EU IIAs is thus not a legal consequence of the division of competences with the EU but reflects a policy preference of the Member States, i.e. their desire to maintain an involvement in IIAs alongside the Union. The internal mechanism for the determination of the respondent status to investment disputes equally suggests that Member States are going to take on a key role in the implementation of EU IIAs.

Second, the Commission has shown itself to be susceptible to pressure from civil society. This study was able to demonstrate that the Commission reinvented EU foreign investment policy as a response to the strong rejection of investor-state arbitration in TTIP, which gained particular legal relevance as the EP endorsed similar views in its resolution. Whereas prior to these events all post-Lisbon IIAs incorporated investor-state arbitration, a retreat from the ICS is now no longer tenable; the ICS has grown to become the epicentre of EU foreign investment policy. As mixed agreements, EU IIAs must also be ratified by the national parliaments in all Member States, in accordance with national constitutional requirements. It is therefore that the institutional and procedural features of the ICS have to address the shortcomings (perceived and actual) from which the legitimacy of investor-state arbitration appears to suffer.

Evaluating the ICS in light of the criticism against investor-state arbitration, the findings in the present study confirm that improvements were made by removing the influence of investors over the selection of adjudicators and, thus, eradicating

the perception of an affiliation with the investor, or any incentive in a pro-investor outcome of the case. The ICS furthermore establishes institutional safeguards that are traditionally associated with the judicial independence of adjudicators, i.e. including tenure, fixed remuneration, professional requirements that require candidates fit for judicial office, and strict ethical standards that prevent ‘double hatting’. Procedurally the ICS achieves a fair allocation of costs, and includes assurances against frivolous, unmeritorious and parallel disputes. Most significant, however, is the establishment of an Appeal Tribunal that can be expected to work towards a *jurisprudence constante* and, thus, improve the predictability of ICS proceedings.

But not everything that glitters is gold. At its core the ICS stays loyal to established arbitration rules, leans institutionally on the ICSID Secretariat, employs familiar enforcement mechanisms and functions for all relevant purposes as an institutional, and decentralized arbitration mechanism—not a court. Whether the Appeals Tribunal will impact on the ICS’s overall legitimacy depends largely on its willingness to exercise restraint not to engage in a *de novo* review limit itself to questions of law.

A third relevant factor that determines the limits of the Union’s capacity to engage in ISDS reform is the principle of autonomy and the principle of non-discrimination. The former, in particular, requires the incorporation of particular safeguards that insulate the EU legal order from external influences and preserve the particular nature of the law established by the Treaties. A visible effort has been made to address these concerns. Accordingly, the ICS explicates domestic law as a matter of fact, binds the ICS tribunals in the examination of domestic law to the prevailing interpretation of the competent court of authority and excludes any jurisdiction over the validity of domestic law. Additional safeguards include the exclusion of direct effect of the IIA, as well as a sector specific carve out for state aid. And yet, evaluating the ICS in light of the principle of autonomy, this study concluded short involving the CJEU by means of preliminary references mechanism, these safeguards are insufficient to alleviate the risk that ICS tribunals embark on an interpretation of EU law, that will leave an indirect effect on legal developments in the EU legal order.

This study was also able to demonstrate that the ICS does not in principle escape an assessment in light of the principle of non-discrimination, albeit that the case law of the CJEU does not currently dictate a unilateral extension of access to the ICS to all investors regarding investments on the internal market. Advocating a normative argument in favour of an application of Article 18 TFEU to the ICS, this study emphasized the potentially detrimental effect that the favourable treatment of foreign investors has on the equality of competitive relationships between economic operators on the internal market.

Fourth, the ICS first and foremost reflects the Commission’s policy preferences with respect to ISDS reform, subject to the above constraints. But the ICS itself

poses a constraint on the Union's capacity to participate in ISDS reform. The findings presented in this study support the view that the ICS leads to an entrenchment of specific policy preferences. The ICS, thus, shapes political realities before a multilateral consensus could be achieved. Imposing its preconceived conceptions as desirable policy choices for a multilateral reform initiative, the Union risks being perceived of as abusing its dominant position to dictate the terms of the UNCITRAL discussions.

Concluding this analysis, the present Chapter elaborates briefly on a number of themes that are running consistently through this study.

9.1 The interplay of law and policy

Some of the factors identified above arise directly out of the application of legal norms or principles as they are interpreted by the CJEU. This is certainly true for the issue of competence, for there can be no international Union action without a requisite external competence. The nature of said competence is likewise derived from the application of the Treaties and relevant case law. Besides competence, the principles of autonomy and non-discrimination, define the contours of future ISDS initiatives as a legal consequence, subject only to the judicial discretion of the CJEU. If, indeed, the CJEU concurs with the findings of the present study a prior involvement mechanism is *sine qua non* for the compatibility of CETA with the Treaties, this will not only affect the ICS but all future ISDS reform proposal. The same is true for the principle of non-discrimination, a violation of which could only effectively be addressed through a multilateral ISDS reform or the establishment of an intra-EU investment court.

Other factors influencing the ICS are based in policy. This is particularly obvious in respect to the nature of future agreements; 'mixity' as this study aptly illustrates is not a legal requirement but a political choice. The ICS as a reform initiative is itself born out of political pragmatism, and so are its institutional and procedural features that purport to improve existing shortcomings. The Union did not, in other words, rise from the Treaty of Lisbon as an ISDS reform actor but was left with little alternative in light of a changing political environment. Left with shared competences over ISDS, the balancing of political interests will only become more difficult as the Commission engages in multilateral reform at UNCITRAL.

And yet, law and policy have not emerged as separate spheres of the Union's capacity to engage in ISDS reform. Instead, law and policy are in a constant interplay. The decision to apply 'mixity' to EU IIAs may be subject to a political choice, but it is 'mixity' as a legal construct in EU external relations law that lays the preconditions for this type of political pragmatism. Similarly, the ICS may be a response to the criticism from civil society over the investor-state arbitration provisions in TTIP, but it was the resolution of the EP that provided this criticism

with legal relevance. The conclusion of EU IIAs is conditioned on the consent of the EP. This interplay is even more pronounced in the ratification procedure of EU IIAs in the domestic sphere. AG Bot's view on the *CETA* opinion provides yet another example as he suggests that the benefits that EU investors acquire in third countries, and central role that ISDS provisions play for investment protection, are relevant factors to be taken into account for a legal analysis of the compatibility of CETA with the Treaties. Future research in this field should further elaborate upon this interplay of law and policy.

9.2 The modest contribution of the Treaty of Lisbon

A logical starting point for this investigation into the ICS was the explicit endowment of the Union with treaty-making competence over FDI under the umbrella of the CCP. It is true, of course, that the Union actively participated in the conclusion of investment-related agreements already prior to the Lisbon Reform. However, these agreements excluded core areas of traditional BITs, i.e. investment protection and ISDS. The Lisbon Reform came with an expectation that the Union is becoming an investment treaty actor, capable of replacing the Member States and their extensive body of BITs with third countries. Indeed, these expectations were generally confirmed by the CJEU in its *EUSFTA* opinion, another aspect of the Court's reasoning is less often discussed i.e. that the achievements of the Treaty of Lisbon in providing the legal foundation for a comprehensive foreign investment policy were in fact much more modest. Let's recap, in light of the *EUSFTA* opinion, how the Lisbon Reform affected the scope of the CCP.

First, the investment competence of the Union is clearly divided between FDI and portfolio investment. This is to say that Article 207 TFEU now extends to investment activity that, according to the Court's definition, is internally covered by Article 63 TFEU. The Lisbon Reform did not, therefore, affect the existence of substantive treaty-making competence over FDI, but provided an explicit legal basis for it. More precisely it only added to the CCP in so far as direct investment was not already covered by the concept of trade in services.¹⁶⁰⁴ The most profound impact of the Treaty of Lisbon was, however, on the nature of Union competence over FDI that is now exclusive.

Second, the Court's conclusion that the Union's substantive treaty-making competence also covers investment protection, is substantiated by the fact that investment protection of FDI has a direct and immediate effects on trade. This test, however, is not applicable to Article 63 TFEU and considering that the CJEU fails to provide an alternative explanation one can only speculate that investment protection, in as far as it relates to portfolio investment, falls either squarely within

¹⁶⁰⁴ Opinion 1/08 *GATS Schedules of cit.*, 120.

the scope *ratio materiae* of Article 63 TFEU, or is perceived to be merely of an ancillary nature. The CJEU, in other words, implicitly confirmed that shared competence over investment protection existed already prior to the Treaty of Lisbon on the basis of the internal market provisions on the free movement of capital.

Third, the fact that the Union's treaty-making competence over ISDS provisions is not linked to Article 207 TFEU at all, also suggests that the recent reform of the CCP has had little effect on the Union's legal capacity to conclude IIAs with ISDS provisions. Somewhat paradoxically, therefore, the Lisbon Reform of the CCP appears to have ignited a debate over a foreign investment policy that is not in fact premised on Article 207 TFEU. This is exacerbated by the political processes following the *EUSFTA* opinion. The Council has, thus, endorsed a trade and investment strategy that focuses on the conclusion of exclusive FTAs and mixed IIAs. In practice, therefore, the Lisbon Reform did little more than furnish the Union with exclusive competence to include FDI liberalization clauses in its post-Lisbon FTAs. The Court's approach is unsatisfactory, and disregards the profound impact that the Treaty of Lisbon has had on the EU as a global actor. Although future research should not be confined to a study of EU foreign investment policy as a by-product of the Treaty of Lisbon, scholarship should, however, also be critical of the Court's conclusions and challenge its approach.

9.3 Reasserting state control

The criticism against investor-state arbitration is ultimately rooted in a challenge to the ideological proposition that FDI is an essential condition for economic development and prosperity that justifies a privileged position of foreign investors in international law.¹⁶⁰⁵ As such it is paradigmatic of a broader resentment of the effects of economic globalization. Indeed, contemporary political developments indicate that the pendulum of liberalism is swinging towards the conservative end, and brings the re-emergence of nationalism and protectionism to many developed countries.¹⁶⁰⁶ This is also reflected in the ICS. The extensive powers of the trade committee over substantive, institutional and procedural aspects of ISDS are pragmatic solutions to provide EU IIAs with the flexibility and institutional responsiveness that is required to manage investment-relations effectively over the lifetime of an IIA.

This pragmatism comes, however, at the cost of reintroducing politics into ISDS. The trade committee provides the contracting states with a platform to adopt sovereignty-protective interpretations of the agreement, determine the set-up of the ICS, as well as the tenure and remuneration of ICS members, and decide over the

¹⁶⁰⁵ See *supra* Chapter 2.3.

¹⁶⁰⁶ This metaphor draws on the image of the "swing of the pendulum" in Schlesinger's cyclical theory, see Arthur M. Schlesinger, *The cycles of American history* (Boston : Houghton Mifflin: 1986).

permanency of ICS tribunals. It is states who nominate the ICS members by political compromise, and these members are affiliated with the state—and only the state—in ICS proceedings. There even is the power to influence the outcome of on-going proceedings reserved for the intergovernmental trade committees. Although the reassertion of state control over ISDS is a plausible response to the current backlash against investor-state arbitration, the decision-making in the trade committee must be transparently and participatory to lay claim at system that is democratically accountable. There is a looming risk for political opportunism to influence the adjudication of investor-state disputes, and more research is needed that reveals the formal and informal practices of treaty bodies and their influence on ISDS.

9.4 External factors: History as a guiding post

Part I of this study revisited the imperial roots of the modern investment treaty regime, composed of thousands of IIA, mostly bilateral, which contain far-reaching standards of investment protection that gravitate around the procedural empowerment of individual investors to vindicate interferences with their property abroad directly before an international tribunal. The notion that property of foreigners is protected in international law finds its origin in the frequent reassertion of Western conceptions of property and ownership that came with the imperialist activity in the Americas and Asia throughout much of the 19th century. Increasing mobility of capital, driven by technological advances and a liberal economic ideology explains the proliferation of BITs in the 1990's, and together with the propensity of international law in the post-war era towards institutionalization and judicialization, favoured the rise of investor-state arbitration as an alternative to 'gunboat diplomacy'.

The many attempts that were undertaken to address the regulation of foreign investment multilaterally failed, in part due to the alienation of developing countries that are important stakeholders in the system. As history tends to repeat itself, this certainly sets the tone for ongoing reform initiatives in UNCITRAL. A conclusion that can be drawn from observations made in this study is that the roles of developed and developing states in the contestation of ISDS were redefined in light of the recent backlash against investor-state arbitration. It is now Western states that drive reform initiatives for the purpose to limit the scope of investment protection, and curtail the power of adjudicators. This alone does not, however, allow for the conclusion that the policy preferences of developed and developing countries are aligned. The UNCITRAL initiative must aim to attain a (true) multilateral consensus. Any attempt by the Union to impose the ICS structure on the rest of the world would effectively undermine this process. The Commission cannot, therefore, allow the ICS to become a stumbling block on the path to multilateral reform. The role of

the Union in multilateral ISDS reform should be focused on facilitating, rather than shaping, a multilateral consensus.

The *EUSFTA* opinion could have provided the Commission with an important incentive to abandon its focus on bilateral ISDS reform, and ‘double down’ on multilateralism.¹⁶⁰⁷ The multilateralization clauses could have instead been implemented in the remaining FTAs in order to ensure the cooperation of its trading partners towards multilateral ISDS reform. On the other hand, it should be acknowledged that it was the threat of an emergence of bilateral appellate mechanisms and their effect on further fragmentation of international investment law that provoked talks over reform in ICSID nearly 15 years ago. Only when this threat failed to materialize was the ICSID appeals facility taken off the table. Viewed in this light, the ICS might turn out to be both, a catalyst and threat to multilateral ISDS reform. As the deliberations at UNCITRAL unfold there will be a need to contextualize these processes and draw important lessons from the past.

9.5 A few final remarks

The findings presented in this study support the general proposition that the Union’s capacity to participate in ISDS reform is conditioned by a number of factors that expose the ICS to a number of challenges. The political pressure is starting to lift. The EP has already given its approval to CETA¹⁶⁰⁸ and the EU-Singapore IPA.¹⁶⁰⁹ Ten Member States are also reported to have already ratified CETA in accordance with their national procedures. The legal challenges, on the other hand, are not over yet. The affirmative view of AG Bot who was assigned to the *CETA* opinion should not be taken as indicative of ‘the likely direction that the decision may take. Indeed, the Court adopted a more restrictive view on the treaty-making competence over ISDS than the AG Sharpston suggested in the *EUSFTA* opinion procedure, and outright rejected the integrationist effort of AG Wathelet in *Achmea*.

This study does therefore not share the positive outlook embraced by AG Bot. The restrictive case law of the CJEU that persistently emphasized the importance of a judicial dialogue that ensures the involvement of the CJEU in the interpretation of EU law. This resonated strongly in the context of ISDS in the Court’s reasoning in *Achmea* and even the *EUSFTA* opinion. Recall only that in this latter instance the Court substantiated its special and proscriptive treatment of ISDS under EU law with the same reasoning that previously led to the rejection of the EPcT for reasons

¹⁶⁰⁷ Howse (2017), *op cit.*, 213-14.

¹⁶⁰⁸ European Parliament Press Release (15 February 2017) *op cit.*

¹⁶⁰⁹ European Parliament, ‘Parliament gives green light to EU-Singapore trade and investment protection deals’, 13 February 2019 accessed at <<http://www.europarl.europa.eu/news/en/press-room/20190207IPR25207/ep-gives-green-light-to-eu-singapore-trade-and-investment-protection-deals>>.

of it being incompatible with the autonomy of the EU legal order. And yet, the author shares with AG Bot his seeming disillusionment over the development of EU law into a purely self-referential system, and his call for pragmatic solution that are sensitive of international realities. This cannot, however, entail the establishment of co-existing legal regimes that circumvent the essential safeguards inherent in the system of judicial remedies established under the Treaties, undermine the special nature of EU law, and distort the level playing field amongst economic operators on the internal market.

The Commission has established itself as a powerful actor in ISDS reform, capable to exploit the political appetite for reform, and influential in shaping a multilateral consensus. Indeed, in spite of the looming risks that flows from the uncertain outcome of the *CETA* decision, the Commission is likely to dominate the reform process the coming years. The purpose of the present study was not, therefore, to apprehend where *CETA* verdict might fall, but demonstrate how the Union's capacity for such an engagement is constrained by various factors, internal and external to the EU legal order. It is for these reasons that the findings presented in this study carry relevance beyond the (uncertain) lifetime of the ICS. But even though reforms are already underway, these proposals do not reflect a fundamental shift in paradigm. Rather, they disseminate a legitimating narrative in response to the rising criticism in civil society, reiterated through a deliberate reassertion of state control, and a correlating exclusion of investor influence from the process of investor-state dispute settlement. Shocking as it may seem to the investment arbitration community, the sentiment that we have come too far to return to traditional investor-state arbitration nurtures the UNCITRAL, and will be reflected in other reform initiatives yet to come.

BIBLIOGRAPHY

Cases

Court of Justice of the European Union

- Joined cases 7-54 and 9-54 *Groupement des Industries Sidérurgiques Luxembourgeoises v High Authority of the European Coal and Steel Community* [1956], EU:C:1956:2.
- Joined Cases C-7/56, C-3-7/57 *Dinecke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community* [1957], EU:C:1957:7.
- Case 14/59 *Société des fonderies de Pont-à-Mousson v High Authority of the European Coal and Steel Community* [1959], EU:C:1959:31.
- Joined Cases 32 and 33/58 *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community* [1959], EU:C:1959:18.
- Case 13/63 *Italian Republic v Commission of the Economic Communities* [1963], EU:C:1963:20.
- Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963], EU:C:1963:1
- Joined cases 90 and 91/63 *Commission v Luxembourg and Belgium (Dairy Products)* [1964], EU:C:1964:80.
- Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964], EU:C:1964:66
- Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co.* [1970], EU:C:1970:115.
- Case 22/70 *Commission of the European Communities v Council of the European Communities (European Road Transport Agreement)* [1971], EU:C:1971:32.
- Case 62/70 *Werner A. Bock v Commission* [1971], EU:C:1971:108.
- Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972], EU:C:1972:115.
- Case 9/73 *Carl Schlüter v Hauptzollamt Lörrach* [1973], EU:C:1973:110.
- Case 181/73 *R & V Haegeman v. Belgian State* [1974], EU:C:1974:41.
- Opinion 1/75 *OECD Understanding on a Local Cost Standard* [1975], EU:C:1975:145.

- Case 55/75 *Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof* [1976], EU:C:1976:8.
- Case 41/76 *Suzanne Criel, née Donckervolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976], EU:C:1976:182.
- Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe* [1977], EU:C:1977:160.
- Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977], EU:C:1977:63.
- Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978], EU:C:1978:49.
- Opinion 1/78 *International Agreement on Natural Rubber* [1979], EU:C:1979:224
- Case C-244/80 *Pasquale Foglia v Mariella Novello* [1981], EU:C:1981:302
- Case C-245/81 *Edeka Zentrale AG v Federal Republic of Germany* [1982], EU:C:1982:277.
- Case C-104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982], EU:C:1982:362.
- Case C-52/81 *Offene Handelsgesellschaft in Firma Werner Faust v Commission of the European Communities* [1982], EU:C:1982:369.
- Case C-270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited* [1982], EU:C:1982:43.
- Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982], EU:C:1982:335.
- Joined Cases C-267, 268 and 269/81 *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983], EU:C:1983:78.
- Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen.* [1984], EU:C:1984:153.
- Case C-174/84 *Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company* [1986], EU:C:1986:60.
- Case C-318/85 *Regina Greis Unterveger* [1986], Order of the Court, EU:C:1986:106.
- Case C-45/86 *Commission of the European Communities v Council of the European Communities (General Tariff Preferences)* [1987], EU:C:1987:163.
- Case C-12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987], EU:C:1987:400.
- Case C- 235/87 *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* [1988], EU:C:1988:460.
- Case C-70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission* [1989], EU:C:1989:254.
- Case C-30/88 *Greece v Commission (Special aid to Turkey)* [1989], EU:C:1989:422.
- Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk*

- Arbejdsgiverforening, acting on behalf of Danfoss* [1989], EU:C:1989:383.
- Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989], EU:C:1989:646.
- Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990], EU:C:1990:395.
- Case C-192/89 *S. Z. Sevince v. Staatssecretaris van Justitie* [1990], EU:C:1990:322.
- Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association* [1991], EU:C:1991:490.
- Case C-69/89 *Nakajima All Precision Co. Ltd v Council* [1991], EU:C:1991:186.
- Case C-221/89 *The Queen / Secretary of State for Transport, ex parte Factortame* [1991], EU:C:1991:320.
- Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992], EU:C:1992:453.
- Opinion 1/92 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1992], 10 April 1992, EU:C:1992:189.
- Case C-240/90 *Germany v Commission (Sheepmeat)* [1992], EU:C:1992:408.
- Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993], EU:C:1993:106.
- Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (WTO Agreements)* [1994], EU:C:1994:384.
- Case C-280/93 *Federal Republic of Germany v Council of the European Union* [1994], EU:C:1994:367.
- Case C-327/91 *France v Commission* [1994], EU:C:1994:305.
- Case C-355/93 *Hayriye Eroglu v Land Baden-Württemberg* [1994], EU:C:1994:369.
- Case C-156/93 *European Parliament v Commission* [1995], EU:C:1995:238.
- Case C-417/93 *European Parliament v Council* [1995], EU:C:1995:127.
- Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995], EU:C:1995:411.
- Joined Cases C-422, 423, and 424/93 *Teresa Zabala Erasun, Elvira Encabo Terrazos and Francisco Casquero Carrillo v Instituto Nacional de Empleo* [1995], EU:C:1995:183.
- Opinion 2/92 *Third Revised Decision of the OECD on national treatment* [1995], EU:C:1995:83.
- Case C-2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996], EU:C:1996:140.
- Case C-61/94 *Commission of the European Communities v. Federal Republic of Germany (International Dairy Arrangement)* [1996], EU:C:1996:313.
- Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd.* [1996], EU:C:1996:357.

- Case C-277/94 *Z. Taflan-Met, S. Altun-Baser, E. Andal-Bugdayci v Bestuur van de Sociale Verzekeringsbank and O. Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1996], EU:C:1996:315.
- Case C-323/95 *David Charles Hayes and Jeannette Karen Hayes v Kronenberger GmbH* [1997], EU:C:1997:169.
- Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997], EU:C:1997:413.
- Case C-337/95 *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* [1997], EU:C:1997:517.
- Case C-122/95 *Federal Republic of Germany v Council of the European Union* [1998], EU:C:1998:94.
- Case C-336/96 *Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998], EU:C:1998:221.
- Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998], EU:C:1998:292.
- Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998], EU:C:1998:293.
- Joined Cases C-364 and 365/95 *T. Port GmbH & Co v Hauptzollamt Hamburg-Jonas* [1998], EU:C:1998:95.
- Case C-134/97 *Victoria Film A/S* [1998], EU:C:1998:535.
- Case C-104/97 *P Atlanta AG and others v Commission of the European Communities and Council of the European Union* [1999], EU:C:1999:498.
- Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999], EU:C:1999:438.
- Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999], EU:C:1999:269.
- Case C-222/97 *Manfred Trummer and Peter Mayer* [1999], EU:C:1999:143.
- Case C-149/96 *Portuguese Republic v Council (Textiles)* [1999], EU:C:1999:574.
- Case C-251/98 *C. Baars v Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem* [2000], EU:C:2000:205.
- Joined Cases C-300 and 392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layber GmbH & Co. KG and Layber BV* [2000], EU:C:2000:688.
- Case C-65/98 *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000], EU:C:2000:336.
- Opinion 2/00 *Cartagena Protocol* [2001], EU:C:2001:664.
- Case T-18/99 *Cordis Obst und Gemüse Großhandel GmbH v Commission* [2001], EU:T:2001:95.
- Case C-307/99 *OGT Fruchthandelsgesellschaft mbH v Hauptzollamt Hamburg-St. Annen* [2001], Order of the Court, EU:C:2001:228.
- Case T-174/00 *Biret International SA v Council of the European Union* [2002], EU:T:2002:2.
- Case C-188/00 *Bülent Kurz, né Yüce v Land Baden-Württemberg* [2002], EU:C:2002:694.
- Case C-281/01 *Commission v Council (Energy Star Agreement)* [2002], EU:C:2002:761.
- Case C-483/99 *Commission v France* [2002], EU:C:2002:327.

- Case C-476/98 *Commission v Germany (Open Skies)* [2002], EU:C:2002:631.
- Joined Cases C-466-469/98, C-471-472/98, C-475-476/98 *Infringement proceedings against Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the United Kingdom* [2002], EU:C:2002:631.
- Case C-471/98 *Commission v. Belgium* [2002], EU:C:2002:628.
- Case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale* [2002], EU:C:2002:16.
- Opinion 1/00 *European Common Aviation Area* [2002], EU:C:2002:231.
- Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzęptowicz-Meyer* [2002], EU:C:2002:57.
- Case C-289/02 *AMOK Verlags GmbH v A & R Gastronomie GmbH* [2003], EU:C:2003:669.
- Case C-93/02 *P Biret International SA v Council* [2003], EU:C:2003:517.
- Case C-148/02 *Carlos Garcia Avello v Belgium* [2003], EU:C:2003:539.
- Case C-98/01 *Commission v United Kingdom* [2003], EU:C:2003:273.
- Joined Cases C-317 and 369/01 *Eran Abatay and Others, and Nadi Sabin v Bundesanstalt für Arbeit* [2003], EU:C:2003:572.
- Case C-171/01 *Wählergruppe Gemeinsam Zajedno / Birlikte Alternative und Grüne GewerkschafterInnen / UG, and Others* [2003], EU:C:2003:260.
- Case C-286/02 *Bellio F.lli Srl v. Prefettura di Treviso* [2004], EU:C:2004:212.
- Case C-266/03 *Commission v Luxembourg (Inland Waterways)* [2005], EU:C:2005:341.
- Case C-376/03 *D v Inspecteur van de Belastingdienst* [2005], EU:C:2005:424.
- Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* [2005], EU:C:2005:121.
- Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v. Ministero delle Politiche Agricole e Forestali* [2005], EU:C:2005:285.
- Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc., and others* [2005], EU:C:2005:333.
- Case C-311/04 *Algemene Scheeps Agentuur Dordrecht BV v Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2006], EU:C:2006:23.
- Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, [2006], EU:C:2006:544.
- Case C-440/05 *Commission v Council* [2006], EU:C:2007:625.
- Case C-94/03 *Commission v Council (Rotterdam Convention)* [2006], EU:C:2006:2.
- Case C-178/03 *Commission v European Parliament* [2006], EU:C:2006:4.
- Case C-459/03 *Commission v. Ireland (MOX Plant)* [2006], EU:C:2006:345.
- Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.* [2006], EU:C:2006:81.
- Case C-11/05 *Friesland Coberco Dairy Foods BV v Inspecteur van de Belastingdienst/Douane Noord/kantoor Groningen* [2006], EU:C:2006:312.

- Case C-344/04 *International Air Transport Association v. Department for Transport* [2006], EU:C:2006:10.
- Case C-265/04 *Margaretha Bouanich v Skatteverket* [2006], EU:C:2006:51.
- Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006], EU:C:2006:773.
- Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006], EU:C:2006:774.
- Case C-298/05 *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt* [2007], EU:C:2007:754.
- Case C-112/05 *Commission v Germany* [2007], EU:C:2007:623.
- Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2007], EU:C:2007:547.
- Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda* [2007], EU:C:2007:496.
- Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007], EU:C:2007:161.
- Joint Cases C-447 and 448/05 *Thomson Multimedia Sales Europe and Vestel France v Administration des douanes et droits indirects* [2007], EU:C:2007:151.
- Case C-157/05 *Winfried L. Holböck v Finanzamt Salzburg-Land* [2007], EU:C:2007:297.
- Joined Cases C-120 and 121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FLAMM), and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC v Council and Commission* [2008], EU:C:2008:476.
- Case C-524/06 *Heinz Huber v Germany* [2008], EU:C:2008:724.
- Case C-164/07 *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions*, [2008], EU:C:2008:321.
- Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008], EU:C:2008:312.
- Case C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v. Commissioners of Inland Revenue* [2008], Order of the Court, EU:C:2008:239.
- Joined cases C-402 and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008], EU:C:2008:461.
- Case C-370/07 *Commission v Council (CITES)* [2009], EU:C:2009:590.
- Case C-45/07 *Commission v Greece (IMO)* [2009], EU:C:2009:81.
- Case C-326/07 *Commission v Italy* [2009], EU:C:2009:193.
- Court of Justice, Opinion 1/08 *GATS Schedules* [2009], EU:C:2009:739.
- Case C-182/08 *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II* [2009], EU:C:2009:559.
- Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* [2009], EU:C:2009:124.
- Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010], EU:C:2010:91.

- Case C-246/07 *European Commission v Kingdom of Sweden (PFOS)* [2010], EU:C:2010:203.
- Case C-81/09 *Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis* [2010], EU:C:2010:622.
- Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010], EU:C:2010:243.
- Case C-366/10 *Air Transport Association of America v. Secretary of State for Energy and Climate Change* [2011], EU:C:2011:864.
- Case C-366/10 *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change*, [2011], EU:C:2011:864.
- Opinion 1/09 *European Patents Court* [2011], EU:C:2011:123.
- Joined Cases C-436 and 37/08 *Haribo and Österreichische Salinen AG v Finanzamt Linz* [2011], EU:C:2011:61.
- Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011], EU:C:2011:125.
- Case C-196/09 *Paul Miles and Others v European Schools* [2011], EU:C:2011:388
- Case C-540/11 *Daniel Levy and Carine Sebbag v Belgian State* [2012], EU:C:2012:581.
- Case C-35/11 *Test Claimants in FII Group Litigation* [2012], EU:C:2012:707.
- Case C-137/12 *Commission v Council (Conditional Access Services)* [2013], EU:C:2013:675.
- Case C-414/11 *Daiichi Sankyo Co. Ltd. v. DEMO* [2013], EU:C:2013:520.
- C-583/11 *P Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013], EU:C:2013:625.
- Case C-282/12 *Itelcar – Automóveis de Aluguer Lda v Fazenda Pública* [2013], EU:C:2013:629.
- Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Bulgaria AD, and others* [2013], EU:C:2013:48.
- Case C-181/12 *Yvon Welte v Finanzamt Velbert* [2013], EU:C:2013:662.
- Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014], 18 December 2014, EU:C:2014:2454.
- Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* [2014], EU:C:2014:1754.
- Case C-114/12 *Commission v Council* [2014], EU:C:2014:2151.
- Case C-399/12 *Germany v Council (OIV)* [2014], EU:C:2014:2258.
- Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* [2014], EU:C:2014:2399.
- Case C-47/12 *Kronos International Inc. v Finanzamt Leverkusen* [2014], EU:C:2014:2200.
- Case C-555/13 *Merck Canada Inc. v Accord Healthcare Ltd and Others* [2014], Order of the Court, EU:C:2014:92.

- Case C-474/12 *Schiebel Aircraft GmbH v Bundesminister für Wirtschaft, Familie und Jugend* [2014], EU:C:2014:2139.
- Case C-73/14 *Council v Commission (ITLOS)* [2015], EU:C:2015:663
- Case C-425/13 *European Commission v Council of the European Union* [2015], EU:C:2015:483.
- Case C-263/14 *Parliament v Commission (Tanzania)* [2016], EU:C:2016:435
- Case C-464/14 *SECIL — Companhia Geral de Cal e Cimento SA v Fazenda Pública* [2016], EU:C:2016:896.
- Case C-272/15 *Swiss International Air Lines AG v Secretary of State for Energy and Climate Change* [2016], EU:C:2016:993.
- Case C-224/16 *Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozi i patishtata (Aebtri) v Nachalnik na Mitnitsa Burgas* [2017], EU:C:2017:880.
- Opinion 1/15 *Draft agreement between Canada and the European Union on the transfer of Passenger Name Record data from the European Union to Canada* [2017], EU:C:2016:656.
- Case C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* [2017], EU:C:2017:448.
- Opinion 2/15 *Free Trade Agreement between the European Union and Singapore* [2017], EU:C:2017:376.
- Case C-600/14 *Germany v Commission (OTIF)* [2017], EU:C:2017:935.
- Case C-195/16 I *v Staatsanwaltschaft Offenburg* [2017], EU:C:2017:815.
- Case C-566/15 *Konrad Erzberger v TUI AG* [2017], EU:C:2017:562.
- Opinion 3/15 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* [2017], EU:C:2017:114.
- Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018], EU:C:2018:117.
- Case C-284/16 *Slovak Republic v Achmea BV* [2018], EU:C:2018:158.
- Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018], EU:C:2018:118.

Opinions of Advocates General

- Opinion of Advocate General Jacobs, Joined cases C-92 and 326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993], EU:C:1993:276
- Opinion of Advocate General Mischo, Case C-13/00 *Commission v Ireland (Berne Convention)* [2001], EU:C:2001:643
- Opinion of Advocate General Alber, Case C-93/02 *P Biret International SA v Council* [2003], EU:C:2003:291
- Opinion of Advocate General Léger, Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2006], EU:C:2006:236

- Opinion of Advocate General Kokott, Case C-13/07 *Commission v Council (Vietnam)* [2009], EU:C:2009:190
- Opinion of Advocate General Maduro, Case C-246/07 *Commission v Sweden (PFOS)* [2009], EU:C:2009:589
- Opinion 1/13 *Convention on the civil aspects of international child abduction* [2014], EU:C:2014:2303
- Opinion of Advocate General Bot, Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* [2014], EU:C:2014:156
- Opinion of Advocate General Sharpston, Case C-660/13 *Council of the European Union v European Commission* [2015], EU:C:2015:787
- Opinion of Advocate General Wathelet, Case C-567/14 *Genentech Inc. v Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH* [2016], EU:C:2016:177
- Opinion of Advocate General Sharpston, Opinion 2/15 *Free Trade Agreement between the European Union and Singapore* [2017], EU:C:2017:174
- Opinion of the Advocate General Wahl, Opinion 3/15 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* [2017], 8 September 2016, EU:C:2016:657
- Opinion of Advocate General Wathelet, Case C-284/16 *Slovak Republic v Achmea BV* [2018], EU:C:2017:699
- Opinion of Advocate General Bot, Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* [2019], EU:C:2019:72

Requests for a preliminary reference

- OJ C363/18, 3 November 2015, Opinion 2/15 *Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (EU-Singapore FTA)*.
- OJ C 369/2, 30.10.2017, Opinion 1/17 *Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Comprehensive Economic and Trade Agreement)*.

Investment awards

- Metalclad Corporation v. The United Mexican States* Final Award of 30 December 1996, ICSID Case No. ARB(AF)/97/1.
- Ethyl Corporation v. Canada* Award on Jurisdiction of 24 June 1998, UNCITRAL
- Emilio Agustín Maffezini v. The Kingdom of Spain* [2000], Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7.
- Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo* Award (excerpts), 1 September 2000, ICSID Case No. ARB/98/7.

- S. D. Myers, Inc. v. Government of Canada* First Partial Award of 13 December 2000, UNCITRAL.
- Salini Costruttori S.p.A. & Italstrade S.p.A., v. Kingdom of Morocco* Award on Jurisdiction, 16 July 2001, ICSID Case No. ARB00/4
- Ronald S. Lauder v. The Czech Republic* UNCITRAL, Final Award, 3 September 2001.
- Pope & Talbot Inc. v. The Government of Canada* Award in Respect of Damages, 31 May 2002, UNCITRAL.
- ADF Group Inc. v. United States* Award, 9 January 2003, ICSID No. ARB(AF)/00/1.
- CME Czech Republic B.V. v. The Czech Republic* UNCITRAL, Final Award, 14 March 2003.
- CMS Gas Transmission Company v Republic of Argentina* [2003], Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8.
- SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* Decision of the Tribunal on Jurisdiction of 6 August 2003, ICSID Case No. ARB/01/13
- Generation Ukraine Inc. v Ukraine* [2003], Final Award, 16 September 2003, ICSID Case No. ARB/00/9.
- SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, ICSID Case No. ARB/02/6.
- Italian Republic v Republic of Cuba* [2005], Interim Award, 15 March 2005, Ad Hoc Arbitration.
- Aguas del Tunari, S.A. v. Republic of Bolivia* Decision on Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3.
- ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* Award, 2 October 2006, ICSID Case No. ARB/03/16.
- Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* [2009], 30 July 2009, ICSID Case No. ARB/07/21.
- Achmea (formerly Eureko) B.V. v. The Slovak Republic* Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, UNCITRAL, PCA Case No. 2008-13.
- Republic of Ecuador v United States of America* Statement of Defense of Respondent, UNCITRAL, PCA Case No 2012-5.
- Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* [2013], Final Award, 2 July 2013, ICSID Case No. ARB/10/1.
- CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India* [2013], Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña of 30 September 2013, PCA Case No. 2013-09.
- Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* Final Award, 11 December 2013, ICSID Case No. ARB/05/20.

- Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* Final Award, 4 May 2017, ICSID Case No. ARB/13/36.
- JGC Corporation v. Kingdom of Spain*, ICSID Case No. ARB/15/27.
- Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/4.
- Itochu Corporation v. Kingdom of Spain*, ICSID Case No. ARB/18/25.
- Masdar Solar & Wind Cooperatif U.A. v. Kingdom of Spain* Final Award, 16 May 2018, ICSID Case No. ARB/14/1.
- Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain* Final Award, 15 February 2018, SCC Case No. 2015/063.

PCIJ / ICJ

- Mavrommatis Palestine Concessions (Greece v United Kingdom)*, 1924 PCIJ Reports Series A No. 2, Decision on Jurisdiction, 30 August 1924.
- Certain German Interests in Polish Upper Silesia*, 1926 PCIJ Series A No. 6 Judgment on Merits, 25 May 1926, .
- Case concerning the Payment in Gold of Brazilian Loans Contracted in France*, PCIJ Series A No. 21, 12 July 1929.
- Panevezys-Saldutiskis (Estonia v Lithuania)*, 1939 PCIJ Series A/B No. 76 .
- Reparation for injuries suffered in the service of the United Nations*, 1949 ICJ Reports 147, Advisory Opinion, 11 April 1949.
- Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, 1970 ICJ Reports 3.
- Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 ICJ Reports 15.

WTO dispute settlement reports

- India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* WTO AB Report, 17 December 1997, WT/DS50/AB/R.
- EC - Customs Classification of Certain Computer Equipment* WTO Panel Report, 5 June 1998, WT/DS62/R, WT/DS67/R, WT/DS68/R.
- United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WTO AB Report, 23 August 2001, WT/DS184/AB/R.
- United States - Section 211 Omnibus Appropriations Act of 1998* WTO AB Report, 2 January 2002, WT/DS176/AB/R.
- United States - Countervailing Measures Concerning Certain Products from the European Communities* WTO Panel Report, 8 January 2003, WT/DS212/R.
- China - Measures Affecting Imports of Automobile Parts* WTO AB Reports, 15 December 2008, WT/DS339/AB/R; WT/DS340/AB/R; WT/DS342/AB/R.

Domestic cases

- R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256.
 District Court of the Hague, civil law section, *The Republic of Ghana v Telkom Malaysia Berhad* [2004], 13/2004 (HA/RK 2004.667).
 OLG Frankfurt am Main, 26. Zivilsenat, Beschluss, 10 May 2012, Az. 26 SchH 11/10.
 BGH, III. Zivilsenat, Beschluss, 30 April 2014, Az. II ZB 37/12.
 OLG Frankfurt am Main, 26. Zivilsenat, Beschluss, 18 December 2014, Az. 26 Sch 3/13.
 BGH, I. Zivilsenat, Beschluss, 31 October 2018, Az. I ZB 2/15.

Legal instruments

EU Treaties

- OJ C 340, 10.11.1997, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.
 OJ C 325/33, 24 December 2002, Treaty establishing the European Community (Consolidated version 2002).
 OJ C 306/1, 17 December 2007, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.
 OJ C 326/47, 26 October 2012, Consolidated version of the Treaty on the Functioning of the European Union [TFEU].
 OJ C 326/13, 26 October 2012, Consolidated version of the Treaty on European Union [TEU].
 OJ C 326/391, 26 October 2012, Charter of Fundamental Rights of the European Union [Charter].

Other EU instruments

- Council of the European Union, 'Directives for the negotiation of a Modernised Association Agreement with Chile' (13553/17 ADD 1), 22 January 2018 accessible at <<https://www.consilium.europa.eu/media/32405/st13553-ad01dc01en17.pdf>>.
 —, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (12981/17 ADD 1), 1 March 2018 accessible at <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>>.

- OJ C 80/1, 10 March 2001, Declaration 23 on the future of the Union, Treaty of Nice.
- OJ C 55/196, 12 February 2016, Amendments adopted by the European Parliament on 23 May 2013 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party (COM(2012)0335 — C7-0155/2012 — 2012/0163(COD)).
- OJ L 336/1, 23 December 1994, Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (1994).
- OJ L 69/115, 09 March 1998, Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty.
- OJ L 179/1, 23 June 1998, Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof
- OJ L 145/1, 30 April 2004, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.
- OJ L 173/349, 12 June 2014, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.
- OJ L 124/3, 17 May 2005, Annex, Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.
- OJ L 299/25, 28 October 2006, Annex, Council Decision 2006/730/EC of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade.
- OJ L 55/13, 28 February 2011, Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
- OJ L 127/1, 14 May 2011, Council Decision (EU) 2011/265 of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.
- OJ L 127/6, 14 May 2011, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

- OJ L 351/40, 20 December 2012, 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 L 174/1, 26 June 2013, Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union.
- OJ L 257/121, 28 August 2014, Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.
- OJ L 11/23, 14 January 2017, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA).
- OJ L 11/1080, 14 January 2017, Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.
- OJ L11/3, 14 January 2017, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States.
- OJ L 279/1, 9 November 2018, Council Decision (EU) 2018/1676 of 15 October 2018 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.
- Laeken Declaration on the future of the European Union, Presidency Conclusions of the Laeken European Council, 14-15 December 2001, Annex I.
- COM (2012) 335 final, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party.
- European Commission, C(2017) 7384 final, 10 November 2017, State aid SA.40348 (2015/NN) — Spain Support for electricity generation from renewable energy sources, cogeneration and waste.

International Trade and Investment Agreements

- | | |
|------------------------------------|---------------------------------|
| Argentina-Switzerland BIT of 1991. | India Model BIT of 2016. |
| Australia-China FTA of 2014. | Indonesia-Chile BIT of 1999. |
| Australia-Korea BIT of 2014. | Indonesia-Netherlands Agreement |
| Canada Model FIPA of 2004. | on Economic Cooperation of |

Canada-Colombia FTA.	1968.
Canada-Korea FTA of 2014.	Italy-Chad BIT of 1969.
Chile-US FTA of 2004.	Korea-New Zealand FTA of 2015
China-Côte d'Ivoire BIT of 2002.	Netherlands-Czechoslovakia BIT of 1991
Dominican Republic-Central America-United States FTA of 2004 [CAFTA-DR].	North American Free Trade Agreement 1993.
EU-Canada Comprehensive Economic and Trade Agreement [CETA].	Norway Model BIT of 2012.
EU-Japan EPA.	Romania-Egypt BIT of 1994.
EU-Mexico FTA, Agreement in principle .	Singapore-US FTA of 2003.
EU-Singapore IPA.	Trans-Pacific Partnership Agreement.
Transatlantic Trade and Investment Partnership Agreement, informal text of 16 September 2015.	UK-Egypt BIT of 1975.
EU-Vietnam IPA.	Uruguay-US BIT of 2005.
Germany-Argentina BIT of 1991.	US-Australia FTA of 2005.
	US-Argentina BIT of 1991.
	US Model BIT of 2004.
	US Model BIT of 2012.

Other international legal instruments

- Covenant of the League of Nations (1919)
- Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)
- Draft Articles on Diplomatic Protection (2006) UN GA Res 61/35, Supplement 10
- Havana Charter for an International Trade Organization (1948) UN Doc E/CONF.2/78)
- ICSID Rules of Procedure for Arbitration Proceedings
- WTO Dispute Settlement Understanding
- United Nations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) [New York Convention]
- , Declaration on Permanent Sovereignty Over Natural Resources (1962).
- , Charter of Economic Rights and Duties of States (1974).
- , Declaration on the Establishment of a New International Economic Order (1974).
- , Convention on Jurisdictional Immunities of States and Their Property (GA Res 59/38, Annex).
- UNCITRAL Arbitration Rules (UN Doc A/Res/65/22).
- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (with a new article 1, paragraph (4), as adopted in 2013), Report of the United

- Nations Commission on International Trade Law, forty-sixth session, 8-26 July 2013 (A/68/17, Annex 1).
- Understanding on the Rules and Procedures Governing the Settlement of Disputes (1994) 1869 UN Treaties Series 401 [DSU].
- Vienna Convention on the Law of Treaties (1969), 1555 UN Treaty Series 331.
- WTO Appellate Body, 'Working procedures for appellate review', 16 August 2010 (WT/AB/WP/6).

Other

- Trade Promotion Authority Act of 2002, Public Law 107-210 s 2102, 19 USC s 3801 (2002).
- Schriftliche Erklärungen zum Vorabentscheidungsersuchen gemäß Artikel 23 Absatz 2 des Protokolls über die Satzung des Gerichtshofs, 30 August 2016.

Policy documents and reports

European Commission

- Concept Paper on the definition of investment, 16 April 2002 (WT/WGTI/W/115).
- Formell underrättelse – överträdelse nummer 2013/2207, skrivelse från Europeiska kommissionen, Generalsekretariatet till Sveriges ständiga representation vid Europeiska unionen .
- Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (COM(2018) 693 final), 17 October 2018 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0693>>.
- Protection of intra-EU investments (COM(2018) 547 final), 19 July 2018 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&from=EN>>.
- Commission Staff Working Document, 'Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement' (SWD(2015) 3 final).
- Communication from the Commission to the European Parliament and to the Council, 'Enhancing the patent system in Europe' (COM(2007) 165 final), 3 April 2007.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a comprehensive European international investment policy' (COM(2010)343 final), 7 July 2010.

Concept Paper on investment in TTIP and beyond – the path for reform, 5 May 2015 accessible at <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>.

Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part (COM(2016) 470 final), 5 July 2016 accessible at <<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-470-EN-F1-1.PDF>>.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A balanced and progressive trade policy to harness globalization', 13 September 2017 accessible at <<https://publications.europa.eu/en/publication-detail/-/publication/4a4b13f2-e3a6-11e7-9749-01aa75ed71a1/language-en/format-PDF>>.

Commission Staff Working Document, 'Impact assessment accompanying the document recommendation for a Council Decision authorising the opening of negotiations for a Free Trade agreement with Australia ' (SWD(2017) 293 final), 13 September 2017 accessible at <<https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-293-F1-EN-MAIN-PART-1.PDF>>.

Commission Staff Working Document, 'Impact assessment accompanying the document recommendation for a Council Decision authorising the opening of negotiations for a Free Trade agreement with New Zealand' (SWD(2017) 289 final), 13 September 2017 accessible at <<http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-289-F1-EN-MAIN-PART-1.PDF>>.

Commission Staff Working Document, 'Impact assessment on multilateral reform of investment dispute resolution accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes' (SWD(2017) 302 final), 13 September 2017 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN>>.

Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia (COM(2017) 472 final), 13 September 2017 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:472:FIN>>.

Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with New Zealand (COM(2017) 469 final), 13 September 2017 accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:469:FIN>>.

Submission of the European Union and its Member States to UNCITRAL Working Group III - Establishing a standing mechanism for the settlement of international investment disputes, 18 January 2019 accessible at <trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf>.

Joint Paper with the Government of Canada, 'Discussion paper: Establishment of a multilateral investment dispute settlement system', 13 and 14 December 2016 accessible at <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf>.

Co-sponsored non-paper with the Government of Canada, 'Reforming investment dispute settlement: Considerations on the way towards a multilateral investment dispute settlement mechanism', 17-21 July 2016 accessible at <[http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20\(rev2\)\(clean\).pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20(rev2)(clean).pdf)>.

The case for creating a multilateral investment dispute settlement mechanism, 20 January 2017 accessible at <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf>.

Other EU documents

European Parliament, INTA, 'Draft report containing the European Parliament's recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' (2014/2228(INI), PE549.135), 5 February 2015 accessible at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-549.135+01+DOC+PDF+V0//EN&language=EN>>.

—, 'Resolution containing the European Parliament's recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' (T8-0252/2015), 8 June 2015 accessible at <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0252>>.

Council of the European Union, Working Document from the General Secretariat of the Council to the Working Party on Intellectual Property (Patents), 'Draft Agreement on the European and Community Patent Court and draft Statute - revised Presidency text' (7928/09 PI 23 COUR 29), 23 March 2009 accessible at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%207928%202009%20INIT>>.

Council of the European Union, 'Draft Council conclusions on the negotiation and conclusion of EU trade agreements' (ST 8549 2018 INIT) accessible at <<http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>>.

Working Group VII on External Action, 'Final report' (CONV 459/02), 16 December 2002.

Fifth negotiating meeting between the CDDH ad hoc negotiating group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Appendix 1, Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, accessible at <https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf>.

UNCITRAL

Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, New York, 23–27 April 2018 (Fifty-first session, New York, 25 June–13 July 2018, A/CN.9/935) accessible at <<https://undocs.org/en/A/CN.9/930/Rev.1>>.

Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, Vienna, 27 November - 1 December 2017 (Fifty-first session, New York, 25 June–13 July 2018, A/CN.9/930/Rev.1) accessible at <<https://undocs.org/en/A/CN.9/930/Rev.1>>.

'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, Vienna, 29 October – 2 November 2018' (Fifty-second session, Vienna, 8–26 July 2019, A/CN.9/964) accessible at <<https://undocs.org/en/A/CN.9/964>>.

Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement (Forty-ninth session, 2016, A/CN.9/890).

Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS)' (Thirty-sixth session, Vienna, 29 November - 2 December 2018, A/CN.9/WG.III/WP.149).

Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union' (Thirty-seventh session, New York 1-5 April 2019 (A/CN.9/WG.III/WP.159/Add.1)) accessible at <https://uncitral.un.org/sites/uncitral.un.org/files/wp159_add1.pdf>.

Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union' (Thirty-fifth session, New York 23-27 April 2018,

A/CN.9/WG.III/WP.145) accessible at <<https://undocs.org/en/A/CN.9/WG.III/WP.145>>.

UNCTAD

- World investment report: Transnational corporations, employment and the workplace (UNCTAD/DTCI/10)
- Interpretation of IIAs: What states can do (IIA Issue Note No. 3, December 2011) accessible at <https://unctad.org/en/Docs/webdiaeia2011d10_en.pdf>.
- Reform of investor-state dispute settlement: in search of a roadmap (IIA Issue Note No. 2, June 2013) accessible at <https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf>.
- World investment report 2013: Global value chains: Investment and trade for development' (UNCTAD/WIR/2013) accessible at <https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf>.
- Investment policy framework for sustainable development' (UNCTAD/DIAE/PCB/2015/5) accessible at <<https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1437>>.
- World investment report 2015: Reforming international investment governance (UNCTAD/WIR/2015) accessible at <<https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>>.
- World investment report 2016: Investor nationality: Policy challenges (UNCTAD/WIR/2016) accessible at <https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>.
- World Investment Report 2017: Investment and the digital economy' (UNCTAD/WIR/2017) accessible at <https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf>.
- World Investment Report 2018: Investment and new industrial policies' (UNCTAD/WIR/2018).

Other international organisations

- ICC, International Code of Fair Treatment for Foreign Investments of 1949 (1999).
- ICSID, 'The ICSID Caseload - Statistics' (Issue 2018-2).
- , 'The ICSID caseload - statistics' (Issue 2019-1).
- , Secretariat Discussion Paper, 'Possible improvements of the framework for ICSID arbitration', October 2004.
- ILA, Draft Statutes of the Arbitral Tribunal for Foreign Investment and of the Foreign Investments Court of 1948 (1996).
- ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1) accessible at <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.p>

- df>.
- , 'Preliminary report on diplomatic protection, by Mr. Mohammed Bennouna, Special Rapporteur' (A/CN.4/484), 1 February 1998
- IMF, 'Balance of payments and international investment position manual, 6th ed.' (BPM6), 2007.
- United Nations, General Assembly, 'Report of the United Nations Commission on International Trade Law, fiftieth session, 3-21 July 2017' (Seventy-second session, Supplement No. 17, A/72/17).
- , 'Report of the International Law Commission on its sixty-fifth session' (UN Doc. A/68/10), 6 May to 7 June 2013 and from 8 July to 9 August 2013.
- OECD, Report by the Committee on International Investment and Multinational Enterprises / and the Committee on Capital Movements and Invisible Transactions, 'A Multilateral Agreement on Investment' (DAFFE/CMIT/CIME(95)13/FINAL), 5 May 1995.
- , 'Benchmark Definition of Foreign Direct Investment, 4th ed.', 2008 accessible at <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>>.
- World Bank, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 18 March 1965.
- WTO, 'Appellate Body Members', 25 June 2004 (WT/BFA/W/118).

Government documents

- Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l'Etat fédéral et les Entités fédérées pour la signature du CETA .
- Government of Australia, Productivity Commission, 'Bilateral and regional trade agreements', 13 December 2010 accessible at <https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>>.
- Kaufmann-Kohler G and Potestà M, Center for International Dispute Settlement, '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', 3 June 2016.
- Krajewski M, German Federal Ministry for Economic Affairs and Energy, 'Modell-Investitionsschutzvertrag mit investor-staat-schiedsverfahren für industriestaaten unter berücksichtigung der USA', 4 May 2015 accessible at https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten.pdf?__blob=publicationFile&v=1>.
- Tietje C and Baetens F, Ministry of Foreign Affairs, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment

Partnership' (MINBUZA-2014.78850), 2014 accessible at <<https://www.rijksoverheid.nl/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip>>.

Other

Richterbund D, 'Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015' (Nr. 04/16), February 2016 accessible at <https://www.bmwi.de/Redaktion/DE/Downloads/S-T/stellungnahme-deutscher-richterbund-zur-errichtung-eines-investitionsgerichts-fuer-ttip.pdf?__blob=publicationFile&v=6>.

Press releases and statements

Cecilia Malmström, 'Proposing an Investment Court System', 16 September 2015 accessed at <https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en>.

European Commission, 'FAQ on the EU-US Transatlantic Trade and Investment Partnership ("TTIP")', 17 June 2013 accessed at <http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151351.pdf>.

European Commission, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', IP/15/5198, 18 June 2015 accessed at <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>

European Commission, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations', 16 September 2015 accessed at <http://europa.eu/rapid/press-release_IP-15-5651_en.htm>.

European Commission, 'European Commission publishes TTIP legal texts as part of transparency initiative', 7 January 2015 accessed at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231>>.

European Commission, 'Press Statement by the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Viet Nam Nguyen Tan Dung', 2 December 2015 accessed at <europa.eu/rapid/press-release_IP-15-5467_en.htm>.

European Commission, 'CETA: EU and Canada agree on new approach on investment in trade agreement', 29 February 2016 accessed at <trade.ec.europa.eu/doclib/press/index.cfm?id=1468&title=CETA-EU-and-Canada-agree-on-new-approach-on-investment-in-trade-agreement>.

European Commission, 'European Commission proposes signature and conclusion of EU-Canada trade deal', 5 July 2016 accessed at <http://europa.eu/rapid/press-release_IP-16-2371_en.htm>.

- European Commission, 'Key elements of the EU-Singapore trade and investment agreements', 18 April 2018 accessed at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1827>>.
- European Commission, 'Commission welcomes European Parliament's support for investment screening framework', 14 February 2019 accessed at <http://europa.eu/rapid/press-release_IP-19-1052_en.htm>.
- European Parliament, 'CETA: MEPs back EU-Canada trade agreement', 15 February 2017 accessed at <<http://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement>>.
- European Parliament, 'Parliament gives green light to EU-Singapore trade and investment protection deals', 13 February 2019 accessed at <<http://www.europarl.europa.eu/news/en/press-room/20190207IPR25207/ep-gives-green-light-to-eu-singapore-trade-and-investment-protection-deals>>.
- Staten-General TKD, 'Letter in the framework of the political dialogue: the role of national parliaments in free trade agreements', 25 June 2014.
- The Rt Hon Sir Leon Brittan QC V-PotEC, European Parliament Plenary Session, SPEECH/98/212, 20 October 1998 accessed at <http://europa.eu/rapid/press-release_SPEECH-98-212_en.htm>.
- Council of the European Union, 'Outcome of the 3463rd Council meeting on Foreign Affairs and Trade Issues', 13 May 2016 accessed at <<http://data.consilium.europa.eu/doc/document/ST-8737-2016-INIT/en/pdf>>.

Literature

- Abbott FM, 'The political economy of NAFTA Chapter Eleven: Equality before the law and the boundaries of North American integration. (Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter 11)' (2000) 23(3-4) *Hastings International and Comparative Law Review* 303-09.
- Ackrill R and Kay A, 'Multiple streams in EU policy-making: The case of the 2005 sugar reform' (2011) 18(1) *Journal of European Public Policy* 72-89.
- Ackrill R, Kay A and Zahariadis N, 'Ambiguity, multiple streams, and EU policy' (2013) 20(6) *Journal of European Public Policy* 871-87.
- Alexandrov SA, 'On the perceived inconsistency in investor-state jurisprudence' in José E. Alvarez and Sauvant Karl P. (eds), *The evolving international investment regime: Expectations, realities, options* (Cambridge University Press: 2011) 60-69.
- Alvarez JE, 'State sovereignty is not withering away: A few lessons for the future' in Antonio Cassese (ed), *Realizing utopia: The future of international law* (Oxford University Press: 2012) 26-37.

- Alvarez JE and Khamisi K, Department, 'The Argentine crisis and foreign investors: A glimpse into the heart of the investment regime', accessible at <<https://www.iilj.org/publications/the-argentine-crisis-and-foreign-investors-a-glimpse-into-the-heart-of-the-investment-regime/>>.
- Alvarez Zárate JM, 'Legitimacy concerns of the proposed multilateral investment court: Is democracy possible?' (2018) 59(8) *Boston College Law Review* 2765-90.
- Alvarez GA and Park WW, 'The new face of investment arbitration: NAFTA chapter 11' (2003) 28(2) *The Yale Journal of International Law* 365-407.
- Amarasinha SD and Kokott J, 'Multilateral investment rules revisited' in Peter Muchlinski, Ortino Federico and Schreuer Christoph (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008) 119-51.
- Amroso B, *On Globalization: Capitalism in the 21st Century* (Macmillan Press: 1998).
- Anghie A, 'Finding the peripheries: Sovereignty and colonialism in nineteenth-century international law' (1999) 40(1) *Harvard International Law Journal* 1-80.
- , *Imperialism, sovereignty and the making of international law* (Cambridge University Press: 2005).
- , 'The evolution of international law: Colonial and postcolonial realities' (2006) 27(5) *Third World Quarterly* 739-53.
- Appelbaum AI, Department, 'Legitimacy in a bastard kingdom', accessible at <http://dspace.mit.edu/bitstream/handle/1721.1/55927/CPL_WP_04_05_Applbaum.pdf?sequence=1>.
- Arato J, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9(3) *The Law & Practice of International Courts and Tribunals* 443-494.
- Arnall A and others, *Wyatt and Dashwood's European Union Law*, 4th edn (Sweet & Maxwell: 2000).
- Baetens F, 'Judicial review of international adjudicatory decisions: A cross-regime comparison of annulment and appellate mechanisms' (2017) 8(3) *Journal of International Dispute Settlement* 432-59.
- Bairoch P and Kozul-Wright R, Department, 'Globalization myths: Some historical reflections on integration, industrialization and growth in the world economy'
- Balaš V, 'Review of Awards' in Peter Muchlinski, Ortino Federico and Schreuer Christoph (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press: 2008)
- Balasubramanyam VN, Salisu M and Sapsford D, 'Foreign direct investment and growth in EP and IS countries' (1996) 106(434) *The Economic Journal: the Quarterly Journal of the Royal Economic Society* 92-105.
- Baldwin RE and Martin P, 'Two Waves of Globalization: Superficial Similarities, Fundamental Differences' in Horst Siebert (ed), *Globalization and Labor* (Mohr Siebeck: 1999) 3-58.
- Bammens N, *The principle in non-discrimination in international and european tax law* (IBDF: 2013).

- Bankas E, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer: 2005).
- Baratta R, 'National courts as 'guardians' and 'ordinary courts' of EU law: Opinion 1/09 of the ECJ' (2011) 38(4) *Legal Issues of Economic Integration* 297-320.
- Barents R, *The Autonomy of Community Law* (Kluwer Law International: 2004).
- Basedow J, 'EU law in international arbitration: referrals to the European Court of Justice' (2015) 32(4) *Journal of International Arbitration* 367-86.
- Basedow JR, *The EU in the global investment regime: commission entrepreneurship, incremental institutional change and business lethargy* (Routledge: 2018).
- Behn D, 'Legitimacy, evolution, and growth in investment treaty arbitration: Empirically evaluating the state-of-the-art' (2015) 46(2) *Georgetown Journal of International Law* 363-415.
- Behn D, Berge T and Langford M, 'Poor states or poor governance? Explaining outcomes in investment treaty arbitration' (2018) 38(3) *Northwestern Journal of International Law & Business* 333-89.
- Bellak C, Department, 'Economic impact of investment agreements', accessible at <<https://epub.wu.ac.at/4625/1/wp200.pdf>>.
- Benacchio GA and Pasa B, *A Common Law for Europe* (Central European University Press: 2005).
- Bieber R and Salomé I, 'Hierarchy of norms in European law' (1996) 33(5) *Common Market Law Review* 907-30.
- Billiet S, 'The EC and WTO Dispute Settlement: The initiation of trade disputes by the EC' (2005) 10(2) *European foreign affairs review* 197-214.
- , 'From GATT to the WTO: The internal struggle for external competences in the EU' (2006) 44(5) *Journal of Common Market Studies* 899-919.
- Bischoff J, 'Just a little BIT of "mixity"? The EU's role in the field of international investment protection law' (2011) 48(5) *Common Market Law Review* 1527-69.
- Bix BH, 'Law as an Autonomous Discipline' in Mark Tushnet and Cane Peter (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press: 2005) 975-86.
- Bodansky D, 'Legitimacy' in Daniel Bodansky, Brunnee Jutta and Hey Ellen (eds), *The Oxford handbook of international environmental law* (OUP: 2008) 705-23.
- , 'Legitimacy in International Law and International Relations' in Jeffrey L. Dunoff and Pollack Mark A. (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP: 2013) 321-41.
- Bonnitcha J, Poulsen LNS and Waibel M, *The Political Economy of the Investment Treaty Regime* (Oxford University Press: 2017).
- Born GB and Shenkman EG, 'Confidentiality and Transparency in Commercial and Investor-State International Arbitration' in Catherine A. Rogers and Alford Roger P. (eds), *The Future of Investment Arbitration* (Oxford University Press: 2009) 5-42.

- Bottini G, 'Reform of the investor-state arbitration regime: The appeal proposal' in *Reshaping the investor-state dispute settlement system: Journeys for the 21st century* (Brill Nijhoff: 2015) 455-73.
- Bourgeois JHJ, 'The EC in the WTO and Advisory Opinion 1/94: An Echternach procession' (1995) 32(3) *Common Market Law Review* 763-87.
- Brandtner B, 'The 'drama' of the EEA – Comments on Opinions 1/91 and 1/92' (1992) 3(2) *European Journal of International Law* 300-23.
- Bronckers M, 'From 'direct effect' to 'muted dialogue': Recent developments in the European Courts' case law on the WTO and beyond' (2008) 11(4) *Journal of International Economic Law* 885–98.
- Bronz G, 'The international trade organization charter' (1949) 62(7) *Harvard Law Review* 1089-125.
- Brower CN, Brower ICH and Sharpe JK, 'The coming crisis in the global adjudication system' (2003) 19(4) *Arbitration International* 415-40.
- Brower CN and Rosenberg CB, 'The death of the two-headed nightingale: why the Paulsson-van den Berg presumption that party-appointed arbitrators are untrustworthy is wrongheaded' (2013) 29(1) *Arbitration International* 7-44.
- Brower CN and Schill SW, 'Is arbitration a threat or a boon to the legitimacy of international investment law?' (2009) 9(2) *Chicago Journal of International Law* 471-98.
- Brower II CH, 'Why the FTC Notes of Interpretation constitute a partial amendment of NAFTA' (2006) 46(2) *Virginia Journal of International Law* 347-63.
- Brown C, 'Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press: 2010)
- Buchanan A and Keohane RO, 'The Legitimacy of global governance institutions' in Rüdiger Wolfrum and Røben Volker (eds), *Legitimacy in international law* (Springer: 2008) 25-62.
- Buga I, *Modification of treaties by subsequent practice* (Oxford University Press: 2018).
- Bull H, *The anarchical society: a study of order in world politics* (Macmillan: 1977).
- Bungenberg M, 'The Division of Competences between the EU and its Member States in the Area of Investment Politics' in Marc Bungenberg, Griebel Joern and Hindelang Steffen (eds), *International Investment Law and EU Law* (Springer: 2011)
- , 'The Politics of the European Union's Investment Treaty Making' in Tomer Broude, Busch Marc L. and Porges Amelia (eds), *The Politics of International Economic Law* (Cambridge University Press: 2011)
- Burgstaller M, 'European law and investment treaties' (2009) 26(2) *Journal of International Arbitration* 181-216.
- , 'Investor-State arbitration in EU international investment agreements with third states' (2011a) 39(2) *Legal Issues of Economic Integration* 207-21.

- , 'The future of bilateral investment treaties of EU Member States' in Marc Bungenberg, Griebel Joern and Hindelang Steffen (eds), *International investment law and EU law* (Springer: 2011b) 55-77.
- , 'Dispute settlement in EU international investment agreements with third states: Three salient problems' (2014) 15(3-4) *The Journal of World Investment & Trade* 551-69.
- Caldeira GA, Kelemen RD and Whittington KE, *The Oxford Handbook of law and politics* (Oxford University Press: 2008).
- Caron DD, 'Reputation and reality in the ICSID annulment process: Understanding the distinction between annulment and appeal' (1992) 7(1) *ICSID Review* 21-56.
- Carter JH, 'The Culture of Arbitration and the Defence of Arbitral Legitimacy' in David D. Caron and others (eds), *Practicing virtue: inside international arbitration* (Oxford University Press: 2015) 97-105.
- Casolari F, Department, 'The principle of loyal co-operation: A 'master key' for EU external representation?', accessible at <https://www.asser.nl/upload/documents/20120911T102448-cleer2012-5book_web.pdf>.
- Casteleiro AD, 'EU declarations of competence to multilateral agreements: A useful reference base?' (2012) 17(4) *European foreign affairs review* 491-510.
- , *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press: 2016).
- Castillo de la Torre F, 'The Court of Justice and external competences after Lisbon: Some reflections on the latest case law' in Piet Eeckhout and López-Escudero (eds), *The European Union's external action in times of crises* (Hart Publishing: 2016) 129-86.
- Ceysens J, 'Towards a common foreign investment policy? - Foreign investment in the European Constitution' (2005) 32(3) *Legal Issues of Economic Integration* 259-91.
- Chimni BS, 'International institutions today: An imperial global state in the making' (2004) 15(1) *European Journal of International Law* 1-37.
- Collins D, *An Introduction to International Investment Law* (Cambridge University Press: 2017).
- Copeland P and James S, 'Policy windows, ambiguity and Commission entrepreneurship: Explaining the relaunch of the European Union's economic reform agenda' (2014) 21(1) *Journal of European Public Policy* 1-19.
- Cottier T, 'Dispute settlement in the World Trade Organization: Characteristics and structural implications for the European Union' (1998) 35(2) *Common Market Law Review* 325-78.
- Craig P, *The Lisbon Reform: Law, Politics and Treaty Reform* (OUP: 2010).
- Craig P and de Búrca G, *EU Law*, 5 edn (Oxford University Press: 2011).
- Crawford J, *Brownlie's Principles of Public International Law* (OUP Oxford: 2012).

- Crawford J, 'A consensualist interpretation of Article 31(3) of the Vienna Convention' in George Nolte (ed), *Treaties and subsequent practice* (Oxford University Press: 2013) 29.
- Cremona M, 'The completion of the internal market and the incomplete commercial policy of the European Union' (1990) 15(4) *European Law Review* 283-97.
- , 'Rhetoric and reticence: EU external commercial policy in a multilateral context' (2001) 38(2) *Common Market Law Review* 359-96.
- , 'Defining competence in EU external relations: lessons from the Treaty reform process' in Alan Dashwood and Maresceau Marc (eds), *Law and Practice of EU External Relations* (CUP: 2008) 34-69.
- , 'External relations and external competence of the European Union: the emergence of an integrated policy' in Paul Craig and de Búrca Gráinne (eds), *The Evolution of EU Law*, 2 edn (OUP: 2011) 217-68.
- Curtin D and Manucharyan T, 'Legal Acts and Hierarchy of Norms in EU Law' in Damian Chalmers and Arnall Anthony (eds), *The Oxford Handbook of European Union Law* (OUP: 2015) 104-24.
- Dahl RA, *Who governs? Democracy and power in an American city*, 2. ed. edn (Yale University Press: 2005).
- Dahlhuisen JH and Guzman AT, Department, 'The applicable law in foreign investment disputes', accessible at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209503&download=yes>.
- Dahlquist Cullborg J, 'The use of "non-ICSID" arbitration rules in investment treaty disputes: Domestic courts, commercial arbitration institutions and arbitral tribunal jurisdiction' (University of Uppsala 2019).
- Dahlquist J, 'Skiljedomen i den bilaterala investeringstvisten Micula m.fl. mot Rumänien' (2014) 2014/15(1) *Juridisk Tidskrift* 183-96.
- Dahlquist J, Lenk H and Rönnelid L, Department, 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden'
- Dashwood A, 'Article 47 TEU and the relationship between first and second pillar competences' in Alan Dashwood and Maresceau Marc (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press: 2008) 70-103.
- , 'The Continuing Bipolarity of EU External Action' in Inge Govaere and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff: 2014) 3-16.
- Dashwood A and others, *Wyatt and Dashwood's European Union Law*, 6th edn (Hart Publishing: 2011).
- Dashwood A and Heliskoski J, 'The Classic Authorities Revisited' in Alan Dashwood and Hillion Christophe (eds), *The General Law of EC External Relations* (Sweet & Maxwell: 2000) 3-19.

- Dattu R, 'A journey from Havana to Paris: The fifty-year quest for the elusive Multilateral Agreement on Investment' (2000) 24(1) *Fordham International Law Journal* 275-316.
- De Broe L, 'Relief of double taxation of cross-border dividends within the Union and the principle of loyal cooperation' (2012) 21(4) *EC Tax Review* 180-82.
- de la Blétière ER, 'The impact of EU law on the elimination of double taxation of business income' in Gauthier Blanluet and Durand Phillippe J. (eds), *Cahiers de Droit Fiscal International: Key practical issues to eliminate double taxation of business income* (2011) 59-79.
- de Waele H, *Layered global player: Legal dynamics of EU external relations* (Springer: 2011).
- Delaney J and Barstow Magraw D, 'Procedural Transparency' in Peter Muchlinski, Ortino Federico and Schreuer Christoph (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press: 2008) 725-87.
- Delgado Casteleiro A, 'The 'Odd Couple': The Responsibility of the EU at the WTO' in Malcolm David Evans and Koutrakos Panos (eds), *The International Responsibility of the European Union : European and International Perspectives* (HART Publishing: 2013) 233-55.
- Denza E, 'Responsibility of the European Union in the Context of Investment' in Malcolm David Evans and Koutrakos Panos (eds), *The International Responsibility of the European Union : European and International Perspectives* (HART Publishing: 2013) 215-32.
- Dezalay Y and Garth BG, *Dealing with virtue: international commercial arbitration and the construction of a transnational legal order* (University of Chicago Press: 1996).
- Dimopoulos A, 'The effects of the Lisbon Treaty on the principles and objectives of the common commercial policy' (2010) 15(2) *European foreign affairs review* 153-70.
- , *EU foreign investment law* (Oxford University Press: 2011a).
- , 'The validity and applicability of international investment agreements between EU Member States under EU and international law' (2011b) 48(1) *Common Market Law Review* 63-93.
- , 'Creating an EU investment policy: Challenges for the post-Lisbon era of external relations' in Paul James Cardwell (ed), *EU external relations law and policy in the post-Lisbon era* (T. M. C. Asser Press: 2012) 401-22.
- , 'The involvement of the EU in investor-state dispute settlement: A question of responsibilities' (2014) 51(6) *Common Market Law Review* 1671-720.
- , 'Taming the conclusion of inter se agreements between EU Member States: The role of the duty of loyalty' (2015) 34(1) *Yearbook of European Law* 286-318.
- Dolzer R and Schreuer C, *Principles of international investment law* (Oxford University Press: 2012).
- Douglas-Scott S, *Constitutional Law of the European Union* (Pearson: 2002).

- Dunning JH, 'The changing geography of foreign direct investment: explanations and implications' in Nagesh Kumar (ed), *Globalization, foreign direct investment and technology transfer* (Routledge: 1998) 43-89.
- , *Multinational enterprises and the global economy*, 2. ed. edn (Edward Elgar: 2008).
- Durán GM, 'The EU and its Member States in WTO Dispute Settlement: A 'Competence Model' or a Case Apart for Managing International Responsibility?' in Marise Cremona, Thies Anne and Wessel Ramses A. (eds), *The European Union and International Dispute Settlement* (Hart Publishing: 2017) 237-73.
- Eckes C, 'International law as law of the EU: The role of the European Court of Justice' in Enzo Cannizzaro, Palchetti Paolo and Wessel Ramses A. (eds), *International law as law of the European Union* (Leiden : Martinus Nijhoff Publishers: 2012) 353-77.
- , 'The European Court of Justice and (quasi-) judicial bodies of international law' in Ramses A. Wessel and Blockmans Steven (eds), *Between autonomy and dependence: The EU legal order under the influence of international organisations* (T.M.C. Asser Press: 2013) 85-109.
- Eeckhout P, 'The EU and its Member States in the WTO—Issues of Responsibility' in Lorand Bartels and Ortino Federico (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press: 2006) 449-64.
- , 'A panorama of two decades of EU external relations law' in Anthony Arnull, Eeckhout Piet and Tridimas Takis (eds), *Continuity and change in EU law: Essays in honour of Sir Francis Jacobs* (Oxford University Press: 2008) 324-37.
- , *EU External Relations Law* (Oxford University Press: 2011).
- Ehlermann C-D, 'Six years on the bench of the "World Trade Court": Some personal experiences as member of the Appellate Body of the World Trade Organization' (2002) 36(4) *Journal of World Trade* 605–39.
- Ehlermann C-D and Ehring L, 'The authoritative interpretation under Article IX:2 of the Agreement establishing the World Trade Organization: Current law, practice and possible improvements' (2005) 8(4) *Journal of International Economic Law* 803-24.
- Eilmansberger T, 'Bilateral investment treaties and EU law' (2009) 46(2) *Common Market Law Review* 383-429.
- Erlbacher F, Department, 'Recent case law on external competences of the European Union: How Member States can embrace their own Treaty', accessible at <https://www.asser.nl/media/3485/cleer17-2_web.pdf>.
- Ewing-Chow M and Losari JJ, 'Which is to be the master? Extra-arbitral interpretive procedures for IIAs' in Jean E. Kalicki and Joubin-Bret Anna (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff: 2015) 91-114.
- Fatouros AA, 'An international code to protect private investment-proposals and perspectives' (1961) 14(1) *The University of Toronto Law Journal* 77-102.
- Fecák T, *International Investment Agreements and EU Law* (Kluwer Law International 2016).

- Fernandez PV, 'Understanding law as social phenomenon' (1990) 65 *Phillipine Law Journal* 30-41.
- Franck SD, 'The legitimacy crisis in investment treaty arbitration: Privatizing public international law through inconsistent decisions' (2005) 73(4) *Fordham Law Review* 1521-625.
- , 'Empirically evaluating claims about investment treaty arbitration' (2007) 86(1) *North Carolina Law Review* 1-87.
- , 'Challenges facing investment disputes: reconsidering dispute resolution in international investment agreements' in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 143-92.
- , 'Rationalizing costs in investment treaty arbitration' (2011) 88(4) *Washington University Law Review* 769-852.
- Franck SD and others, 'The diversity challenge: Exploring the "invisible college" of international arbitration' (2015) 53(3) *Columbia Journal of Transnational Law* 429-506.
- Franck TM, *The Power of Legitimacy among Nations* (OUP: 1990).
- Friedmann W, *The Changing Structure of International Law* (Stevenson & Sons: 1964).
- Gaffney J, 'Should investment treaty tribunals be permitted to request preliminary rulings from the Court of Justice of the European Union?' (2013) 10(2) *Transnational Dispute Management* 1-14.
- Gantz DA, 'An appellate mechanism for review of arbitral decisions in investor-state disputes: Prospects and challenges' (2006) 39(1) *Vanderbilt Journal of Transnational Law* 39-76.
- García-Bolívar OE, 'Permanent investment tribunals: The momentum is building up' in Jean E. Kalicki and Joubin-Bret Anna (eds), *Reshaping the investor-state dispute settlement system: Journeys for the 21st century* (Brill Nijhoff: 2015) 394-402.
- Gáspár-Szilágyi S, 'A standing investment court under TTIP from the perspective of the Court of Justice of the European Union' (2016) 17(5) *The Journal of World Investment & Trade* 701-42.
- , 'Quo vadis EU investment law and policy? The shaky path towards the international promotion of EU rules' (2018) 23(2) *European foreign affairs review* 167-86.
- Geiger R, 'Regulatory expropriation in international law: Lessons from the Multilateral Agreement on Investment' (2002) 11(1) *New York University Environmental Law Journal* 94-109.
- , 'The multifaceted nature of international investment law' in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 17-27.
- , 'Multilateral approaches to investment: The way forward' in José E. Alvarez and Sauvant Karl P. (eds), *The evolving international investment regime: Expectations, realities, options* (Cambridge University Press: 2011) 153-73.

- Genschel P, 'Globalization, tax competition, and the welfare state' (2002) 30(2) *Politics & Society* 245-275.
- Gianelli A, 'Customary international law in the European Union' in Enzo Cannizzaro, Palchetti Paolo and Wessel Ramses A. (eds), *International law as law of the European Union* (Martinus Nijhoff: 2011) 93-110.
- Ginsburg T, 'The culture of arbitration' (2003) 36(4) *Vanderbilt Journal of Transnational Law* 1335-46.
- Giorgetti C, 'Who decides who decides in international investment arbitration' (2013) 35(2) *University of Pennsylvania Journal of International Law* 431-86.
- Goldhaber M, 'Wanted: A world investment court' (2004) 1(3) *Transnational Dispute Management* 1-4.
- Gordon JN and Ringe W-G, *The Oxford Handbook of Corporate Law and Governance*, 1 edn (Oxford University Press: 2018).
- Greenwood L and Baker CM, 'Getting a better balance on international arbitration tribunals' (2012) 28(4) *Arbitration International* 653-67.
- Griller S, 'Judicial enforceability of WTO law in the European Union. Annotation to Case C-149/96, Portugal V. Council' (2000) 3(3) *Journal of International Economic Law* 441-72.
- Haas E, 'Why collaborate? Issue-linkage and international regimes' (1980) 32(3) *World Politics* 357-405.
- Haas EB, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (University of Notre Dame Press: 2004).
- Hable A, Department, 'The European constitution: Changes in the reform of competences with a particular focus on the external dimension'
- Haftel YZ and Thompson A, 'When do states renegotiate investment agreements? The impact of arbitration' (2018) 13(1) *The Review of International Organizations* 25-48.
- Hage J, 'Law and coherence' (2004) 17(1) *Ratio Juris* 87-105.
- Hallward-Driemeier M, Department, 'Do bilateral investment treaties attract FDI? Only a Bit ... and they could bite', accessible at <<http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf>>.
- Hartley T, 'International law and the law of the European Union: A reassessment' (2002) 72(1) *British Year Book of International Law* 1-35.
- Hartley TC, 'The European Court and the EEA' (1992) 41(4) *International and Comparative Law Quarterly* 841-48.
- Heliskoski J, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International: 2001).
- , 'EU Declarations of Competence and International Responsibility' in Malcolm David Evans and Koutrakos Panos (eds), *The International Responsibility of the European Union : European and International Perspectives* (HART Publishing: 2013) 189-212.

- Hepburn J, 'Applicable law in 'TPP investment disputes' (2016) 17(2) *Melbourne Journal of International Law* 349-68.
- Herdegen M, 'The relation between the principles of equality and proportionality' (1985) 22 *Common Market Law Review*
- Herrmann C, 'The role of the Court of Justice of the European Union in the emerging EU investment policy' (2014) 15(3-4) *The Journal of World Investment and Trade* 570-84.
- Herrmann CW, 'Common commercial policy after nice: Sisyphus would Have done a better job' (2002) 39(1) *Common Market Law Review* 7-29.
- Hess B, Department, 'The fate of investment dispute resolution after the Achmea decision of the European Court of Justice'
- Hillion C, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing: 2018) 117-74.
- Hillion C and Koutrakos P, *Mixed agreements revisited: the EU and its member states in the world* (Hart: 2010).
- Hillion C and Wessel RA, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions' in Marise Cremona, Thies Anne and Wessel Ramses A. (eds), *The European Union and International Dispute Settlement* (Hart Publishing: 2017) 7-30.
- Hindelang S, *The free movement of capital and foreign direct investment: The scope of protection in EU law* (Oxford University Press: 2009).
- , 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39(2) *Legal Issues of Economic Integration* 179.
- , 'The Autonomy of the European Legal Order' in Marc Bungenberg and Herrmann Christoph (eds), *Common Commercial Policy after Lisbon: Special Issue* (Springer Verlag: 2013) 187-198.
- Hirsch M, 'The sociology of international law: Invitation to study international rules in their social context' (2005) 55(4) *University of Toronto Law Journal* 891-939.
- Hirsch M and Hirsch M, *Invitation to the Sociology of International Law* (Oxford University Press: 2015).
- Hirschman AO, *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states* (Cambridge, Mass. : Harvard Univ. Press: 1970).
- Hix J-P, Department, 'Indirect effect of international agreements: Consistent interpretation and other forms of judicial accomodation of WTO law by the EU Courts and the US Courts', accessible at <<http://jeanmonnetprogram.org/wp-content/uploads/2014/12/Hix.pdf>>.
- Hoekman B and Kostecky M, *Political economy of the world trading system: WTO and beyond* (Oxford University Press: 2001).
- Hoffmeister F, 'Litigating against the European Union and its member states - Who

- responds under the ILC's draft articles on international responsibility of international organizations?' (2010) 21(3) *European Journal of International Law* 723-47.
- , 'The European Union and the peaceful settlement of international disputes' (2012) 11(1) *Chinese Journal of International Law* 77-105.
- Holdgaard R, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Kluwer Law International: 2008).
- Horsley T, 'Reflections on the role of the Court of Justice as the motor of European integration: Legal limits to judicial lawmaking' (2013) 50(4) *Common Market Law Review* 931-65.
- Horvath GJ and Berzero R, 'Arbitrator and counsel: The double-hat dilemma' (2013) 10(4) *Transnational Dispute Management* 1-19.
- Howard DM, 'Creating consistency through a world investment court' (2017) 41(1) *Fordham International Law Journal* 1-52.
- Howse R, Department, 'Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes', accessible at <https://cdn-media.web-view.net/i/fjj3t288ah/Courting_the_Criticsdraft1.pdf>.
- , 'Designing a multilateral investment court: Issues and options' (2017) 36(1) *Yearbook of European Law* 209-36.
- Hymer SH, *The international operations of national firms: A study of direct foreign investment* (MIT Press: 1976).
- Ibbetson D, 'Historical research in law' in Mark Tushnet and Cane Peter (eds), *The Oxford Handbook of legal studies* (Oxford University Press: 2005) 863-78.
- Igbokwe VC, 'Determination, interpretation and application of substantive law in foreign investment treaty arbitrations' (2006) 23(4) *Journal of International Arbitration* 267-99.
- Ishikawa T, 'Keeping interpretation in investment treaty arbitration 'on track': The role of State Parties' in Jean E. Kalicki and Joubin-Bret Anna (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff: 2015) 115-49.
- Jackson JH, Davey WJ and Sykes AO, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations*, 4 edn (West Group: 2002).
- Jacobsson L, 'Permanent establishment through related persons: A study on the treatment of related persons under Article 5 of the OECD Model Tax Convention' (University of Uppsala 2018).
- Jenks CW, 'The interpretation and application of municipal law by the Permanent Court of International Justice' (1938) 19 *British Yearbook of International Law* 67-103.
- Jensen NM, *Nation-States and the multinational corporation: a political economy of foreign direct investment* (Princeton University Press: 2006).

- Jensen NM and others, *Politics and Foreign Direct Investment* (University of Michigan Press: 2012).
- Johansson J, 'EU-domstolens restriktionsprövning: i mål om de grundläggande friheterna och direkta skatter' (University of Stockholm 2016).
- Johnson L and Razbaeva M, Department, 'State control over interpretation of investment treaties', accessible at <http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf>.
- Karagiannis Y, 'Collegiality and the politics of European competition policy' (2010) 11(1) *European Union Politics* 143-64.
- Karl J, 'The competence for foreign direct investment: New powers for the European Union?' (2004) 5(3) *The Journal of World Investment & Trade* 413-48.
- Kassim H, 'What Officials Believe' in Hussein Kassim and others (eds), *The European Commission of the Twenty-First Century* (Oxford University Press: 2013) 103-29.
- Kaufmann-Kohler G and Potestà M, Department, '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'
- Kemmeren ECCM, 'Double tax conventions on income and capital and the EU: Past, present and future' (2012) 21(3) *EC Tax Review* 157-77.
- Kenzler HG and Pitschas C, 'Die Gemeinsame Handelspolitik im Verfassungsvertrag' in Christoph Herrmann, Krenzler Horst G. and Streinz Rudolf (eds), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag* (Nomos: 2006) 11-42.
- Keohane RO, Moravcsik A and Slaughter A-M, 'Legalized dispute resolution: Interstate and transnational' (2000) 54(3) *International Organization* 457-88.
- Keohane RO and Nye JS, *Power and Interdependence: World Politics in Transition* (Little Brown: 1977).
- Kerremans B and Orbie J, 'The social dimension of European Union trade policies' (2009) 14(4) *European foreign affairs review* 629-41.
- Kingsbury B, 'Sovereignty and inequality' in Andrew Hurrell and Woods Ngaire (eds), *Inequality, globalization and world politics* (Oxford University Press: 1999) 66-94.
- Klabbers J, 'Presumptive personality: The European Union in International Law' in Martti Koskeniemi (ed), *International Law Aspects of the European Union* (Kluwer: 1998) 231-53.
- Klamert M, *The principle of loyalty in EU law* (Oxford University Press: 2014).
- Kleimann D, Department, 'Reading Opinion 2/15: Standards of analysis, the Court's discretion, and the legal view of the Advocate General'
- Kleimann D and Kübek G, 'The signing, provisional application, and conclusion of trade and investment agreements in the EU: The case of CETA and Opinion 2/15' (2018) 45(1) *Legal Issues of Economic Integration* 13-46.

- Kleist D, 'Methods for elimination of double taxation under double tax treaties' (University of Gothenburg 2012).
- Kobrin SJ, 'The Architecture of Globalization: State Sovereignty in a Networked Global Economy' in John H. Dunning (ed), *Governments, Globalization, and International Business* (Oxford University Press: 1997) 146-71.
- Kodama Y, 'Dispute settlement under the draft Multilateral Agreement on Investment the quest for an effective investment dispute settlement mechanism and its failure' (1999) 16(3) *Journal of International Arbitration* 45-88.
- Kominos AP, 'Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, Judgment of 1 June 1999, Full Court' (2000) 37 *Common Market Law Review* 459.
- Kornobis-Romanowska D, 'Effects of international customary law in the legal order of the European Union' (2018) 8(1) *Wrocław Review of Law, Administration & Economics* 405-28.
- Koskenniemi M, *The gentle civilizer of nations: the rise and fall of international law 1870-1960* (Cambridge University Press: 2002).
- , 'International law in Europe: Between tradition and renewal' (2005) 16(1) *European Journal of International Law* 113-24.
- Koutrakos P, 'The interpretation of mixed agreements under the preliminary reference procedure' (2002) 7(1) *European foreign affairs review* 25-52.
- , *EU international relations law*, 2nd edn (Hart Publishing: 2015).
- Krajewski M, 'Of modes and sectors: External relations, internal debates and the special case of (trade in) services' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press: 2008) 172-215.
- , 'The Reform of the Common Commercial Policy' in Andrea Biondi, Eeckhou Piet and Ripley Stefanie (eds), *EU Law After Lisbon* (Oxford University Press: 2012) 292-311.
- Krasner S, 'International regimes' (1982) 36(2) *International Organization* 185-205.
- Kriebaum U, 'The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective' (2015) *ELTE Law Journal* 27-35.
- , 'Evaluating social benefits and costs of investment treaties: Depoliticization of investment disputes' (2018) 33(1) *ICSID Review* 14-28.
- Kuijper PJ and Hoffmeister F, 'WTO influence on EU Law: Too close for comfort?' in Ramses A. Wessel and Blockmans Steven (eds), *Between autonomy and dependence: The EU legal order under the influence of international organisations* (T. M. C. Asser Press: 2013) 131-58.
- Kuijper PJ and Paasivirta E, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm David Evans and Koutrakos Panos (eds), *The International Responsibility of the European Union: European and International Perspectives* (HART Publishing: 2013) 35-71.

- Kuijper PJ and others, *The Law of EU External Relations: Cases, Materials and Commentary on the EU as an International Legal Actor*, 2nd edn (Oxford University Press: 2015).
- Kulick A, *Global Public Interest in International Investment Law* (CUP: 2012).
- (ed), *Reassertion of control over the investment treaty regime* (Cambridge University Press: 2016).
- Kumar N, *Globalization and the Quality of Foreign Direct Investment* (Oxford University Press: 2002).
- Kurtz J, 'Australia's rejection of investor–state arbitration: Causation, omission and implication' (2012) 27(1) *ICSID Review* 65-86.
- Lang A, *World trade law after neoliberalism: Re-imagining the global economic order* (Oxford University Press: 2011).
- Langford M, Behn D and Fauchald OK, 'Backlash and state strategies in international investment law' in Thomas Gammeltoft-Hansen and Aalberts Tanja E. (eds), *The changing practices of international law: Sovereignty, law and politics in a globalising world* (Cambridge University Press: 2018) 70-102.
- Langford M, Behn D and Lie R, 'The Revolving Door in International Investment Arbitration' in Anne van Aaken and others (eds), *The Judicialization of International Law* (Oxford University Press: 2018) 128-58.
- Langvatn SA and Squatrito T, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals' in Nobuo Hayashi and Baillet Cecilia M. (eds), *The Legitimacy of International Criminal Tribunals* (CUP: 2017) 41-65.
- Larik J, 'Pars Pro Toto: The Member State's Obligations of Sincere Cooperation, Solidarity and Unity' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing: 2018) 175-99.
- Lavrano N, *Legal interaction between decisions of international organizations and European law* (Europa Law Publishing: 2004).
- , 'Protecting its Exclusive Jurisdiction: The MOX Plant-Judgment of the ECJ' (2006) 5 *The Law and Practice of International Courts and Tribunals* 479.
- , 'The ECJ's Relationship With Other International Courts' in Henning Koch and others (eds), *Europe: the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf Publishing: 2010)
- Lavrano N, 'New developments in the interaction between international investment law and EU law' (2010) 9(3) *The Law & Practice of International Courts and Tribunals* 409-41.
- Lavrano N, 'Designing an International Investor-to-State Arbitration System After Opinion 1/09' in Marc Bungenberg and Herrmann Christoph (eds), *Common Commercial Policy after Lisbon: Special Issue* (Springer Verlag: 2013) 199.
- Leczykiewicz D, 'Common commercial policy: The expanding competence of the European Union in the area of international trade' (2005) 6(11) *German Law Journal* 1673-85.

- Lee E and Gary K, 'Empirical research and the goals of legal scholarship: The rules of inference' (2002) 69 *University of Chicago Law Review* 1-209.
- Lenaerts K and Desomer M, 'Towards a hierarchy of legal acts in the European Union? Simplification of legal instruments and procedures' (2005) 11(6) *European Law Journal* 744-65.
- Lenk H, Department, 'Investor-state arbitration under TTIP: Resolving investment disputes in an (autonomous) EU legal order'
- , 'Issues of attribution: Responsibility of the EU in investment disputes under CETA' (2016) 13(1) *Transnational Dispute Management* 1-23.
- , 'Investment arbitration under EU investment agreements: Is there a role for an autonomous EU legal order?' (2017) 28(2) *European Business Law Review* 135-62.
- , 'Something borrowed, something new: The TTIP investment court: How to fit old procedures into new institutional design' in Elaine Fahey (ed), *Institutionalisation beyond the Nation State* (Springer International: 2018a) 129-47.
- , 'More trade and less investment for future EU trade and investment policy' (2018b) 19(2) *Journal of World Investment and Trade* 305-19.
- , 'Constitutional constraints on intra-EU BITs in the Union legal order' in Stephan W. Schill, Tams Christian J. and Hofmann Rainer (eds), *International investment law and constitutional law* (forthcoming: 2019)
- Levine J, 'Dealing with arbitrator "issue conflicts" in international arbitration' (2006) 61(1) *Dispute Resolution Journal* 60-67.
- Lipsey RG, 'Globalization and National Government Policies: An Economist's View' in John H. Dunning (ed), *Governments, Globalization, and International Business* (Oxford University Press: 1997) 73-113.
- Lipson C, *Standing Guard: protecting foreign capital in the nineteenth and twentieth centuries* (University of California Press: 1985).
- Losari JJ, 'A clash of treaties the lawfulness of countermeasures in international trade law and international investment law' (2015) 16(2) *The journal of world investment & amp* 274-313.
- Mackenzie R and Sands P, 'International courts and tribunals and the independence of the international judge' (2003) 44(1) *Harvard International Law Journal* 271-85.
- Maresceau M, 'A typology of mixed bilateral agreements' in Christophe Hillion and Koutrakos Panos (eds), *Mixed agreements revisited* (Hart Publishing: 2010)
- Martines F, 'Direct effect of international agreements of the European Union' (2014) 25(1) *European Journal of International Law* 129-47.
- McGoldrick D, *International relations law of the European Union* (Longman: 1997).
- , 'The international legal personality of the European Community and the European Union' in Michael Dougan and Currie Samantha (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing: 2009) 181-217.
- McRae D, 'The WTO Appellate Body: A model for an ICSID appeals facility?' (2010) 1(2) *Journal of International Dispute Settlement* 371-87.

- Mechlem K, 'Treaty bodies and the interpretation of human rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905-48.
- Michael Reisman W, 'International arbitration and sovereignty' (2002) 18(3) *Arbitration International* 231-39.
- Milanesi E, 'European Union restrictions to the free movement of capital v. BIT's guarantees: learning from the European Court of Justice case law' in Giorgio Sacerdoti and De Luca Anna (eds), *General interests of host states in international investment law* (Cambridge: Cambridge University Press: 2014)
- Milano E, 'The investment arbitration between Italy and Cuba: The application of customary international law under scrutiny' (2012) 11(3) *The Law & Practice of International Courts and Tribunals* 499-524.
- Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment' (2010) 121(1) *Colorado Journal of International Environmental Law & Policy* 1-47.
- , *The Origins of International Investment Law* (Cambridge University Press: 2013).
- , 'International investment law and universality: Histories of shape-shifting' (2014) 4(3) *Cambridge Journal of International and Comparative Law* 986-1010.
- Mills A, *Party autonomy in private international law* (Cambridge University Press: 2018).
- Mitrany D, *A working peace system: an argument for the functional development of international organization* (Royal Institute of International Affairs: 1943).
- Mody A, *Foreign direct investment and the world economy* (Routledge: 2007).
- Moon H-C, *Foreign Direct Investment: A Global Perspective* (World Scientific Publishing: 2016).
- Moosa IA, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave: 2002).
- Moskvan D, 'The clash of intra-EU Bilateral Investment Treaties with EU law: a bitter pill to swallow' (2015) 22 *Columbia Journal of European Law* 101-381.
- Mourdoukoutas P, *The Global Corporation: the Decolonization of International Business* (Quorum Books: 1999).
- Muchlinski P, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press: 2009) 341-62.
- Muchlinski PT, 'The rise and fall of the Multilateral Agreement on Investment: Where now?' (2000) 34(3) *The International Lawyer* 1033-53.
- , *Multinational Enterprises and the Law*, 2 edn (Oxford: 2007).
- Neframi E, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47(2) *Common Market Law Review* 323-359.
- , 'Mixed agreements as a source of European Union law' in Enzo Cannizzaro, Palchetti Paolo and Wessel Ramses A. (eds), *International law as law of the European Union* (Marinus Nijhoff: 2012) 325-49.

- Neumayer E and Spess L, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33(10) *World Development* 1567-85.
- Neuwahl NAEM, 'A partner with a troubled personality: EU treaty-making in matters of CFSP and JHA after Amsterdam' (1998) 3(2) *European foreign affairs review* 177-95.
- Noland M, Department, 'Public Attitudes, Globalization, and Risk'
- , Department, 'Affinity and International Trade'
- Nollkaemper A, *National Courts and the International Rule of Law* (Oxford University Press: 2011).
- Nolte G, 'Jurisprudence under special regimes relating to subsequent agreements and subsequent practice' in George Nolte (ed), *Treaties and subsequent practice* (Oxford University Press: 2013)
- O'Rourke KH and Williamson JG, *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy* (The MIT Press: 1999).
- Ohler C, 'Die Umsetzung der Gemeinsamen Handelspolitik nach dem Vertrag von Lissabon' in Thomas Eilmansberger, Griller Stefan and Obwexer Walter (eds), *Rechtsfragen der Implementierung des Vertrags von Lissabon* (Springer: 2011) 307-340.
- Orakhelashvili A, 'The idea of European international law' (2006) 17(2) *European Journal of International Law* 315-47.
- , 'Principles of treaty interpretation in the NAFTA arbitral award on Canadian Cattlemen' (2009) 26(1) *Journal of International Arbitration* 159-73.
- Ortolani P, 'Intra-EU Arbitral Awards vis-a-vis Article 107 TFEU: State Aid Law as a Limit to Compliance' (2015) 6(1) *Journal of International Dispute Settlement* 118-135.
- Paasivirta E and Kuijper PJ, 'Does one size fit all?: The European Community and the responsibility of international organizations' (2005) 36(1) *Netherlands Yearbook of International Law*
- Palmeter D and Mavroidis PC, *Dispute Settlement in the World Trade Organization - Practice and Procedure*, 2nd edn (Cambridge University Press: 2004).
- Pan EJ, 'Authoritative interpretation of agreements: Developing more responsive international administrative regimes' (1997) 38(2) *Harvard International Law Journal* 503-35.
- Pantaleo L, 'Member States prior agreements and newly EU attributed competence: What lesson from foreign investment' (2014) 19(2) *European foreign affairs review* 307-24.
- , Department, 'Lights and shadows of the TTIP investment court system'
- , 'Respondent status and allocation of international responsibility under EU investment agreements' (2016b) 1(3) *European Papers* 847-60.
- Parisi F, *The Oxford Handbook of law and economics*, 1 edn (Oxford University Press: 2017).
- Parra A, *The history of ICSID* (Oxford University Press: 2012).

- Parra AR, 'The role of the ICSID secretariat in the administration of arbitration proceedings under the ICSID convention' (1998) 13(1) *ICSID Review* 85-100.
- , 'Applicable substantive law in ICSID arbitrations initiated under investment treaties' (2001) 16(1) *ICSID Review* 20-24.
- Parra AR, 'Advancing reform at ICSID' (2014) 11(1) *Transnational Dispute Management* 1.
- Paschalidis P, 'Arbitral tribunals and preliminary references to the EU Court of Justice' (2016) 33(4) *Arbitration International* aiw026.
- Paul JR, 'Cultural resistance to global governance' (2000) 22(1) *Michigan Journal of International Law* 1-84.
- Paulsson J, 'Arbitration without privity' (1995) 10(2) *ICSID Review* 232-57.
- , 'Moral hazard in international dispute resolution' (2010) 25(2) *ICSID Review* 339-55.
- Paulsson J and Paulsson J, *The Idea of Arbitration* (Oxford University Press: 2013).
- Paunio E and Lindroos-Hovinheimo S, 'Taking language seriously: An analysis of linguistic reasoning and its implications in EU law' (2010) 16(4) *European Law Journal* 395-416.
- Pauwelyn J, 'At the edge of chaos?: Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed' (2014) 29(2) *ICSID Review* 372-418.
- Peczenik A, 'A theory of legal doctrine' (2001) 14(1) *Ratio Juris* 75-105.
- Pescatore P, 'External relations in the case-law of the Court of Justice of the European Communities' (1979) 16(4) *Common Market Law Review* 615.
- Petersmann E-U, 'The transformation of the world trading system through the 1994 Agreement establishing the World Trade Organization' (1995) 6(1) *European Journal of International Law* 161-221.
- Phelan W, 'The Troika: The interlocking roles of Commission v. Luxembourg and Belgium, Van Gend en Loos and Costa v. ENEL in the creation of the European legal order' (2015) 21(1) *European Law Journal* 116-35.
- Piris J-C, *The Lisbon Treaty: a legal and political analysis* (Cambridge University Press: 2010).
- Pollack MA, 'Delegation, agency, and agenda setting in the European Community' (1997) 51(1) *International Organization* 99-134.
- , *The engines of European integration: delegation, agency, and agenda setting in the EU* (OUP: 2003).
- Posner EA and Sykes AO, 'Efficient breach of international law: Optimal remedies, "legalized noncompliance", and related issues' (2011) 110(2) *Michigan Law Review* 243-94.
- Potestá M, 'Interstate arbitration-bilateral investment treaties-diplomatic protection-exhaustion of local remedies-definition of investment' (2012) 106(2) *American Journal of International Law* 341-47.

- Poudret J-F and Besson S, *Comparative Law of International Arbitration*, 2nd edn (Sweet & Maxwell: 2007).
- Poulsen LNS, *Bounded rationality and economic diplomacy: the politics of investment treaties in developing countries* (Cambridge University Press: 2015).
- Puig S, 'Social capital in the arbitration market' (2014) 25(2) *European Journal of International Law* 387-424.
- Rahman A and Brown C, 'Regional economic integration in Southeast Asia' in Christoph Herrmann, Krajewski Markus and Terhechte Jörg Philipp (eds), *European yearbook of international economic law 2013* (Springer Berlin Heidelberg: 2013) 353-68.
- Redfern A, 'Dissenting opinions in international commercial arbitration: the good, the bad and the ugly - The 2003 Freshfields lecture' (2004) 20(3) *Arbitration International* 223-43.
- Reinisch A, 'The Scope of investor-state dispute settlement in international investment agreements' (2013) 21(1) *Asia Pacific Law Review* 3-26.
- , '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(4) *Journal of International Economic Law* 761-86.
- Reinisch A and Knahr C, 'Transparency versus confidentiality in international investment arbitration – The Biwater Gauff Compromise' (2007) 6(1) *The Law & Practice of International Courts and Tribunals* 97-118.
- Reinisch A and Malintoppi L, 'Methods of dispute resolution' in Peter Muchlinski, Ortino Federico and Schreuer Christoph (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008) 691.
- Rivkin DW, 'Towards a new paradigm in international arbitration: The town elder model revisited' (2008) 24(3) *Arbitration International* 375-86.
- Rixen T, 'Bilateralism or multilateralism? The political economy of avoiding international double taxation' (2010) 16(4) *European Journal of International Relations* 589-614.
- Roberts A, 'Power and persuasion in investment treaty interpretation: The dual role of states' (2010) 104(2) *The American Journal of International Law* 179-225.
- Rodrik D, 'Has globalization gone too far?' (1997) 39(3) *California Management Review* 29-53.
- Romano CPR, 'The proliferation of international judicial bodies: The pieces of the puzzle' (1999) 31(4) *New York University Journal of International Law and Politics* 709-51.
- Rosas A, 'The European Union and mixed agreements' in Alan Dashwood and Hillion Christophe (eds), *The general law of EC external relations* (Sweet & Maxwell: 2000) 200-20.
- , 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal* 1304.

- , 'Exclusive, shared and national competences in the context of EU external relations: Do such distinctions matter?' in Inge Govaere and others (eds), *The European Union in the world: Essays in honour of Marc Mareceau* (Martinus Nijhoff: 2014) 17-43.
- Rose-Ackerman S and Tobin JL, 'Do BITs benefit developing countries?' in Catherine A. Rogers and Alford Roger P. (eds), *The future of investment arbitration* (Oxford University Press: 2009) 131-43.
- Rossi LS, 'Does the Lisbon Treaty provide a clearer separation of competences between the EU and the Member States?' in Andrea Biondi, Eeckhou Piet and Ripley Stefanie (eds), *EU law after Lisbon* (Oxford University Press: 2012) 85-106.
- Rovetta D and Gambardella M, 'Intra-EU BITs and EU law: What to learn from the Micula battle' (2015) 10(6) *Global Trade and Customs Journal* 194-97.
- Rönnelid L, 'The emergence of routine enforcement of international investment law: Effects on investment protection and development' (Uppsala University 2018).
- Sacerdoti G, 'Investment arbitration under ICSID and UNCITRAL rules: Prerequisites, applicable Law, review of awards' (2004) 19(1) *ICSID Review* 1-48.
- Sachs JD and Warner A, 'Economic reform and the process of global integration' (1995) *Brookings Papers on Economic Activity* 1-118.
- Salacuse J, 'BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries' (1990) 24 *The International Lawyer* 655-75.
- , 'The treatification of international investment law' (2007) 13(1) *Law and Business Review of the Americas* 155-66.
- , 'The emerging global regime for investment' (2010) 51(2) *Harvard International Law Journal* 427-73.
- Salacuse JW and Sullivan NP, 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' (2005) 46(1) *Harvard International Law Journal* 67-130.
- Sammartano MR, 'The fall of a taboo: review of the merits of an award by an appellate arbitration panel and a proposal for an international appellate court' (2003) 20(4) *Journal of International Arbitration* 387-92.
- Sands P, 'Reflections on international judicialization' (2016) 27(4) *European Journal of International Law* 885-900.
- Sardinha E, 'Towards a new horizon in investor-state dispute settlement? Reflections on the investment tribunal system in the Comprehensive Economic Trade Agreement (CETA)' (2017) 54 *The Canadian Yearbook of International Law* 311-65.
- , 'Party-appointed arbitrators no more' (2018) 17(1) *The Law & Practice of International Courts and Tribunals* 117-34.
- Sattorova M, 'Investor rights under EU law and international investment law' (2016) 17(6) *The Journal of World Investment & Trade* 895-918.

- Sauvant KP, 'The rise of international investment, investment agreements and investment disputes' in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 3-16.
- Schafer J, 'European Commission officials' policy attitudes' (2014) 52(4) *Journal of Common Market Studies* 911-27.
- Schermers HG, 'A typology of mixed agreements' in David O'Keffee and Schermers Henry G. (eds), *Mixed agreements* (Kluwer: 1983)
- , 'Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1992' (1992) 29(5) *Common Market Law Review* 991-1009.
- Schermers HG and Waelbroeck D, *Judicial protection in the European Communities*, 5 edn (Kluwer: 1992).
- , *Judicial protection in the European Union*, 6 edn (Kluwer: 2001).
- Schill SW, *The Multilateralization of International Investment Law* (CUP: 2009).
- , 'International investment law and comparative public law – an introduction' in Stephan W. Schill (ed), *International investment law and comparative public law* (Oxford University Press: 2010) 3-37.
- , 'Ordering paradigms in international investment law: Bilateralism—multilateralism—multilateralization' in Zachary Douglas, Pauwelyn Joost and Viñuales Jorge E. (eds), *The foundations of international investment law: Bringing theory into practice* (Oxford University Press: 2014) 109-41.
- , 'Editorial: Opinion 2/13 – The end for dispute settlement in EU trade and investment agreements?' (2015) 16(3) *The Journal of World Investment & Trade* 379-88.
- Schilling T, 'The autonomy of the Community legal order: An analysis of possible foundations' (1996) 37(2) *Harvard International Law Journal* 389-409.
- Schlesinger AM, *The cycles of American history* (Boston : Houghton Mifflin: 1986).
- Schmalenbach K, 'Struggle for exclusiveness: The ECJ and competing international tribunals' in Isabelle Buffard and others (eds), *International law between universalism and fragmentation: Festschrift in honour of Gerhard Hafner* (Martinus Nijhoff: 2008)
- Schmalenbach K and Dörr O, *Vienna convention on the law of treaties a commentary* (Springer: 2012).
- Schneidermann D, 'Compensating for democracy's 'defects': The case of international investment law' in Christian Joerges and Gliniski Carola (eds), *The European crisis and the transformation of transnational governance: Authoritarian managerialism versus democratic governance* (Bloomsbury Publishing: 2014) 47-70.
- Schreuer C, 'Travelling the BIT route: Of waiting periods, umbrella clauses and forks in the road' (2004) 5(2) *The Journal of World Investment & Trade* 231-56.
- , 'Calvo's grandchildren: The return of local remedies in investment arbitration' (2005) 4 *The Law & Practice of International Courts and Tribunals* 1-17.
- , 'Consent to arbitration' in Peter Muchlinski, Ortino Federico and Schreuer Christoph (eds), *The Oxford handbook of international investment law* (Oxford

- University Press: 2008) 831-66.
- , 'Denunciation of the ICSID Convention and consent to arbitration' in Michael Waibel and others (eds), *The backlash against investment arbitration* (Wolters Kluwer: 2010) 353-68.
- , 'From ICSID annulment to appeal half way down the slippery slope' (2011a) 10(2) *The Law & Practice of International Courts and Tribunals* 211-25.
- , 'Interaction of international tribunals and domestic courts in investment law' in Arthur W. Rovine (ed), *Contemporary issues in international arbitration and mediation: The Fordham Papers 2010* (Brill: 2011b) 71-94.
- , 'Investment arbitration based on national legislation' in Hafner Gerhard, Franz Matscher and Schmalenbach Kirsten (eds), *Völkerrecht und die Dynamik der Menschenrechte* (Facultas: 2012) 527-37.
- Schreuer CH, *The ICSID Convention: A Commentary*, 2 edn (Cambridge University Press: 2009).
- Schultz T and Dupont C, 'Investment arbitration: Promoting the rule of law or over-empowering Investors? A quantitative empirical study' (2014) 25(4) *European Journal of International Law* 1147-68.
- Schultz T and Kovacs R, 'The rise of a third generation of arbitrators? Fifteen years after Dezalay and Garth' (2012) 28(2) *Arbitration International* 161-71.
- Schumpeter JA, *The theory of economic development : an inquiry into profits, capital, credit, interest, and the business cycle* (Cambridge, Mass.: 1934).
- Schütze R, 'Parallel external powers in the European Community: From 'cubist' perspectives towards 'naturalist' constitutional principles?' (2004) 23(1) *Yearbook of European Law* 225-74.
- , 'The morphology of legislative power in the European Community: Legal instruments and the federal division of power' (2006) 25(1) *Yearbook of European Law* 91-151.
- , *Cooperative federalism constitutionalized* (Oxford University Press: 2009a).
- , *From dual to cooperative federalism: The changing structure of European law* (Oxford University Press: 2009b).
- , *European constitutional law* (Cambridge University Press: 2012).
- , *European Union Law* (Cambridge University Press: 2015).
- Seid SH, *Global regulation of foreign direct investment* (Ashgate: 2002).
- Semertzi A, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51(4) *Common Market Law Review*
- Shalakany AA, 'Arbitration and the Third World: A plea for reassessing bias under the specter of neoliberalism' (2000) 41(2) *Harvard International Law Journal* 419-68.
- Shan W, 'From "North-South Divide" to "Private-Public Debate": Revival of the Calvo doctrine and the changing landscape in international investment law' (2007) 27(3) *Northwestern Journal of International Law & Business* 631-64.

- Shan W and Zhang S, 'The Treaty of Lisbon: Half Way towards a Common Investment Policy?' (2011) 21 *European Journal of International Law* 1049.
- Shenkin TS, 'Trade-related investment measures in bilateral investment treaties and the GATT: Moving toward a multilateral investment treaty' (1994) 55(2) *University of Pittsburgh Law Review* 541-606.
- Simmons BA, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66(1) *World Politics* 12-46.
- Smits JM, 'Redefining normative legal science: Towards an argumentative discipline' in Fons Coomans, Grünfeld Fred and Kamminga Menno T (eds), *Methods of human rights research* (Intersentia: 2009) 45-59.
- Sornarajah M, 'Power and justice in foreign investment arbitration' (1997) 14(3) *Journal of International Arbitration* 103-40.
- , 'A coming crisis: expansionary trends in investment treaty arbitration' in Karl P. Sauvant (ed), *Appeals mechanism in international investment disputes* (Oxford University Press: 2008) 39-79.
- , 'The retreat of neo-liberalism in investment treaty arbitration' in Catherine A. Rogers and Alford Roger P. (eds), *The future of investment arbitration* (Oxford University Press: 2009) 273-96.
- , *Resistance and Change in the Law on Foreign Investment* (Cambridge University Press: 2015).
- Spierman O, 'Applicable law' in Peter Muchlinski, Ortino Federico and Schreuer Christoph (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008) 90-116.
- St John T, *The rise of investor-state arbitration: Politics, law, and unintended consequences* (Oxford University Press: 2018).
- Stephen DK, *Power, the State, and Sovereignty: Essays on International Relations* (Routledge: 2009).
- Steunenberg B, 'Is big brother watching? Commission oversight of the national implementation of EU directives' (2010) 11 *European Union Politics* 359-80.
- Söderlund C, 'Intra-EU BIT investment protection and the EC Treaty' (2007) 24(5) *Journal of International Arbitration* 455-68.
- Tams CJ, Department, 'An appealing option? A debate about and ICSID appellate structure', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413694.
- Temple Lang J, 'The Ozone Layer Convention: A new solution to the question of Community participation in "mixed" international agreements' (1986) 23(1) *Common Market Law Review* 157-76.
- Ten Cate IM, 'International arbitration and the ends of appellate review' (2012) 44(4) *New York University Journal of International Law and Politics* 1109-204.
- Thomas CA, 'The uses and abuses of legitimacy in international law' (2014) 34(4) *Oxford Journal of Legal Studies* 729-58.

- Thym D, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*
- , 'Foreign affairs' in Armin von Bogandy and Bast Jürgen (eds), *Principles of European constitutional law*, 2nd edn (Hart Publishing: 2009) 309-44.
- Tietje C, 'Die gemeinsame Handelspolitik der EU im System des Welthandelsrechts: Ein Spannungsverhältnis zwischen fortschreitender Liberalisierung und zunehmendem Protektionismus' in Eckhard Pache and Schorkopf Frank (eds), *Die Europäische Union nach Lissabon* (Nomos: 2009) 33-57.
- Tietje C and Wackernagel C, 'Enforcement of intra-EU ICSID awards' (2015) 16(2) *The Journal of World Investment & Trade* 205-47.
- Timmer LJE, 'Manifest excess of powers as a ground for the annulment of ICSID awards' (2013) 14(5) *The Journal of World Investment & Trade* 775-803.
- Timmermans C, 'Organizing joint participation of EC and Member States' in Alan Dashwood and Hillion Christophe (eds), *The general law of EC external relations* (Sweet & Maxwell: 2000) 239-47.
- Titi C, 'The European Union's proposal for an international investment court: Significance, innovations and challenges ahead' (2016a) *Transnational Dispute Management*
- , 'Most-favoured-nation treatment: Survival clauses and reform of international investment law' (2016b) 33(5) *Journal of International Arbitration* 425-40.
- Tizziano A, 'The powers of the Community' in Commission of the European Communities (ed), *Thirty years of Community law* (Office for Official Publications of the European Communities: 1981) 43-68.
- Tomuschat C, 'Attribution of international responsibility: Direction and control' in Malcolm David Evans and Koutrakos Panos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing: 2013)
- Toth AG, 'The individual and European law' (1975) 24(4) *International and Comparative Law Quarterly* 659-706.
- Toye R, 'Developing multilateralism: The Havana Charter and the fight for the International Trade Organization, 1947-1948' (2003) 25(2) *The International History Review* 282-305.
- Tridimas T, *The general principles of EU law* (Oxford University Press: 2006).
- , 'Competence after Lisbon: The elusive search for bright lines' in Diamond Ashiagbor, Countouris Nicola and Lianos Ioannis (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press: 2012) 47-77.
- Tridimas T and Eeckhout P, 'The external competence of the Community and the case-law of the Court of Justice: Principle versus pragmatism' (1994) 14(1) *Yearbook of European Law* 143-77.
- Twining W, *Blackstone's tower: The English law school* (Sweet & Maxwell: 1994).
- Uwera G, 'Investor-state dispute settlement (ISDS) in future EU investment-related agreements: Is the autonomy of the EU legal order an obstacle?' (2016) 15(1) *The Law and Practice of International Courts and Tribunals* 102-51.

- van Aaken A, 'Delegating Interpretative Authority in Investment Treaties: the Case of Joint Administrative Commissions' in Jean E. Kalicki and Joubin-Bret Anna (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff: 2015) 21-47.
- van den Berg AJ, 'Dissenting opinions by party-appointed arbitrators in investment arbitration' in Mahnouch H Arsanjani and others (eds), *Looking to the future: Essays on international law in honour of W Michael Reisman* (Martinus Nijhoff: 2011) 821-43.
- , 'Charles Brower's problem with 100% - Dissenting opinions by party-appointed arbitrators in investment arbitration' in David D. Caron and others (eds), *Practicing virtue: inside international arbitration* (Oxford University Press: 2015) 504-14.
- van Den Broek N and Morris D, 'The EU's proposed investment court and WTO dispute settlement: A comparison and lessons learned' (2017) 2(1) *European Investment Law and Arbitration Review* 35-89.
- Van Der Loo G and Wessel R, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017) 54(3) *Common Market Law Review* 735-70.
- Van Elsuwege P and Merket H, Department, 'The role of the Court of Justice in ensuring the unity of the EU's external representation', accessible at <https://www.asser.nl/upload/documents/20120911T102448-cleer2012-5book_web.pdf>.
- Van Harten G, *Investment treaty arbitration and public law* (Oxford University Press: 2007).
- , *Investment treaty arbitration and public law* (Oxford University Press: 2008).
- , 'Perceived bias in investment treaty arbitration' in Michael Waibel and others (eds), *The backlash against investment arbitration: Perceptions and reality* (Wolters Kluwer: 2010a) 433-53.
- , 'Investment treaty arbitration, procedural fairness, and the rule of law' in Stephan W. Schill (ed), *International investment law and comparative public law* (Oxford University Press: 2010b) 627-58.
- , 'Arbitrator behaviour in asymmetrical adjudication: An empirical study of investment treaty arbitration' (2012) 50(1) *Osgoode Hall Law Journal* 211-68.
- , 'The European Commission and UNCTAD reform agendas: Do they ensure independence, openness, and fairness in investor-state arbitration?' in Steffen Hindelang and Krajewski Markus (eds), *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (Oxford University Press: 2016) 128-41.
- Van Harten G and Loughlin M, 'Investment treaty arbitration as a species of global administrative law' (2006) 17(1) *European Journal of International Law* 121-50.
- van Rossem JW, 'The autonomy of EU law: More is less?' in Ramses A. Wessel and Blockmans Steven (eds), *Between autonomy and dependence: The EU legal order under the influence of international organisations* (T.M.C. Asser Press: 2013) 13-46.

- van Thiel S, 'Removal of income tax barriers to market integration in the European Union: litigation by the Community citizen instead of harmonization by the Community legislature?' (2003) 12(1) *EC Tax Review* 4-19.
- Vandevelde KJ, *Bilateral investment treaties: History, policy and interpretation* (OUP: 2010).
- , *The first bilateral investment treaties: U.S. postwar friendship, commerce, and navigation treaties* (Oxford University Press: 2017).
- Villa-Lobos N and Carvalhais Pereira T, 'The special nature of tax arbitration courts' in Nuno Villa-Lobos and Carvalhais Pereira Tânia (eds), *The Portuguese tax arbitration regime* (Almedina: 2015) 49-83.
- Von Bogdandy A and Bast J, 'The European Union's vertical order of competences: The current law and proposals for its reform' (2002) 39(2) *Common Market Law Review* 227-68.
- , 'The federal order of competences' in Armin von Bogandy and Bast Jürgen (eds), *Principles of European constitutional law*, 2nd edn (Hart Publishing: 2009) 275-308.
- von Bogdandy A and Venzke I, *In whose name?: A public law theory of international adjudication* (Oxford University Press: 2014).
- Von Mehren RB, 'The Eco-Swiss case and international arbitration' (2003) 19(4) *Arbitration International* 465-70.
- Von Papp K, 'Clash of 'autonomous legal orders': Can EU Member State courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ' (2013) 50(4) *Common Market Law Review* 1039-81.
- Waibel M, *The backlash against investment arbitration* (Wolters Kluwers: 2010).
- Waibel M and others, 'The backlash against investment arbitration: Perceptions and reality' in Michael Waibel and others (eds), *The backlash against investment arbitration: Perceptions and reality* (Wolters Kluwer: 2010) xxxvii-li.
- Waibel M and Wu Y, *Are arbitrators political? Evidence from international investment arbitration* (2017)
- Wehland H, 'Intra-EU investment agreements and arbitration: Is European Community law an obstacle?' (2009) 58(2) *International and Comparative Law Quarterly* 297-320.
- , 'The enforcement of intra-EU BIT awards *Micula v Romania* and beyond' (2016) 17(6) *The Journal of World Investment & Trade* 942-63.
- Weiler J, 'The Community system: The dual character of supranationalism' (1981) 1(1) *Yearbook of European Law* 267-306.
- Weiler JHH, 'The transformation of Europe' (1991) 100(8) *Yale Law Journal* 2403-83.
- Weiler JHH and Haltern UR, 'The autonomy of the Community legal order - Through the looking glass' (1996) 37(2) *Harvard International Law Journal* 411-48.
- Weiler T, 'NAFTA investment law in 2001: As the legal order starts to settle, the bureaucrats strike back' (2002) 36(2) *International Lawyer* 345-53.

- Wessel RA, 'The EU as a party to international agreements: shared competences, mixed responsibilities Law and Practice of EU External Relations' in Alan Dashwood and Maresceau Marc (eds), *Law and Practice of EU External Relations* (Cambridge University Press: 2008) 152-187.
- Wierzbowski M and Gubrynowicz A, 'Conflict of norms stemming from intra-EU BITs and EU legal obligations: Some remarks on possible solutions' in Christina Binder and Schreuer Christoph (eds), *International investment law for the 21st century: Essays in honour of Christoph Schreuer* (Oxford University Press: 2009)
- Williamson J, 'Democracy and the Washington Consensus' (1993) 21(8) *World Development* 1329-36.
- Wilske S and Raible M, 'The arbitrator as guardian of international public policy? Should arbitrators go beyond solving legal issues?' in Catherine A. Rogers and Alford Roger P. (eds), *The future of investment arbitration* (Oxford University Press: 2009) 249-72.
- Winter G, 'Reforming the sources and categories of European Union law: A summary' in Gerd Winter (ed), *Sources and categories of European Union law: A comparative and reform perspective* (Nomos: 1996) 13-65.
- Woolcock S, Department, 'European Union policy towards Free Trade Agreements', accessible at <<https://ecipe.org/wp-content/uploads/2014/12/european-union-policy-towards-free-trade-agreements.pdf>>.
- Wouters J, Coppens D and De Meester B, 'The European Union's external relations after the Lisbon Treaty' in Stefan Griller and Ziller Jacques (eds), *The Lisbon Treaty: EU constitutionalism without a constitutional Treaty?* (Springer: 2008) 143-203.
- Wouters J and Van Eeckhoutte D, Department, 'Giving effect to customary international law through European Community law', accessible at <<https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP25e.pdf>>.
- Wälde TW, 'Interpreting investment treaties: experiences and examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press: 2009) 724-81.
- Yang X, *State Immunity in International Law* (Cambridge University Press: 2012).
- Yannaca-Small K, 'Parallel proceedings' in Peter Muchlinski, Ortino Federico and Schreuer Christoph (eds), *The Oxford handbook of international investment law* (Oxford University Press: 2008a) 1008-48.
- , 'Definition of investor and investment in international investment agreements' in OECD (ed), *International investment law: Understanding concepts and tracking innovations* (2008b) 7-100.
- Zahariadis N, 'Ambiguity and choice in European public policy' (2008) 15(4) *Journal of European Public Policy* 514-30.
- Zuleta E, 'The challenges of creating a standing international investment court' in Jean E. Kalicki and Joubin-Bret Anna (eds), *Reshaping the investor-state dispute settlement system: Journeys for the 21st century* (Brill Nijhoff: 2015) 403-23.

Other

- Ankersmit L, 'Opinion 2/15 and the future of mixity and ISDS', *European Law Blog*, 18 May 2017 <accessed at <http://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/>>
- Dahlquist J, 'Place of arbitration in the proposed "Investment Court" scenario: An overlooked issue?', *Kluwer Arbitration Blog*, 23 March 2017 <accessed at <http://kluwerarbitrationblog.com/2017/03/23/joel-booked/>>
- Fortese F, 'Foreign investment arbitral claims continue to pile up on Spain, as government turns screws on energy sector' *Investment Arbitration Reporter* (5 December 2013) <<https://www.iareporter-com.ezproxy.ub.gu.se/articles/foreign-investment-arbitral-claims-continue-to-pile-up-on-spain-as-government-turns-screws-on-energy-sector/>>
- Kleimann D and Kübek G, 'The Singapore opinion or the end of mixity as we know it', *Verfassungsblog*, 23 May 2017 <accessed at <http://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/>>
- Larik J, 'Trade and Sustainable Development: Opinion 2/15 and the EU's Foreign Policy Objectives', *Europe and the World: A law review*, 1 June 2017 <accessed at <http://blogs.ucl.ac.uk/europe-and-the-world-journal/2017/opinion215-trade-sustainable-development>>
- Lavranos N, 'The End of Intra-EU BITs Is Nearing', *Arbitration Blog*, 13 May 2016 <accessed at <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is-nearing/>>
- Middleton K, 'Shorten tested in backroom fights' *The Saturday Paper* (8-14 December 2018)
- Mourre A, 'Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration', *Kluwer Arbitration Blog* <accessed at <http://arbitrationblog.kluwerarbitration.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/>>
- Ranald P, 'The legal clause which could allow Adani to sue Australia' *The Guardian* (16 December 2018) <<https://www.theguardian.com/commentisfree/2018/dec/17/the-legal-clause-which-could-allow-adani-to-sue-australia>>
- Roberts A, 'Anti-TTIP demonstrations seize European capitals' *EURACTIV* (13 October 2014) <<https://www.euractiv.com/section/trade-society/news/anti-ttip-demonstrations-seize-european-capitals/>>
- Schill SW, 'Das TTIP-Gericht: Keimzelle oder Stolperstein für echte Multilateralisierung des internationalen Investitionsrechts?', *Verfassungsblog*, 25 November 2015 <accessed at <https://verfassungsblog.de/das-ttip-gericht-keimzelle-oder-stolperstein-fuer-echte-multilateralisierung-des-internationalen-investitionsrechts/>>

- Stirk D, 'Growing number of countries allowing exclusion agreements with respect to annulment warrants greater scrutiny of arbitration clauses', *Kluwer Arbitration Blog*, 11 January 2012 <accessed at <http://arbitrationblog.kluwerarbitration.com/2012/01/11/growing-number-of-countries-allowing-exclusion-agreements-with-respect-to-annulment-warrants-greater-scrutiny-of-arbitration-clauses/>>
- Thym D, 'Mixity after Opinion 2/15: Judicial Confusion over Shared Competences', *Verfassungsblog*, 31 May 2017 <accessed at <http://verfassungsblog.de/mixity-after-opinion-215-judicial-confusion-over-shared-competences/>>
- , 'The CJEU ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals', *EU Law Analysis*, 9 March 2018 <accessed at <http://eulawanalysis.blogspot.com/2018/03/the-cjeu-ruling-in-achmea-death.html>>
- Trehearne C, 'Transparency, Legitimacy, and Investor-State Dispute Settlement: What can we learn from the streaming of hearings?', *Kluwer Arbitration Blog*, 8 June 2018 <accessed at <http://arbitrationblog.kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learn-streaming-hearings/>>
- Van Der Burchard H, 'Juncker proposes fast-tracking EU trade deals' *Politico* (4 September 2017) <<https://www.politico.eu/article/juncker-proposes-fast-tracking-eu-trade-deals/>>
- Van Harten G, 'The (lack) of women arbitrators in investment treaty arbitration', *Columbia FDI Perspectives* <accessed at http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf>