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KCL LawTTIP Young Researchers Workshop

Beyond TTIP: a new season for EU FTAs?

Andrea Biondi, Giorgia Sangiuolo
Editors

LAwTTIP Working Papers
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Acronyms

ASEAN  Association of Southeast Asian Nations
BITs  Bilateral Investment Treaties
CARIFORUM  Forum of Caribbean Group of African, Caribbean and Pacific States
CCP  Common Commercial Policy
CETA  Comprehensive and Economic Trade Agreement
CJEU  Court of Justice of the European Union
COREPER  Comité des Représentants Permanents
CPTPP  Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CTSD  Committee on Trade and Sustainable Development
CSF  Civil Society Forum
DAGs  Domestic Advisory Groups
DR-CAFTA  Dominican Republic-Central America-United States FTA
EAEC  European Atomic Energy Community
EC  European Commission
ECtHR  European Court of Human Rights
EEAS  European External Action Service
EESC  European Economic and Social Committee
EPA  Economic Partnership Agreement
EPO  European Patent Organisation
EU  European Union
EURATOM  European Atomic Energy Community
EUSFTA  EU-Singapore Free Trade Agreement
EUSIPA  EU-Singapore Investment Protection Agreement
FTAs  Free Trade Agreements
IACHR  Inter-American Court of Human Rights
ICC  International Criminal Court
ICJ  International Court of Justice
ICS  Investment Court System
ICSID  International Centre for Settlement of Investment Disputes
IITs  International Investment Treaties
ILO  International Labour Organization
ISA  Investor-State Arbitration
ISDS  Investor-State Dispute settlement
IUSCT  Iran-United States Claims Tribunal
MFN  Most Favourite Nation
MIC  Multilateral Investment Court
NAFTA  North American Free Trade Agreement
NGOs  Non-Governmental Organizations
OECD  Organization for Economic Co-operation and Development
PCIJ  Permanent Court of International Justice
SMEs  Small and Medium Enterprises
SOEs  State Owned Enterprises
TEU  Treaty on European Union
TFEU  Treaty on the Functioning of the European Union
TPP  Trans-Pacific Partnership
TRIPs  Agreement on Trade-Related Aspects of Intellectual Property Rights
TSD  Trade and Sustainable Development
TTIP  Transatlantic Trade and Investment Partnership
UNCITRAL  United Nations Commission on International Trade Law
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<tr>
<td>US</td>
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<td>VCLT</td>
<td>1969 Vienna Convention on the Law of Treaties</td>
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Introductory Remarks

Andrea Biondi, Giorgia Sangiuolo

This issue of the LAwTTIP working papers series collects some of the papers presented in the 1st Young Researchers Workshop of the Jean Monnet Network "LAwTTIP: Legal ambiguities withstanding the TTIP," organized by the King’s College London Centre of European Law on 17-20 October 2018.

The four-days’ workshop, which took place at the premises of the Centre of European Law in Somerset House, London, was envisaged as a “training school” for promising young researchers and doctoral students conducting research in the fields of the economic external relations of the EU and international investment arbitration. The participants in the Young Researchers Workshop, selected through a call for paper, were given the opportunity to present their work before highly regarded scholars working in the same field. The oral presentation of the papers was thus discussed by the invited experts and followed by a group discussion. At the end of the Workshop, participants were invited to implement the comments received into a final version of their papers, some of which are included below.

Despite the apparently scary format, the event was an unqualified success and a rewarding experience for all involved. During the four days of the Young Researchers Workshop in the historical rooms of Somerset House discussions took place on a variety of topics related to the economic external relations of the EU, spanning from the fate of investment arbitration in the EU, to sustainable development clauses in the EU Free Trade Agreements (FTAs), to more “principled” questions regarding the distinction between arbitration and judicial dispute settlement.

More specifically, the sessions were organized as follows. The first session was dedicated to the topic of sustainability in the EU FTAs. The papers of Elisabet Ruiz Cairó, Thibaud Bodson and Aakriti Bhardwaj explore in detail how the EU FTAs implement the guidelines of Article 21 TEU to safeguard labour rights, health protection and sustainable development. Discussions during the second session revolved around the topic of investment protection. Anran Zhang and Marine Foquet delve into the functioning of investor-State dispute settlement mechanisms. While Anran Zhang analyses whether State-owned enterprises are (or should be) covered by the definition of “investment” in current international investment treaties, Marine Foquet addresses the gaps of protection of victims of gross human rights violations on the part multinational enterprises left by the system of investment arbitration. The third and fourth sessions addressed issues of reform of the EU economic external policy. As Yulya Kaspiarovich and Markus Beham look at the future of the EU trade relations, Rodolfo Scarponi and Raymundo Treves give their view on the consequences of the CJEU’s decision in Achmea on the EU investment policy. Finally, the last two papers reflect on the theme of institutionalization of investor-State dispute settlement in the EU by means of the Investment Court System and the Multilateral Investment Court. While Jonathan Brusseau-Rioux seeks to identify the distinctive traits of arbitration as opposed to judicial settlement, Matteo Vaccaro Incisa draws a parallel between certain features of ICSID annulment and national and international judiciaries.

The very different — and, in some cases, opposing — positions featured in this working paper remain probably one of the most interesting and enriching parts of the Young Researchers Workshop. For instance, the argument of Yulya Kaspiarovich that “mixity” in the EU FTAs is a natural and welcomed consequence of the evolution of the EU, resoundingly contrasts with the policy recommendation made by Markus Beham that FTAs should be concluded as EU-only to unite the 28-block and overcome populist rhetoric. To
the critical assessments of the current system of Investor-State Dispute Settlement of Elisabeth Ruiz Cairo and Rodolfo Scarponi responds the more accommodating voice of Raymundo Treves, who interestingly argues that the decision of the European Court of Justice in Achmea triggers a “normalization” rather than a crisis in the protection of investors in the EU.

To all involved — the chairs, the discussants, the attendees and the young researchers — goes a big thank you! We hope you all enjoyed the workshop and that this was an opportunity to meet other like-minded scholars, and, who knows, maybe new friends!
SESSION I

Horizontal Policies in the EU FTAs

Chair: Professor Cécile Rapoport
University Rennes I
Investment Agreements and Public Health Protection: Has the European Union found the Right Balance?

Elisabet Ruiz Cairó*

I. Introduction

Recent investment arbitration cases highlight a direct link between investment agreements and public health protection. There is indeed an inherent tension between public interests that a State, or the European Union (EU), seeks to protect and investment agreements, which essentially seek to protect the economic interests of investors in a foreign country. In the case of public health, legislation aimed at protecting it will always impose limitations on investors. Accordingly, such legislation is likely to be challenged under investment arbitration rules.

The threat of such challenges often materialises, as the example of Australian tobacco-control legislation illustrates. While the guidelines for the implementation of the Framework Convention on Tobacco Control recommend the adoption of plain packaging legislation since 2008, Australia was the first to adopt such legislation in 2012. Such legislation was subsequently challenged under an investment agreement by the tobacco giant Philip Morris. It was only after Australia won the dispute that a few other States decided to introduce plain packaging as well. However, Philip Morris also challenged Uruguay on similar grounds of the effects of tobacco-control legislation on investment.

Public health concerns are thus currently at the heart of investment debates. In all cases, the courts and tribunals need to balance the business rights of investors and the State’s right to adopt public policies aimed at protecting public health. Reaching a fair balance is a difficult task and traditional investment agreements do not seem to provide satisfactory responses to this conflict. The EU has been actively involved in this debate. While only Member States have so far been involved in investor-State arbitration, the recent negotiation of several EU investment agreements sparked a debate within the European Union on the need to address public interest in disputes with investors. Civil society in the EU has been very active at requesting more stringent rules on the scope and terms of this litigation. In response to some of these requests, the EU has adopted new standards of protection in its recent trade and investment agreements, including on public health and environment. The goal of this paper is to examine whether these new standards of protection provide for better public health protection, and to assess whether they achieve the aim of tackling the issues

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2 World Health Organization, Guidelines for implementation of article 11, WHO FCTC on “Packaging and labelling of Tobacco Products”, November 2008, Decision FCTC/COP3(10), para. 46.


6 This paper refers to EU investment agreements either to refer to proper investment agreements or to refer to the investment chapters of EU free trade agreements. Following Opinion 2/15, the European Union is now including investment provisions in separate agreements; see CJEU, Opinion of the Court of 16 May 2017 in Opinion 2/15 Free Trade Agreement with Singapore, EU:C:2017:376, http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN.
It is argued that four are the legal provisions included in EU investment agreements that might have a positive impact in the protection of public health: (I) the incorporation of a “loser pays” principle; (II) the introduction of a specific provision on the right to regulate; (III) the modification of the rules on third-party intervention; and (IV) the inclusion of an appellate tribunal. These provisions will be analysed in more details below. The paper concludes that the EU has the potential to play a leadership role in the balancing between economic and non-economic interests under investment agreements. However, for this to happen, the relevant normative framework needs to be further strengthened.

II. The “loser pays” principle as an incentive for the European Union to regulate on public health grounds

Investment agreements can have a “chilling” effect on States’ right to regulate: the threat of being challenged under investment arbitration agreements can make them hesitant to legislate. This is partly related with the high costs arbitration involves: even where the State wins a dispute brought under an investment agreement, the costs of the proceedings often need to be covered by each of the parties, and these constitute one of the largest components of the costs of investment arbitrations. For example, the proceedings in Philip Morris v. Australia, won by Australia on jurisdictional grounds, had a cost of 39 million dollars for Australia. These elements can discourage some States from adopting legislation, leading to what is commonly known as “regulatory chill.”

The risk of regulatory chill is greater in the field of public health. Many of the public policies that are adopted to protect human health tackle non-communicable diseases, which are the consequence of our lifestyle: consuming tobacco, drinking too much alcohol or eating unhealthy food are some of the major concerns. Multinational enterprises have a major interest in these fields and the capacity to challenge regulatory measures.

The Union is aware of this issue and recent EU investment agreements incorporate a “loser pays” principle. This principle entails that the loser in an investment proceeding will

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have to pay all the costs of the proceedings, including the litigation costs of the other party. Accordingly, if an investor is unsuccessful in the arbitration, it will need to pay the costs of the respondent State that has won the proceedings.

This rule has great relevance to the field public health. The “loser pays” principle protects the EU’s right to adopt legitimate public health policies with possible negative effects on investors and constitutes an incentive to the right to regulate by ensuring that the threat of a legal challenge is not a barrier to the adoption of legislation. Moreover, by increasing the costs incurred by the losing party, it may even deter investors with little chances of winning a dispute from challenging the EU before an arbitral tribunal. The “loser pays” principle can therefore be an important first step for the Union to adopt legislation on public health grounds. In the next paragraph, it will be argued that the incentive to regulate is further enhanced by the inclusion of a specific provision on the right to regulate in all recent EU investment agreements.

III. The right to regulate: is the European Union truly protected when regulating on public health grounds?

Some argue that States should be allowed to adopt legislation to pursue legitimate public objectives notwithstanding the impact that such legislation can have on investors. This idea is captured in the so-called States’ “right to regulate”, not mentioned in traditional investment agreements. This brings questions as to whether a State can justify, under an investment agreement, a piece of legislation that negatively impacts on foreign investments based on its right to pursue legitimate objectives.

The EU took an important step in this regard and incorporated a right to regulate in the preamble of the drafts of the Comprehensive Economic and Trade Agreement (CETA) and the EU-Singapore agreement. This inclusion was however deemed insufficient as it left doubts as to the legally binding nature of the right and the enforceability of the provision.

The final version of CETA, as well as other recent EU investment agreements have thus gone further and contain a specific provision in the body of the treaty establishing the right to regulate in the main text of the agreement. This brings more clarity to the need to balance the investors’ and the public interests. In a standard formula, those agreements note that “the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity”. [3]
The “right to regulate” clause remains however questionable on a number of grounds. The use of the word “reaffirm” in relation to the right to regulate constitutes a merely declarative formula, which might thus not be enforceable. A more effective tool to ensure that States’ right to regulate remains protected under EU economic agreements might be that of excluding tout court a number of areas from the scope of the agreement. Yet, the provisions introduced in EU agreements don’t follow this path, for instance excluding public health measures from investment protection. A compromise solution could be the introduction of a rebuttable presumption of compliance whenever a State is implementing international law obligations. For example, if a State adopted tobacco-control legislation in accordance with the Framework Convention on Tobacco Control, then it would be presumed that this legislation was valid.

EU economic agreements also state that the “right to regulate” is protected only when the contracting parties legislate to achieve “legitimate” policy objectives. The expression implies a “necessity test”. The proposed language does not ensure that arbitral tribunals do not give more weight to investment protection than to non-economic goals such as health or environmental protection. The balancing exercise that the necessity test attempts to achieve could however still be useful, if carried out appropriately. The recent case law of the Court of Justice of the European Union (CJEU) in the field of tobacco control highlights an increasing concern towards health protection and the balancing exercise carried out by the CJEU seems to take account of these aspects. When asked to balance the freedom of expression and public health protection, the Court stated that: “human health protection — in an area characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases caused by the compounds those products contain that are pharmacologically active, toxic, mutagenic and carcinogenic — outweighs the interests put forward by the claimants in the main proceedings”. Accordingly, reaffirming the right to regulate to achieve legitimate objectives and highlighting it by including it in the main text of the agreement can be considered as positive measures to protect public health.

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19 See a similar solution in Article 2.5 TBT Agreement: “Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in para. 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade”. However, it is interesting to note that the FCTC was not considered to constitute a standard under this provision in the WTO Australia Plain Packaging case; see WTO, DS435/DS441/DS458/DS467 Australia – Certain measures concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging, Panel Report, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS/467/R (Australia Plain Packaging), paras. 7.264-7.397.


21 Phil Morris, cit., para. 156.
Although EU trade and investment agreements seemingly protect States’ right to regulate on public health grounds, the provisions that have been incorporated are very general and do not shield the 28-block from investors’ challenges against public health legislation. The interpretation of these provisions in practice will bring more clarity as to the scope of the right to regulate under investment agreements. The question that follows, however, is whether investment arbitration proceedings bring sufficient protection to public health concerns so that these are given the necessary attention in a dispute.

IV. The contribution of third parties to the protection of public health in EU investment disputes

Arbitration proceedings under recent EU investment agreements also underwent some changes compared to Member States’ previous practice to enhance the protection of the public interest. An interesting novelty concerns third-party intervention provisions. With confidentiality traditionally being a feature of investment arbitration, third parties’ participation is not normally foreseen in investor-State treaties. Authors have observed that this might limit civil society’s right to present its views during arbitral proceedings and, thus, defend public interests in the form of amici curiae or intervention. These participation tools indeed usually intervene in favour of the respondent State and tend to support the collective interests.

Third parties’ participation can also contribute to minimising fragmentation between different international legal regimes. For example, the Australian plain packaging legislation was challenged both before an arbitral tribunal and before the World Trade Organization (WTO) dispute settlement mechanism. Allowing WTO legal representatives to assist to the investment arbitration proceedings could facilitate obtaining non-conflicting awards.

The participation of third parties in investment proceedings can thus contribute to the preservation of public interests during the proceedings. In more general terms, it increases the participation of the public in disputes traditionally solved behind closed doors, thus enhancing transparency in arbitral proceedings. This is particularly relevant in the case of public health, considering the number of organisations that are specialised in the field and the scientific expertise that is required to assess whether a public measure is appropriate to tackle a public health issue.


The EU has taken due account of this aspect by incorporating rules on transparency, including provisions on third-party participation, to its investment agreements. Some EU agreements, for instance, refer to the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules, which, under Article 4, allow third persons to file written submissions with the arbitral tribunal regarding a matter within the scope of the dispute. A submission may be allowed if the third person has a significant interest in the arbitral proceedings and if the submission can assist the arbitral tribunal in the determination of a factual or legal issue related to the proceedings. The EU-Singapore agreement instead incorporates its own transparency rules, thus not referring to the UNCITRAL ones. However, the requirements to submit written briefs are identical. It is stated that “interested natural or legal persons of the Parties are authorised to submit *amicus curiae* briefs to the arbitration panel”. More specifically, written submissions from third parties are admitted if the third party has a “significant” interest in the proceedings and if it can assist the tribunal in the determination of any factual or legal issue.

Although the move of the Union in terms of transparency is commendable, it is argued that the EU could go even further. The above-mentioned transparency provisions limit third-party participation to the submission of written briefs. Instead, the 2015 EU proposal on TTIP included a fully-fledged right of intervention for third parties “which can establish a direct and present interest in the result of the dispute”. This right of intervention was more far-reaching as it involved a right to participate orally in the proceedings. This is something that in CETA and in the EU-Singapore agreement is only limited to non-disputing parties (respectively, Canada, Singapore and the EU). Yet, such provision was regretfully not incorporated in later agreements.

Once again, while the possibility to defend the public interests by means of third-party participation in the new EU FTAs is enhanced in comparison to traditional investment agreements, there is still margin for improvement.

V. The “judicialisation” of arbitration and its impact on the interpretation of public health concerns in EU investment disputes

The newly introduced rules on the composition of arbitral tribunals in EU investment agreements can also lead to a better assessment of public health concerns in investment arbitral proceedings. Arbitration is traditionally constituted by a single instance tribunal established for a specific dispute arisen in a specific bilateral investment agreement. Accordingly, arbitral tribunals should not, as a rule, base their rulings on previous cases. In the case of national legislation to protect public health, this means that similar laws – such as tobacco-control measures – can be challenged several times by several investors under different investment agreements with potentially different and competing outcomes. This

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29 Article 4.3 UNCITRAL Transparency Rules.
30 Article 3.41.2 EU-Singapore Investment Agreement.
31 Article 3.3, Annex 8 EU-Singapore Investment Agreement; Article 3 Annex 9 EU-Singapore Investment Agreement.
33 Article 3.17 EU-Singapore Investment Agreement. Article 8.38 CETA.
34 BEUC, ClientEarth, European Environmental Bureau, EPHA, Transport & Environment, “Joint analysis of CETA’s Investment Court System (ICS)”, cit., p. 4.
36 Luca Pantaleo, “Investment Disputes under CETA”, cit., p. 175.
37 Ibid., p. 178.
situation is even more likely when national legislation is also challenged in other fora, as observed above with Australian plain packaging legislation, which was challenged not only under investment arbitration, but was also before the WTO dispute settlement body.38

Recent EU FTAs provide dispute resolution mechanisms that are closer to national courts than arbitral tribunals and, to some extent, tackle the mentioned issues. Members of the tribunal need to possess certain qualifications to be appointed and are subject to ethical rules and a code of conduct. Arbitrators are selected from pre-set lists. Therefore, investment disputes under certain agreements will be decided by the same group of people. The agreement also provide for an “appellate” tribunal. This allows parties to appeal arbitral decisions and responds to one of the main criticisms in the EU’s TTIP public consultation:39 consistency in the interpretation of investment agreements and predictability of the outcomes.40

However, the increased consistency reached by an appellate mechanism remains limited to disputes arisen under a certain investment agreement, as each of them would have a different appeal tribunal. From this perspective, the new EU investment dispute settlement mechanism remains far from perfect.

A multilateral investment court would most likely enhance this process with the establishment of a centralised appeal system following a single set of rules.41 It is true that a centralised appeal tribunal would still have to interpret several investment agreements, which might include very different provisions with respect to each other.42 The multilateral court would thus still reach divergent conclusions depending on the investment agreement that it interprets. However, a centralised appeal tribunal would also ensure that terms and rules that are common to several EU agreements would be interpreted in a uniform way. As noted above, EU investment agreements do share many elements, such as the “loser pays” principle, incorporated in almost identical terms in all of them. Accordingly, a multilateral court could bring more uniformity in the interpretation and support the creation of a uniform standard of public health protection.

The establishment of such a court is explicitly provided for in recent agreements and the negotiating directives have already been adopted by the Council.43 The EU is thus working at the multilateral level in UNCITRAL Working Group III to reach consensus with other States.

VI. Conclusion

Investment agreements’ provisions have the potential to discourage States from adopting legislation aimed at protecting public health. Recent investment disputes against Uruguay and Australia have highlighted that such proceedings can entail very high costs for States, in terms of fees and time spent in litigation. In its most recent trade and investment agreements, the EU has adopted several measures in order to tackle these shortcomings, some of which were analysed in this work.

38 WTO, Australia Plain Packaging, cit.
42 It is outside the scope of this paper to make a comparative analysis of the provisions contained in all investment agreements currently in force around the world but they might strongly differ.
These measures adopted by the EU partly addressed the criticism surrounding investment protection globally. The provisions safeguarding the Union’s right to regulate could shield the adoption of legislation aimed at protecting public health. Where such legislation is challenged before an arbitral tribunal, the greater participation of third parties could enhance the protection of public interests. The composition of the tribunals and the structure of the overall investment protection system has the potential to lead to a more homogenous assessment of public health concerns in investment disputes.

However, for the EU to become a leader in public health protection, more work is needed. The paragraphs above highlighted that the provisions on the “right to regulate” in EU investment treaties remain rather broad and lack tooth. A similar conclusion was reached regarding third party participation rules which still subject such participation to the unclear requirement of “significant interest.” Finally, vis-à-vis bilateral dispute resolution mechanisms, a multilateral court would better contribute to public health protection by ensuring the uniform interpretation of similar provisions throughout EU investment agreements. Only the strengthening of these mechanisms would lead to an investment protection model that takes sufficient account of public interests and fully addresses the criticism that is currently raised against the traditional investor-State dispute settlement mechanisms.
I Decide How I Rule! Ah, Really? Right to Regulate in Matters of Labour Rights Protection in the EU-Japan Economic Partnership Agreement

Thibaud Bodson*

I. Introduction
What regulatory space does the Trade and Sustainable Development (TSD) chapter of the EU-Japan Economic Partnership Agreement (EPA) provide for the contracting parties in matters of labour rights protection?

This article argues that to answer this question one must distinguish between two types of labour rights: (A) those corresponding to the “internationally recognised standards” or included in the “international agreements to which the Party is party”; and (B) those complementary to “internationally recognised standards and international agreements to which the Party is party.” While labour rights of Type (A) are protected by relatively precise obligations of result, labour rights of Type (B) fall under the protection of relatively imprecise obligations of conduct. Ultimately, this article reaches two conclusions. First, the contracting Parties’ regulatory space is larger for labour rights of Type (B) than for labour rights of Type (A). Second, in a context of trade liberalisation, and considering the relevant obligations, labour rights of Type (B) are more exposed to a diminution of their levels of protection than those of Type (A). To enhance the protection of Type (B) labour rights, the article suggests the establishment of a concertation procedure contracting parties should follow each time they envisage a reform of their domestic labour law.

This article begins by giving some context for the analysis. It discusses the relation between trade liberalisation and workers’ rights as well as the EU’s progressive adoption of standardised provisions on workers protection in its Free Trade Agreements (FTAs) (Section II). Then, it analyses the legal mechanisms established by two clauses of the EU-Japan EPA defining the contracting parties’ regulatory space in matters of labour rights’ protection: the “right to regulate” and the “levels of protection” clauses (Section III). After this analysis, it presents some reflections on the legal implications and the normative justifications of the regime shaped by these two clauses (Section IV). Finally, it suggests a way to enhance the protection of labour rights under the EU FTAs and the inclusion of a so-called “regulatory concertation clause” in TSD chapters (Section V).

II. Trade, Labour and the Development of Standardised Labour Provisions in EU FTAs
Agreements facilitating trade between countries are not neutral for workers. The adoption of trade-liberalising measures by the World Trade Organisation and through the ratification of FTAs entails a complex mix of positive and negative effects for workers. Various studies indeed highlight diverging dynamics.

On the one hand, some research has pointed to the existence of a negative relation between trade liberalisation and labour rights protection – i.e. trade liberalisation is

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associated with an average decrease in labour rights protection in the countries concerned. On the other hand, other studies have underlined positive patterns linking trade liberalisation and labour rights protection — i.e. trade liberalisation is associated with an average increase in labour rights protection. Empirical research thus points at the coexistence of different and not necessarily consistent dynamics linking trade liberalisation and labour rights protection. 

In face of the disputed relation between economic globalisation and labour rights protection, some states and civil society organisations have called for the inclusion of labour provisions — provisions promoting the respect of certain labour standards — in trade agreements. Over the past two decades the insertion of labour provisions in FTAs has become a reality and, indeed, has proliferated.

Towards the mid-2000s, the EU emerged as one of the key actors promoting the addition of labour provisions in FTAs. In fact, it began inserting labour-related provisions in the FTAs it concluded as early as in the 1990s. However, these provisions were generally limited to the mutual recognition by the contracting parties of a principle of non-discrimination in employment towards their nationals and, of the right of the latter to access the host country’s social security schemes. In the “Global Europe” strategy of 2006 and later in the “Trade for all” strategy of 2015, the EU Commission affirmed its commitment to include a more extensive model of labour provisions in its FTAs. This resulted in the design of specific chapters on “Trade and Sustainable Development” in EU trade agreements. The first such agreement to contain a TSD chapter was the EU-Korea FTA. It provisionally entered into force in 2011. TSD chapters have been added to all FTAs concluded by the EU consecutively. These chapters address issues touching upon labour rights and environmental protection through the formulation of provisions setting (1) substantive obligations; (2) enforcement mechanisms; (3) cooperation mechanisms; and (4) institutional elements.

The EU-Japan EPA was signed on 17 of July 2018, ratified by the EU Parliament on the 12th December of the same year, and entered into force on the 1st of February 2019. Given the scope of the matters it covers, as well as the importance of trade flows between the

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7 See for example articles 64 and 65 of the EU-Tunisia Association Agreement of 1998.


10 Among them, the agreements that already entered into force are: EU-Republic of South Korea (2011); EU-Colombia-Peru-Ecuador (2013, for Colombia and Peru and 2017, for Ecuador); EU-Central America (2013); EU-Moldavia (2016); EU-Georgia (2016); EU-Ukraine (2016); EU-Canada (2017); EU-SADC (2018); EU-Japan (2019).

11 The EPA provides for the removal of tariffs on more than 90% of EU exports to Japan and of several non-tariff barriers between both blocs. In that regard, the EPA includes chapters on public procurements, SMEs, good regulatory practices, geographic indications etc.
two parties, it can be considered as the most ambitious trade agreement concluded by the EU so far. The EU-Japan EPA includes a TSD chapter relatively similar to those found in the other FTAs concluded by the EU. The analysis conducted in the next section focuses on two types clauses of the EPA’s TSD chapter: the “right to regulate” and the “levels of protection” clauses.

### III. The “Right to Regulate” and “Levels of Protection” Clauses in the EU-Japan EPA

The contracting parties’ regulatory space in matters of labour rights’ protection in TSD chapters is defined by the “right to regulate” and by the “levels of protection” clauses. While the former recognises the contracting parties’ right to establish their own levels of domestic labour protection, the latter limits this right in different ways. Together these provisions establish a relatively complex legal regime. This section addresses the questions of how both clauses are interwoven and how they protect workers from a possible diminution of their levels of protection consequent to trade liberalisation.

The right to regulate and levels of protection clauses are contained in article 16.2 of the EPA. They read as follows:

1. Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.

2. The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties. [...].

Article 16.2, paragraph 1 of the EPA sets out the contracting parties’ right to regulate in labour-related matters. This clause provides for each party’s right to autonomously “establish its own level of domestic […] labour protection.” This implies that each of them can “adopt or modify accordingly its relevant laws and regulations.” Hence, the contracting parties’ right to regulate entails that they can modify their labour law and adopt higher levels of workers’ protection as well as lower levels of protection. As such, this clause recognises the parties’ sovereignty in matters of labour law. However, the text limits the right to regulate in four different ways. These limitations are provided in the levels of protection clause.

The first limitation to the right to regulate is set by each party’s commitments towards “the internationally recognised standards and international agreements to which [it] is

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12 Together the EU and the Japan markets represent almost 630 million consumers – i.e. approximatively 10% of the world population. They generate 40% of international trade and produce about 30% of global GDP. In 2016, EU companies exported goods to Japan worth 58 billion euros and services worth 28 billion euros. For more information, see the website of the EU Commission <http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/> accessed 20 January 2019.

This obligation is one of result, where the specific result to be achieved is, in substance, to respect two types of normative sources. Firstly, the “internationally recognised standards.” In that regard, one generally considers that they include the standards protected under the 1998 International Labour Organisation (ILO) Declaration on Fundamental Rights and Principles at Work, namely: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation; as well as the standards of “productive employment and decent work for all” referred to in the 2008 ILO Declaration on Social Justice for a Fair Globalisation. Secondly, the “international agreements to which a Party is party.” With respect to this second normative source, the Court of Justice of the European Union has affirmed that the definition of the scope of the obligations included in international agreements “is a matter covered by the interpretation, mediation and dispute settlement mechanisms that are in force for those international agreements.” With that in mind, it is interesting to note that most of the “international agreements” setting labour rights-related obligations are ILO Conventions, which benefit from the extensive interpretation made by the ILO bodies. In sum, the first limitation to the right to regulate is formulated as an obligation of result and the result to be achieved is enounced in relatively precise and clear terms.

Article 16.2, paragraph 1, of the EPA also sets a second limitation to the parties’ right to regulate when it states that each of them “strive to ensure that its laws, regulations and related policies provide high levels of […] labour protection.” This obligation is one of conduct, where the particular course of conduct required is to “strive to ensure” a certain state of legislation. Hence, the EU and Japan must make appropriate efforts towards achieving “high levels of […] labour protection.” One can consider that this formulation is relatively imprecise for at least two reasons. First, the contracting parties are not bound to the achievement of a certain result, rather to the adoption of a conduct. Yet, the provision is silent with respect to the exact characteristics of this conduct, so that contracting parties have a certain margin of appreciation in that regard. Second, no indication is given on what constitutes “high levels of labour protection.” Does it span “internationally recognised standards?” Does it go beyond that? Should “high levels of labour protection” be considered as one and the same thing across all countries, irrespective of, for example, differences in the countries’ level of development? Or should it be relative to certain of the countries’ specific characteristics, such as their institutional capacities, financial resources, etc.? Addressing these questions is crucial for defining the scope of this obligation. While answers have been formulated in previous EU FTAs, the EU-Japan EPA does not bring any precision on this matter and leaves the discussion open on what should be considered as “high levels of labour protection.” In sum, the second limitation to the right to regulate provides for an obligation of conduct that is relatively imprecise. As such, it does not bind...
contracting parties to the achievement of a specific legislative result and it allows them a
certain margin of appreciation vis-à-vis the exact nature of their commitments.

The third limitation to the right to regulate included in article 16.2, paragraph 1, of the
EPA entails that each contracting party must “strive to continue to improve those laws and
regulations and their underlying levels of protection.” This third limitation is formulated as an
obligation of conduct, vis-à-vis which contracting parties have an obligation to “strive to
continue” the betterment of their domestic legislation. As it was the case for the second
limitation, this obligation does not bind the contracting Parties to the achievement of a
specific result and is relatively imprecise as for the conduct to be adopted. Indeed, the notion
of “improvement” raises some problems of interpretation. It is not always clear what
constitutes an improvement of workers’ rights. For example, how should one consider the
adoption of a legislation allowing employers to put their employees on temporary layoffs in
times of economic downturn? Sound arguments could be made both, for and against it being
perceived as an improvement. What about more comprehensive legislative reforms which
include some provisions that can be seen as an improvement and others that are a clear
degradation of working conditions? How should these comprehensive reforms be
considered overall? These are interpretative issues likely to arise from the absence of
specifications under the third limitation on what should be considered an improvement of
the laws and regulations and of their underlying levels of protection. As was the case for the
second limitation, one can conclude that the third limitation to the contracting Parties’ right
to regulate is an obligation of conduct that is relatively imprecise and that consequently
leaves some degree of discretion to the contracting Parties.

The fourth limitation to the right to regulate under article 16.2, paragraph 2, of the
EPA includes three obligations for the contracting parties, namely: (1) not to “waive from;”
(2) not to “otherwise derogate from;” and (3) not to “fail to effectively enforce” their labour
laws and regulations. Considering that the ordinary meanings of obligations (1) and (3) are
not “to refrain from applying or enforcing (a rule, law), to make an exception to”\(^\text{18}\) and not to fail “to compel the observance of (a law); to support by force (a claim, demand, obligation)”\(^\text{19}\)
respectively, these are obligations of conduct. In contrast, obligation (2) is defined as the
interdiction “to repeal or abrogate in part (a law, sentence, etc.); to destroy or impair the
force and effect of; (…)”\(^\text{20}\) and establishes as such an obligation of result. These three
obligations are further qualified by several phrases. Some of these phrases apply to the
three obligations indistinctly, others to obligation (3) only.

As described in Table 1 below, the phrases qualifying the three obligations are those
set out in the first sentence of article 16.2, paragraph 2, of the EU-Japan EPA. Indeed, one
should consider that not all waivers, derogations or failures to effectively enforce labour
laws and regulations are constitutive of a breach under this provision, rather only those which (a)
“encourage trade or investment” by (b) “relaxing or lowering the levels of protection.” With
respect to the phrases qualifying obligation (3) only, the second sentence of article 16.2§2
adds two other prongs. It states indeed that the Parties shall not fail to effectively enforce
their labour laws and regulations (c) “through a sustained or recurring course of action or
inaction” and (d) “in a manner affecting trade or investment between the Parties.” It is clear

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from the formulation of the clause that these two prongs do not apply to obligations (1) and (2).\textsuperscript{21}

Table 1: phrases qualifying the different obligations included in article 16.2§2 of the EU-Japan EPA

<table>
<thead>
<tr>
<th>Qualification (a): “to encourage trade or investment” (first sentence)</th>
<th>Qualification (b): “by relaxing or lowering the levels of protection” (first sentence)</th>
<th>Qualification (c): “through a sustained or recurring course of action or inaction” (second sentence)</th>
<th>Qualification (d): “in a manner affecting trade or investment between the Parties.” (second sentence)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obligation (1): not to waive from labour laws and regulations</td>
<td>YES</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>Obligation (2): not to otherwise derogate from labour laws and regulations</td>
<td>YES</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>Obligation (3): not to fail to effectively enforce labour laws and regulations</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>

Thus, the fourth limitation to the right to regulate concerns three obligations qualified by several sentences in the provisions. However, each of them raises its own problems of interpretation. Here are some of these problems.

With respect to the formulations common to obligations (1), (2) and (3), difficulties mainly relate to the second qualification, according to which contracting Parties’ interventions

\textsuperscript{21} The word “or” has been used between each type of intervention so as to clearly distinguish between the different obligations, and between the specific qualifications applicable to each of them.
should not “[relax or lower] the levels of protection.” The problem arising from this qualification is similar to the one identified for the notion of “improvement” discussed above. Namely, it is not always clear whether or not the contracting Parties’ interventions constitute a “lowering or relaxing” of the levels of protection.

Regarding the qualifications that specifically apply to obligation (3), several issues of interpretation can also be identified. One of them concerns the fourth qualification. Indeed, one may wonder “what must be shown to establish that a failure to enforce labour laws through a sustained or recurring course of action or inaction is “in a manner affecting trade between the Parties”?” This question prominently figured in a recent dispute opposing the US and Guatemala.22 Whereas the US contended that “a course of action or inaction is “in a manner affecting trade” if it modifies conditions of competition,” Guatemala argued that “it is “in a manner affecting trade” only if it causes a change in prices of or trade flows in particular goods or services.”23 After an analysis of the meaning of the words and of the context, the arbitration panel agreed with the US interpretation and added that “[one needs] only determine that a competitive advantage has accrued to a relevant employer to find that there is an effect on conditions of competition.”24 As this case shows, the potential for contention on the interpretation of this qualification is high. Yet, the EU-Japan EPA has not brought any clarification on how to interpret the phrase “in a manner affecting trade.” Disagreements between the contracting parties on how to understand this clause are thus awaiting around the corner.25 As was the case for the second and third limitations to the right to regulate, the fourth limitation is worded as an obligation of conduct which is relatively imprecise and, as such, is likely to raise non-negligible issues of interpretation.

Three important points should be emphasised to conclude the analysis of the “right to regulate” and “levels of protection” clauses undertaken in this section. First, the “right to regulate” clause provides a right for the Parties to define their own levels of labour protection. Second, this right is not absolute and includes four limitations. Third, as summarised in table 2 below, the obligations limiting the parties’ right to regulate have varying characteristics – i.e. one finds both, obligations of conduct and of result; these obligations have different degrees of precision and of clarity. In the context of our analysis on the contracting parties’ regulatory space in matters of labour rights’ protection, the first limitation certainly has the strongest capacity to limit this regulatory space given that it is formulated as a relatively clear and precise obligation of result. The second, third and fourth limitations are comparatively weaker. The obligations included therein are mostly obligations of conduct and have a lower degree of precision. Together, these three observations raise more fundamental questions on the legal implications and on the normative justifications of the regime set by the “right to regulate” and “levels of protection” clauses.

23 See para. 165 of the arbitral decision In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR.
24 See para. 195 of the arbitral decision In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR.
25 Following this decision, the contracting Parties to the USMCA agreement concluded between the United States, Mexico and Canada have decided to include explanatory footnotes in the text of the agreement so as to clarify this formulation. See for instance article 23.3 of the USMCA which specifies in a footnote that: “For greater certainty, a failure is “in a manner affecting trade or investment between the Parties” where it involves: (1) a person or industry that produces goods or provides services traded between the Parties or has investment in the territory of the Party that has failed to comply with this obligation; or (2) a person or industry that produces goods or provides services that compete in the territory of a Party with goods or services of another Party.”
Table 2: the limitations to the right to regulate included in article 16.2 of the EU-Japan EPA:

<table>
<thead>
<tr>
<th>Limitation</th>
<th>Type of obligation</th>
<th>Characteristics</th>
<th>Scope of the limitation to the right to regulate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td>To respect minimum levels of protection</td>
<td>Obligation of result - relatively precise</td>
<td>Bound to a certain legislative result and little margin of appreciation for the contracting Parties \ =&gt;$ \text{some limitation to the right to regulate}</td>
</tr>
<tr>
<td>2nd</td>
<td>To provide for high levels of protection</td>
<td>Obligation of conduct - relatively imprecise</td>
<td>Not bound to a certain legislative result and wider margin of appreciation for the contracting Parties \ =&gt;$ \text{little limitation to the right to regulate}</td>
</tr>
<tr>
<td>3rd</td>
<td>To improve the levels of protection</td>
<td>Obligation of conduct - relatively imprecise</td>
<td>Not bound to a certain legislative result and wider margin of appreciation for the contracting Parties \ =&gt;$ \text{little limitation to the right to regulate}</td>
</tr>
<tr>
<td>4th</td>
<td>Not to lower the levels of protection</td>
<td>Obligations of conduct/result - Relatively imprecise</td>
<td>Mostly not bound to a certain legislative result and wider margin of appreciation for the contracting Parties \ =&gt;$ \text{little limitation to the right to regulate}</td>
</tr>
</tbody>
</table>

IV. Legal Implications of and Normative Justifications for the Regime set by the “Right to Regulate” and “Levels of Protection” Clauses

As observed in the previous section, the right to regulate and its limitations give shape to a complex legal regime. This legal regime defines the regulatory space available to the contracting parties. Against this backdrop, special consideration needs to be given to the first limitation. Indeed, this limitation \textit{de facto} makes a distinction between two types of domestic labour laws. The first type, which one will call “Type (A),” is composed of the domestic labour laws transposing “internationally recognised standards and international agreements to which a Party is party.” Typical examples of Type (A) legislation are domestic laws guaranteeing the four core labour standards – i.e. (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. The second type, “Type (B),” includes the domestic labour laws providing for protections \textit{complementary} to “internationally recognised standards and international agreements to which a Party is party.” Examples of Type (B) legislation are domestic laws relating to temporary layoffs, maternity leave, limited duration contracts, dismissal conditions, etc. \textit{provided} that the concerned State has not ratified international agreements on these matters. Thus, the first limitation to the right to regulate defines what one could call a “dual structure of domestic labour law” as represented in graph 1 below.
Importantly, both types of domestic labour laws are protected by different kinds of obligations under the “right to regulate” and “levels of protection” clauses. Whereas the levels of protection provided by the domestic labour laws of Type (A) cannot be lowered under the first limitation, the levels of protection guaranteed by the domestic labour laws of Type (B) are shielded by relatively weaker obligations. Indeed, labour laws of Type (B) can only be protected by the second, third and fourth limitations to the right to regulate which, as observed above, generally do not bind contracting parties to a certain legislative result and are relatively imprecise. These two characteristics may feature both, the contracting parties’ difficulties to reach an agreement on the precise nature of their common obligations, as well as their willingness to keep a certain margin of appreciation regarding the exact scope of the commitments to which they subject themselves. Overall, these observations lead to two conclusions. First, the regulatory space left to contracting parties by the right to regulate and the levels of protection clauses of the EU-Japan EPA is larger for labour rights of Type (B) than for those of Type (A). Second, in a context of trade liberalisation and considering the relevant obligations, labour rights of Type (B) are more exposed to a diminution of their level of protection than labour rights of Type (A).

This analysis of the regulatory space defined by the right to regulate and levels of protection clauses seems to correspond with a trend identified by Häberli, Jansen and Monteiro in their article, *Regional Trade Agreements and Domestic Labour Market Regulation.* In this article, the authors assess the labour legislation of ninety developed and developing countries from 1980 to 2005. With respect to high-income countries, the authors identify a decrease in the protection of the domestic labour standards other than those reflected in the 1998 ILO Declaration on the Fundamental Principles and Rights at Work, after the entry into force of FTAs. Häberli et al.’s study and the present analysis both capture two facets of one and the same phenomenon, namely the fact that trade liberalisation plays out differently on various types of labour rights. Indeed, states seem to be keen on keeping a free hand vis-à-vis certain labour rights so as to guarantee themselves some flexibility to adjust to international competition. This, in turn, raises some foundational questions. What are the normative justifications supporting the right to regulate and its

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limitations? How should one assess a distinction in the protection of different types of labour rights?

On the one hand, one can consider that the right to regulate in labour-related matters is a central prerogative of States’ sovereignty. It is a key element of the socio-economic regime a country wishes to adopt for itself. Beyond that, labour rights protection is also widely considered an instrument at the disposal of States to steer their trade and investment policies, their economic development and ultimately to optimise the overall welfare of their population. Against this backdrop, the desire of States to keep their hands on the steering wheel of their economy’s competitiveness largely justifies their right to regulate in labour-related matters.

On the other hand, limitations included under the “levels of protection” clause can be supported by at least three arguments. First, certain limitations to the right to regulate can be justified by humanitarian concerns. Countries may want other countries (and themselves) to adopt high standards of protection because it increases the welfare of workers. Second, some limitations can be striven for as a means of promoting fair competition. Companies based in countries with higher labour standards may wish to compete on an equal footing with other foreign companies. Therefore, they may put their national authorities under pressure to set a common level playing field with other countries. Third, limitations to the right to regulate can also be justified for autonomy reasons. In a context of integrated markets, labour rights constitute a policy area which should not be addressed in a vacuum. Indeed, countries may want to limit the impact of socio-economic decisions taken abroad on the regulatory space available at home. Hence, in order to secure some regulatory space for themselves, they can seek to reduce the incidence of foreign decisions through mutually agreed limitations to their right to regulate.

Together, these sovereignty considerations, on the one hand, and the humanitarian, fair competition and autonomy elements, on the other hand, shape the normative grounds justifying both the right to regulate and its limitations. In turn, these normative grounds help considering the issue of a distinction in the protection of different types of labour rights and, indeed, the fact that certain labour rights can be diminished.

If one conceives of labour laws and regulations as adjustment tools for socio-economic policies addressing general welfare objectives, then it seems fair to accept possible variations in the level of protection guaranteed by these labour laws and regulations. However, the fact that labour policies adopted in a certain country are also likely to affect the competitiveness of other economies means that States’ desire for flexibility must go hand in hand with an attention for these effects. All in all, the need for flexibility justifies a reasonable exercise of the right to regulate and a possible diminution of certain labour rights, such as labour rights of Type (B). At the same time, the activation of this right by some authorities must be accompanied by a genuine consideration of the implications for other countries. In sum, governments need to exert an informed right to regulate.

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V. Pushing for an *Informed* “Right to Regulate”

This inquiry into the EU-Japan EPA’s contracting parties’ regulatory space raises the question of how to adjust the “right to regulate” and “levels of protection” clauses so as to enhance the protection of domestic labour laws of Type (B). As concluded in the previous section, any such adjustment should endorse both flexibility and mechanisms guaranteeing genuine consideration of the implications for other countries of the exercise of the right to regulate.

While the flexibility to adopt appropriate labour rights policies is assured by the right to regulate and by the discretion contracting parties enjoy from relatively imprecise limitations to that right, current mechanisms guaranteeing a consideration of domestic policies’ effects on other countries are still insufficient. The channels of communication already established under the TSD chapter of the EU-Japan EPA – such as the TSD Committee, the Joint Dialogue with Civil Society, and the so-called “transparency provision” – do not specifically foresee the kind of concertation on the impact of labour laws’ draft reforms that would be necessary.

There is indeed a need for appropriately designed procedures that would enable the contracting Parties to adopt new labour laws while knowing what their effect for the other contracting Party is and whether or not they comply with the obligations under the TSD chapter. This could possibly be achieved through the inclusion of a “regulatory concertation clause” in TSD chapters. Such concertation clause should compel any contracting Party planning to undertake a reform of its domestic labour laws to submit its project to the other contracting Party, to the TSD Committee or to a panel of experts for impact and conformity assessment. The “regulatory concertation clause” could read as follows:

“Recognising their mutual right to regulate, each Party shall communicate to the other Party/to the Trade and Sustainable Development Committee/to a panel of experts any project to adopt or modify its labour laws or regulations and shall communicate the object and the scope of such project in an appropriate manner. The other Party/the Trade and Sustainable Development Committee/the panel of experts may express its views vis-à-vis such project and its potential effects on the trade between the Parties and on the obligations included in the levels of protection clause. The Party initiating the concertation shall follow up on these views in such a manner as it deems appropriate.”

This model of a “regulatory concertation clause” aims at establishing an impact and conformity assessment procedure before any adoption or modification of the domestic labour law takes place. Moreover, the “regulatory concertation clause” provides for the possible communication of “views” by the other contracting Party, the TSD Committee or a panel of experts. These views are not binding for the Party initiating the concertation. Overall, this mechanism should have three important benefits. First, it would prevent

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32 This specialised committee, co-chaired by representatives of the Parties, is charged with the monitoring of the TSD chapter. See article 16.13 of the EU-Japan EPA. Concertation between the contracting Parties on projects of legislative reforms are not discussed by TSD Committees. For example, the *Joint statement to the Civil Society Forum on the outcomes of the Trade and Sustainable Development Committee's reports of the EU-Republic of South Korea FTA (from 2012 to 2016)* do not mention the existence of any such concertation for reforms undertaken in South Korea or in any of the EU Member States.
33 It is a dialogue between the Parties and the civil society organisations established in their territory. See article 16.15 of the EU-Japan EPA.
34 See article 16.10 of the EU-Japan EPA. This provision supports the “establishment of a transparent and predictable regulatory environment […]” However it does not set any obligation to communicate on projects of legislative reforms.
situations in which a party is exposed to the *fait-accompli* of the adoption of a disputable legislation against which only an *ex post* dispute settlement procedure is available under current TSD chapters.35 Second, it would enable contracting parties to exert their right to regulate in an informed manner, thus taking into consideration the implications of the exercise of the right to regulate for other countries. Third, it would subject the content of relatively imprecise limitations to the right to regulate to concertation, potentially clarify the obligations included therein, and ultimately offer additional protection to the domestic labour laws of Type (B).

Crucially, this concertation procedure would not affect in a negative way the contracting parties’ regulatory space in matters of labour rights’ protection. In the contrary, it is aimed at preventing the adoption of labour rights legislations likely to be experienced by the other contracting party as damaging the competitiveness of its own economy. Such legislations are dangerous as they can possibly trigger a dynamic of legislative reactions-counter reactions eventually leading to a diminution of labour rights protection particularly detrimental to labour rights of Type (B).

In conclusion, the inclusion of “regulatory concertation clauses” in TSD chapters may not be the panacea for the protection of labour rights in a context of trade liberalisation. However, they could surely enhance the achievement of *high levels of protection*, the *improvement* of labour rights protection as well as to contain certain questionable attempts to *relax or lower* these levels of protection. Discussions on the design of the “right to regulate” and “levels of protection” clauses need to continue to both increase public acceptance of further trade liberalization, and to take into account of the increasing exposure of workers to international competition.

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35 See articles 16.16, 16.17 of the EU-Japan EPA on dispute settlement mechanisms under the TSD chapter.
The Governance And Enforcement Of Trade And Sustainable Development Provisions In Eu Free Trade Agreements: An Analysis Of The Comprehensive Economic And Trade Agreement

Aakriti Bhardwaj*

I. Introduction

The 2011 Free Trade Agreement (“FTA”) between the European Union (“EU”) and the Republic of Korea¹ signalled the beginning of the “new generation” EU FTAs, aimed at improving the competitiveness of the EU, “spur wider economic growth and sustainable development and prepare the ground for future global trade rounds.”² These agreements include Trade and Sustainable Development (“TSD”) chapters aimed at promoting sustainable development through the setting of labour and environmental standards in the trade relations of the EU. Overall, TSD chapters seek to facilitate the participation of civil society in monitoring the enforcement of the provisions and inter-governmental consultations in case of non-compliance by either contracting party of the trade agreement, be it the EU or its trade partners. The provisions set up to this aim largely utilise three types of approaches: network-based mode of governance,³ the co-operation-based⁴ and the promotional approach.⁵ Nevertheless, the transparency of – and access to – trade policy processes remains low for civil society groups in the EU.⁶

¹ Free trade Agreement between the European Union and its Member States and the Republic of Korea, Official Journal of the European Union L 127/6, 14/05/2011 (hereinafter “EU-Korea FTA”).
⁵ Of particular relevance to the enforcement of labour and environmental provisions in FTAs, the promotional approach focuses on cooperative activities, dialogue between stakeholders such as businesses and the civil society in addition to governmental authorities. This approach is based on the realisation that state and non-state actors (both for-profit and not-for-profit) outside the government possess the ability to shape and implement policies see Social Dimensions of Free Trade Agreements (International Labour Office 2013). Robyn Keast and Myrna Mandell and Kerry A. Brown, ‘Mixing state, market and network governance modes: the role of government in “Crowded” policy domains’ (2006) 9 International Journal of Organization Theory & Behavior, pp. 27-50.

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This paper delves into the relationship between governance and enforcement mechanisms to assess the TSD chapters of EU FTAs using the provisions of the Comprehensive and Economic Trade Agreement (CETA) between the EU and Canada, the most progressive EU FTA, as a case study. More specifically, it analyses the approach to the governance of labour and environmental standards under CETA, of which the civil society mechanism is inter alia a component, arguing that the enforcement of TSD chapters primarily depends on two factors. First, the contribution of the framework on civil society participation in the governance of labour and environmental standards, i.e. the network-based mode of governance. Second, the effectiveness – read in conjunction with the objectives of the TSD chapters – of the co-operation-based and promotional approaches through which the parties seek to pursue “trade-related sustainable development issues of common interest”. Whilst this paper overall recognizes the effectiveness of the EU’s agenda on trade and sustainable development, it concludes that a re-evaluation of the provisions of the TSD chapters is necessary for substantively improving their governance and enforcement.

To analyse the contribution of the framework on civil society participation in the governance of labour and environmental standards, this work draws from the limited experience of civil society's inclusion in international economic governance as seen at the World Trade Organisation (WTO). While a full analysis of the impact of civil society actors (or the lack thereof) on international economic governance remains outside the scope of this work, it is maintained that EU FTAs create a niche for the civil society to participate. This paper thus presents a case for investigating how non-trade issues may be promoted outside the WTO system through FTAs. The second part of this paper analyses the characteristics of the effectiveness of the co-operation-based and promotional approaches under the TSD chapters of CETA. The characteristics are then compared to an alternative approach found in the FTAs of the United States of America (US). Although particular provisions in US FTAs continue to evolve, they represent the sanctions-based approach, essentially opposite to that of the EU.

Section II introduces the EU trade strategy in the context of sustainable development. Section III provides an overview of the TSD chapter under CETA. Drawing from experiences at the multilateral level, Section IV studies the role of civil society participation in the enforcement of labour and environmental standards. Finally, Section V analyses EU's co-operation-based approach and Section VI concludes by summarising the key findings of this work.

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8 Article 22.3 CETA.


II. EU Trade Strategy and Sustainable Development

The EU has consistently sought to promote sustainable development through its trade agreements. The 2006 communication, “Global Europe: Competing in the World” already made clear that the EU was “reorienting” its trade policy towards an enhanced protection of trade-related labour and environmental standards. Post-Lisbon, the EU constitutionalised the commitment to contribute to sustainable development in its external relations through Articles 3(5) and 21 of the Treaty on the European Union (TEU). Through the “Trade for All” communication, the EU has emphasised “a trade agenda to promote sustainable development, human rights and good governance” that aims to “engage with partner countries in a cooperative process fostering transparency and civil society involvement.” The Treaty on the Functioning of the European Union (TFEU) prescribes transparency in international trade negotiations at the inter-institutional level, i.e. requiring the European Parliament to be “fully informed at all stages of the procedure” and externally i.e. between EU institutions and critical voices of the civil society “in order to promote good governance.” The TFEU also directs the European Economic and Social Committee (EESC) consisting of representatives of organisations of employers, of the employed (trade unions), and of other parties representative of civil society to assist the European Parliament, the Council and the Commission. The EESC has the mandate to provide the Secretariat for facilitating the work of the civil society under CETA.

Intertwined with governance, enforcement is the second key concept for testing the framework on the promotion of labour and environmental standards in FTAs. Indeed, while governance is concerned with principles of transparency and participation, enforcement is concerned with all measures intended to achieve (or, in case of violations, address) the violation of labour and environmental standards. While civil society participation is integral to enforcement, CETA relies on governments, which possess direct powers to enforce laws or regulations, and private firms to develop corporate social responsibility codes and practices. However, neither governments nor businesses can be penalised for violations of standards under the TSD chapters of CETA. This lack of effective sanctions, in turn, creates a rising dissatisfaction among the civil society. The rationale for the lack of effectiveness of TSD chapters is probably to be attributed primarily to the “promotional” approach that they embody.

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16 Article 218 (10) TFEU.
17 Article 15(1) TFEU.
18 Article 300 TFEU.
19 See European Commission Directorate-General for Trade, “Call for Interest to Become a Member of the EU Domestic Advisory Group for CETA” (Brussels, 2018).
20 Also categorised as “social governance” (civil society pressure on business from labour organizations and non-governmental organizations), “public governance” (government policies to support gains by labour groups and environmental activists), “private governance” (corporate codes of conduct and monitoring) see Gary Gereffi, Joonkoo Lee, “Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters” (2016) 133, Journal of Business Ethics, p. 31.

III. An Overview of the Trade and Sustainable Development Provisions under CETA

TSD chapters in CETA contain safeguards on the right to regulate of each party, for instance, by allowing them to set their respective priorities on labour and environment standards. This broad right is however limited from a general mandatory obligation that “the Parties shall seek to ensure that the relevant “laws and policies provide for and encourage high levels” of labour and environmental protection.”\footnote{CETA chapters 23, 24, articles 23.2, 24.3 (emphasis added).} The provision intends to prevent a “race to the bottom” of environmental and labour standards and “regulatory competition”\footnote{In the context of labour, see Katherine VW Stone, “Globalization and the Middle Class” in Critical Legal Perspectives on Global Governance, eds. Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (Hart Publishing 2014), pp. 168-9.} linked to the competitive advantage that a country might gain through lower levels of protection, by encouraging “trade or the establishment, acquisition, expansion or retention of an investment” in its territory.\footnote{Articles 23.4, 24.5 CETA.}

Trade and Sustainable Development provisions under CETA are trifurcated into three chapters, which contain the relevant substantive obligations and rules on dispute settlement: (i) framework for civil society participation; (ii) labour; and (iii) environment.\footnote{Chapters 22-24, CETA. This trifurcation is peculiar to CETA as other new generation FTAs contain only one chapter on ‘Trade and Sustainable Development’ covering trade, labour, environment and civil society and dispute settlement mechanism see for instance EU-Korea, (n. 1).} In respect of labour standards, CETA “reaffirms” the commitment of the Parties to inter alia the eight fundamental conventions\footnote{The Fundamental Conventions are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (N. 87); Right to Organise and Collective Bargaining Convention, 1949 (N. 98); Forced Labour Convention, 1930 (N. 29); Abolition of Forced Labour Convention, 1957 (N. 105); Minimum Age Convention, 1973 (N. 138); Worst Forms of Child Labour Convention, 1999 (N. 182); Equal Remuneration Convention, 1951 (N. 100); Discrimination (Employment and Occupation) Convention, 1958 (N. 111).} of the International Labour Organisation (ILO) encompassing the five fundamental principles and rights at work.\footnote{The principles are: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour, a prohibition on the worst forms of child labour and other labour protections for children and minors; (4) the elimination of discrimination in respect of employment and occupation; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.} Similarly, commitments on environmental standards cover a set of multilateral environmental agreements on issues arising in specific areas, such as climate change, hazardous substances, marine environment and pollution.\footnote{See obligations on climate change, conservation of biological diversity, forest management and forest products and fisheries and aquaculture, article 24 CETA.} As it has been observed, these reaffirmations appear redundant and declaratory in nature.\footnote{Supra (n. 15) (Mega-Regional Trade Agreements), p. 204.}
A specialised Committee on Trade and Sustainable Development (CTSD), comprised of high-level representatives of the EU and Canada, is responsible for overseeing matters covered by TSD chapters and their implementation. The CTSD is also responsible to present a report to the Civil Society Forum (CSF), convened once a year to hold discussions on and review the implementation of the TSD chapters. The civil society representatives from EU and Canada are to be arranged into Domestic Advisory Groups (DAGs) that may issue advice, submit opinions and make recommendations to the CTSD on issues related to the TSD chapters. The role of the CSF and DAGs is outlined generally and remains unclear in the midst of the broad objectives set out by the chapter.

Public submissions are invited by the EU and Canada under the Trade and Environment chapter (chapter 24), although there is no further provision laying down a follow-up procedure for public submissions on environmental issues. These submissions may include communications related to implementation concerns. The absence of a similar provision for labour provisions is conspicuous and indicative of an imbalance in addressing labour issues at the ground level. The dispute settlement mechanism under the TSD chapters provides for resolving disputes through government-to-government consultations and a “Panel of Experts” if disputes remain unresolved post consultations. In preparing the reports, the panel may modify the final report based on the comments received from the EU or Canada on the interim report. The final report must be adopted within a stipulated time and should be made public, to allow the civil society to overlook its implementation.

IV. The Governance of Labour and Environmental Standards and Civil Society Participation

EU FTAs typically provide a platform for civil society participation. Although the EU utilises this mechanism in all its post EU-Korea FTAs (2011), large variations exist in respect of the degree of involvement of civil society in the implementation and monitoring of provisions of each FTA. CETA greatly emphasises participants’ independence, scope of membership, and, most of all, dispute settlement. Participation of civil society in the dispute resolution process is strictly limited, as it remains a government-to-government self-contained process confined to the stage of consultations and the Panel of Experts. Arguably, the inclusion of a more prominent role for civil society is susceptible to being perceived as symbolic and

31 Article 22.4 CETA.
32 Article 22.5 CETA.
33 Articles 23.8, 24.13 CETA.
34 Article 24.7.3 CETA.
35 At first inter-governmental consultations are to resolve any dispute that may arise and the Committee on TSD may be engaged to provide its input. Either Party may initiate consultations by submitting a request for Consultation. If consultations fail, a panel of experts may be convened to examine the case, issue interim and final reports and make recommendations for its resolution. Articles 23.9, 23.10, 24.14, 24.15 CETA.
36 Articles 23.10.11, 24.15.10 CETA.
37 Ibid.
39 Based on the assessment of civil society groups sought to be included by the Parties. The more specific the commitment to involve a certain group, the better. It also concerns the obligations of these groups to develop mechanisms to work on TSD areas along with opportunities to work at the transnational level and with state actors.
40 Supra (n. 39). CETA is similar to EU-Korea FTA in this respect.
41 The dispute resolution procedure comes to an end when Parties “reach a mutually agreed solution,” articles 23.10.13, 24.15.12 CETA.
without an actual capacity to influence actions of governments and businesses. The current framework on civil society participation under CETA seems to mirror developments at the multilateral level: CETA provides for civil society engagement and, like the WTO Public Forum, the organisation of a CSF on an annual basis. At the same time, it risks facing similar challenges in the functioning of the civil society mechanism.

The WTO has, to a certain extent, addressed trade-related environmental issues. Yet, these measures still reflect an “outmoded strategy” and are far from adequate to involve civil society, as they do not amount to legitimate participation of the civil society and transparency in rule making.

For instance, it is true that the traditional “Westphalian” foundation of the organisation results in a lack of transparency that is ill-suited to address the call for enhanced participation of civil society organisations representing labour and environmental groups. However, in the light of much criticism, the WTO put in place measures to facilitate dialogue through an annual Public Forum. The organisation also granted observer status to intergovernmental organisations to enable them to follow discussions on matters that may be of direct interest to them. The existing WTO norms also include the view that only national delegates can make decisions about global trading rules as representatives of governments of the members. As an effect, civil society participation within the WTO system has developed norms and patterns of interaction between governments and non-governmental organisations (“NGOs”) that convey that NGOs must be discreet and supportive rather critical of the work of policy makers. NGO representatives are expected to work as aides on trade policy issues and not advocates of causes, confronting governments on issues. The question that arises is whether civil society will succeed in initiating an “opposing” discourse on labour and environmental issues if it is unacceptable that it challenges policy-makers represented by national governments.

FTAs — such as CETA, that incorporate mechanisms for civil society participation – tend to follow the same structure of the WTO and do not appear to improve dramatically on existing civil society frameworks established at the multilateral level or in previous EU FTAs. When it comes to transparency in the negotiation phase, for instance, CETA has been one of the least transparent FTAs negotiated by the EU in recent years. The exclusion of labour and environmental civil society groups in the negotiations phase shows an inherent democratic deficit in CETA, which results in the neglect of empowerment of citizens in

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44 Supra (n. 26).
45 Supra (n. 32).
46 The organisation stated that labour standards were best left with the International Labour Organisation to deal with see Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996. WTO Agreements allow members the right to regulate on public policy grounds such as environment see Article XX General Agreement on Tariffs and Trade, 1994 33 I.L.M. 1153 (1994), Article XIV General Agreements on Trade in Services, 1994 33 I.L.M. 1167 (1994).
52 Ibid.
53 Supra (n. 15) (Mega-Regional Trade Agreements), p. 228.
transnational economic cooperation.54 It is true that in the post-negotiation phase, EU and Canada invited civil society representatives to a meeting of the Civil Society Forum. Yet, it is questionable whether the discussions carried out therein can be qualified as true “exchange of views”.55

The increasing number of commitments of the parties emanating from various instruments under international law creates a risk of incoherence in the arrangement of dialogue with the civil society, considered the different obligations that each of these instruments provides for. For instance, the EU conveyed that obligations arising under the Paris Agreement56 will be prerequisite for signing FTAs with potential trading partners.57 At the inaugural meeting of the CETA Joint Committee, the EU and Canada also adopted recommendations setting the stage for further work on climate change and the Paris Agreement.58 The answer is potentially grounded in policy development than legal framework in this respect as requirements based on internationally agreed standards demand trading partners propose coherent policy packages.59

V. The Enforcement of Labour and Environmental Standards and the Co-Operation Based Approach of the EU

This section analyses the co-operation-based approach of the EU in comparison to an alternative sanctions-based approach. Generally, TSD provisions under CETA are based on “softer” concepts of cooperation and dialogue and appear less “formalised” when compared to the sanctions-based approach or the conditional approach of US and Canada.60 The main argument against the co-operation-based approach is that it does not strengthen enforcement of labour and environmental standards but merely promotes them. For instance, CETA sets the objective to ratify the fundamental conventions of the ILO for the parties followed by exchange of information on the status of ratification.61 All EU Member States have ratified the core labour conventions. Canada has now ratified all core labour conventions by ratifying the Convention on the Right to Organise and Collective Bargaining in 2017.62 As ratification ipso facto does not amount to enforcement, it is difficult to conclude that the approach is successful in enforcing labour standards.

58 See Joint Communique “Canada and the European Union hold the Inaugural Meeting of the CETA Joint Committee” (26 September 2018, Montreal); The EU and Canada acknowledged the envisaged adoption of three recommendations on trade and climate, trade and gender and small and medium enterprises see Joint Report, Meeting of the Committee on Trade and Sustainable Development, 13 September 2018, Brussels.
61 See articles 23.3(4) CETA.
While explaining the preference for the co-operative approach and contemplating the options for broadening the scope of TSD provisions, the Commission sought opinions from stakeholders on whether levying sanctions is preferable. Labour unions expressed their dissatisfaction with the present approach terming it inadequate and supported sanctions for violations. Business Europe, a social partner representing corporations, showed overall support for the present “consultative” mechanism of EU FTAs but indicated that it is in need of a reform. At the time of negotiating CETA, Canada advocated for provision on sanctions for violation of labour standards. According to the Canadian proposal, remedial measures included the imposition of compensation payments up to a maximum of a stipulated amount. The EU is said to have rejected this proposal. Further, the TSD chapters under CETA are unclear on how a violation of standards would be determined.

Analysis has also revealed the difficulty in establishing whether sanctions are more effective in comparison to the promotional approach. In the only case where an issue concerning labour standards came before an arbitral panel competent to issue sanctions, in a dispute between the US and Guatemala under the Dominican Republic-Central America-United States FTA (DR-CAFTA), the tribunal did not go as far as deciding to impose them. The panel’s findings were instead restricted to assessing whether the alleged violation of labour rights in Guatemala was in breach of the trade agreement. The panel found that although the US did prove that Guatemala failed to enforce its labour laws, the respondent’s actions constituted “a course of inaction” that was not “in a manner affecting trade,” i.e. Guatemala did not gain a competitive advantage by breaching an obligation under the agreement. On its side the EU has requested consultations over the alleged breach of

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65 Social partners are cross-industry organisations representing specific or sectoral interests of European workers and employers see Social Europe Guide Volume 2: Social Dialogue (European Union 2012); Consolidated Version of the Treaty on the Functioning of the European Union Article 152, 2008 O.J. C 115/47, at 114, the EU “recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy”.


68 Ibid.

69 Writing at the time the dispute was still unresolved, Gerda van Rosendaal pointed out that the effectiveness of the labour chapter suffered from several weaknesses and in the absence of a more substantive institutional change, the provisions remain vastly symbolic see Gerda van Rosendaal, “The Diffusion of Labour Standards: The Case of The US and Guatemala” (2015) 3 Politics and Governance, pp. 18-33: The enforcement of labour obligations under DR-CAFTA had been stated to be weak and ineffective by the Washington Office on Latin America in a qualitative study conducted for the period 2006-2009 see Samira Salem and Faina Rozental, “Labor Standards and Trade: A Review of Recent Empirical Evidence” (2012) 4(2) Journal of International Commerce and Economics 16; Ferdi De Ville, Jan Orbie and Lore Van den Putte, “TTIP And Labour Standards” (European Union, 2016), p. 15.

70 The US had alleged that Guatemala had failed to effectively enforce its labour laws by failing to conduct proper inspections or impose penalties upon finding labour law violations see paras. 173-175, 190 and 592-594, Final Report of
TSD chapter (labour commitments), specifically under the EU-Korea FTA. The case is still pending. Existing theoretical analysis coupled with limited empirical findings make it thus difficult to conclude whether a sanctions-based approach is better.

Perhaps there is scope for a mixed approach and the EU has sought to apply it in the past. The Economic Partnership Agreement between the EU and the Forum of Caribbean Group of African, Caribbean and Pacific States (CARIFORUM) is the only agreement wherein the EU (then the European Community) combined the promotional and conditional approach. It is the only EU agreement to submit labour and environmental provisions to sanction-based arbitral dispute settlement. The agreement contains additional obligations for foreign investors concerning labour and environmental provisions. The EU has refrained from incorporating the same provisions in the new generation FTAs and has restricted dispute resolution to measures as provided within the TSD chapters. CETA also does not contain provisions regulating the behaviour of investors through domestic regulation. The (co-operation based) commitment under CETA to “promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection” requires effective enforcement. The agreement emphasises that the parties should trade goods produced under voluntary sustainability schemes such as “fair and ethical trade” and “eco-labels” but does not propose the means to contribute towards commitments to undertake cooperative activities by way of investments, nor does it instruct investors to undertake such responsibilities. The Comprehensive and Progressive Transpacific Trade Partnership (CPTPP) to which Canada is party, instead includes specific provision on the funding of cooperative activities (to be decided by the contracting parties involved on a case-by-case basis) under chapters on labour and environment. Thus, the CPTPP exemplifies that countries may harness trade policy to facilitate investments for sustainable development.

VI. Conclusion

Trade liberalisation sees opposition with rising demands for promotion of shared social values including fair labour practices, fair product prices, non-exploitative production methods and environmental sustainability. This paper highlights that TSD provisions in CETA intend to ensure that trade liberalisation works in aid of social and environmental standards but suffer from two vulnerabilities: no substantial improvement in the civil society

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72 Before CARIFORUM, EU trade agreements contained references to working conditions, remuneration and dismissal, and social security primarily under a framework on cooperation in social matters see Assessment of Labour Provisions in Trade and Investment Arrangements (ILO 2016).

73 Article 72(b) “Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998...” and article 72(c) on environment “Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.” Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, L289, 30 October 2008.

74 Article 22.3, CETA “Cooperation and Promotion of Trade Supporting Sustainable Development” (emphasis added).


mechanism and the lack of effectiveness of the co-operation-based approach. Civil society members fear that governments will undermine domestic regulations on labour and environment in favour of corporate interests of maximising business gains if there are no punitive sanctions to counter their actions. CETA is possibly the most ambitious regional free trade agreement that Canada and the European Union have negotiated so far\(^7\) but needs better engagement on the part of governments, businesses and civil society on labour and environmental standards. The lack of a horizontal connection between the investment chapter of the agreement and the TSD chapters is another weakness of the overall approach to sustainable trade and investment. However, within the framework of the present approach under CETA, there is scope for the enforcement of labour and environmental standards through measures that facilitate sustainable investment.

SESSION II

The Evolution of ISDS

Chair: Professor Federico Casolari
University of Bologna
The Role of State-Owned Enterprises in Investment Protection Agreements: A More Experienced EU Approach?

Anran Zhang*

I. Introduction

This working paper gives a brief introduction to the role of State-owned enterprises (SOEs) in investment protection agreements. SOEs play a critical role in international investments: when an SOE intends to gain access to investor-State arbitration, the respondent State might object to the jurisdiction of the arbitral tribunal by arguing that the SOE is not qualified as a private investor. Reference will be made to the probably most representative SOEs in the world, the Chinese SOEs.

The paper starts with an overview of two investor-State arbitration cases, in which arbitral tribunals discuss the legal standing of Chinese SOEs taking into account the investment treaty provisions to establish their jurisdiction. It then offers an overview of how the existing European Union (EU)'s investment treaties, identify the role and aims of SOEs and attempt to assess whether the EU's approach is applicable to the investment treaty between the EU and China.

II. “SOEs”

The term “SOEs” refers to enterprises owned by sovereign States. States can have significant control over SOEs by holding full, majority, or significant minority ownership.2 In a broad sense, any enterprise over which a State exercises ownership could be considered as an SOE.3 SOEs have been gradually engaging in global investment in recent years, in the form of State-owned companies, sovereign wealth funds and other sovereign commercial vehicles.4 Around 1,500 multinational SOEs, with more than 86,000 foreign affiliates representing close to 1.5% of the multinational entities and 10% of global affiliates in the world, play an essential role in global economy and international investment.5

An SOE usually both exercises its power as a public authority and also acts as a private investor subject to that power.6 This duality raises concerns about whether an SOE might obtain protection under international investment treaties (IITs). It has been widely accepted that IITs are conceived to attract and protect private investments, rather than facilitate the flow of transnational sovereign capitals.7 Consequently, scholars have discussed and provided opinions on whether an SOE, especially a Chinese SOE, had the legal standing to

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6 Luca Schicho, State Entities in International Investment Law (Auflage 2012), p. 15.

7 Paul Blyschak, p. 19.
call on investor-State arbitration. However, in the absence of case law on the point, these analyses remained somewhat theoretical until 2017. In that year were issued two decisions on jurisdiction in investor-State arbitrations concerning the role of Chinese SOEs, which addressed this legal standing issue from a practical point of view.

The EU is also paying particular attention to the role of SOEs in its new investment treaties 'negotiations. The EU approach posits how the EU would like to address the issue of SOEs in its future investment agreements, notably the one with China, the negotiations for which started in 2013.

This paper first gives a brief introduction to the two 2017 investor-state arbitration cases mentioned above in which arbitral tribunals decided on the legal standing of Chinese SOEs. It then turns to examine the provisions on the role of SOEs under existing international investment treaties, paying specific attention to US and EU treaties. This paper concludes with some reflections on the EU approach and suggestions regarding the role of SOEs to the future investment treaty negotiation, especially between the EU and China.

III. Role of SOEs in Investor-State Arbitration

This section discusses the recent case law in investor-State arbitration concerning Chinese SOEs, which are considered to be the representative SOEs in the global investment. According to the World Investment Report, China is the second largest (after the EU) economy in which multinational SOEs are headquartered. China also counts some 257 multinational SOEs (18% of global multinational SOEs). After a long period of World Wars and the Civil War, China’s SOEs started to play a role in undertaking nation-building tasks. The “Reform and Opening-up” policies of 1978 began to attract foreign investment in China, while Chinese companies started to invest in other countries under the guidance of the “Going Out” policy. In the past 30 years, Chinese SOEs have gone through various processes of transformation, which saw smaller SOEs closing down, merging, or being sold, and larger SOEs becoming bigger and more transnational. Large SOEs have also been transformed from inefficient production units operating under the State’s economic plans into profitable business entities. In 2015 China became the first time a net capital exporter, with Chinese investment overseas exceeded foreign investment in China.

In 2017, two Investor-State Dispute Settlement (ISDS) cases, the Beijing Urban Construction Group Co., LTD v. Yemen (“BUCG”) and China Heilongjiang International Economic & Technical Cooperative Corp (“China Heilongjiang”), Beijing Shougang Mining Investment Company Ltd (“Beijing Shougang”), and Qinhuangdaoshi Qinlong International Industrial Co. Ltd (“Qinlong”) v. Mongolia (“CBQ”) cases, discussed for the first time the standing of Chinese SOEs in international investment arbitration. In both cases, the

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9 UNCTAD, World Investment Report 2017, Figure 1.25.
11 Ibid. (n. 10).
respondent States raised objections on jurisdiction and argued that the claimants, being SOEs, failed to qualify as investors in investor-State arbitration. Instead of focusing on the facts of the two cases, this section will address the reasoning followed by the arbitral tribunals to affirm jurisdiction.

In the BUCG case the arbitral tribunal applied the “Broches Test” to examine the legal standing of the claimant SOE. In 1972, the first Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID), Aron Broches, argued that a government-owned corporation could not be disqualified as a “national of another Contracting State” unless (a) it acts as an agent for the government, or (b) it is discharging an inherently governmental function.14 These criteria were named the “Broches Test”. The BUCG tribunal examined the circumstances to see whether or not claimant met either of the criteria. The tribunal first held that the government or party control commonly existed in the structure of any Chinese SOE, so the critical concern turned out to be the activities of the SOE rather than the framework of the SOE. In the present case, the arbitral tribunal found that the claimant joined an open tender and competed with other competitors on the bidding project. Moreover, since the respondent Yemeni government was alleged to have acted against BUCG instead of the Chinese government, the BUCG was indirectly proved to be the commercial contractor in the project under the dispute. Consequently, the tribunal held that BUCG was a qualified foreign investor.

In CBQ, the respondent objected to the jurisdiction by arguing that the claimants being SOEs were not economic entities under Article 1 (2) of the China-Mongolia BIT. Article 1(2) of the China-Mongolia BIT defines “investors” as

(a) Natural persons who have nationality of the People’s Republic of China;
(b) Economic entities established in accordance with the laws of the People’s Republic of China and domiciled in the territory of the People’s Republic of China.

The respondent argued that the claimants did not fit the criteria of being “economic”, did not exercise economic activities, and were not motivated to gain benefits in international investment. In its interpretation, the arbitral tribunal first found that the applicable BIT did not prohibit SOEs to take part in the bilateral investment. Furthermore, the arbitral tribunal did not find any evidence in the record to conclude that the claimants acted under the express Chinese government’s instructions to invest abroad to serve China’s foreign policy goals. Consequently, the arbitral tribunal dismissed the respondent’s objection on jurisdiction.

Generally, the CBQ and BUCG cases address two different aspects of the legal standing of SOEs in international investment arbitration. To examine the jurisdiction, arbitral tribunals will either apply the Broches Test or consider the provisions of the definition of investors in the applied investment treaties.

IV. The Role of SOEs in Investment Treaties

The provisions of IITs play an important role in the determination of the role of SOEs. IITs typically define SOEs as either “governmentally owned” or “governmentally owned or controlled”.15 Some of them also directly use the term “State enterprise” or “State-owned enterprise”. The Organization for Economic Co-operation and Development (OECD) published a survey and addressed the investment treaty practice in relation to the SOEs in

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Regarding this OECD survey, the majority of IITs does not distinguish the ownership of investors and does not mention SOEs. This OECD survey provides that, of the 1813 agreements surveyed, in the provisions of investor definition 1,524 (84%) do not explicitly mention either type of government control investors, which are (i) State-owned enterprises (SOEs); (ii) State-owned investment funds such as SWFs; or (iii) a government itself as investor. 16% of IITs specified to cover SOEs, including “public institutions,” “State corporations and agencies,” “governmental institutions,” and so forth, and 3 IITs specifically excluded SOEs.

The OECD survey mentions that three Bilateral Investment Treaties (BITs) signed with Panama in 1983 expressly exclude SOEs from their scope. This section will refer to this approach as the “Panama Model”. Article 1 of the Panama-UK BIT first explains that “shares, stock and debentures of companies or interest in the property of such companies” are the “investment” under this agreement. The Panama Model expressly excludes SOEs from its scope of investors, which means that SOEs are no longer protected investors under the IITs. With respect to Panama, SOEs having domiciles in the territory of Panama are not company investors; conversely, with respect to the UK, the company investors are more broadly “companies, associations incorporated or constituted under the law […] in any part of the United Kingdom […]” which does not expressly exclude SOEs.

However, the Panama-UK BIT was signed around 35 years ago, when SOEs were not have regarded as key player in global investment. This exclusion without reservation of the Panama Model remains also extremely rare, according to the OECD working paper. Indeed, considered the importance that SOEs hold nowadays, the Panama model appears to be out of date and rightfully remains an exception for the new IITs.

a. The US Model

The OECD survey further indicates that all US IITs explicitly include SOEs in the definition of the investor. This paper refers to the US approach to SOEs as “US model.” The 2012 US model BITs states that, enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

The US model BIT explicitly excludes that governmentally owned or controlled enterprises are among covered investors. It also further defines “State enterprise” as “enterprise owned, or controlled through ownership interests, by a Party” (State). The US model BIT concerning

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16 Ibid.
17 Ibid., p. 11.
18 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of investments, [hereinafter “Panama-United Kingdom BIT”] (signed on 07 October 1983); entre le Gouvernement de la Confédération Suisse et le Gouvernement de la République du Panama concernant la promotion et la protection des investissements [herein after “Panama-Switzerland BIT”] (signed on 19 October 1983); Convenio entre la Republica de Panama y la Republica Federal de Alemania sobre Fomento y Proteccion reciproca de Inversiones de Capital [hereinafter “Panama-Germany BIT”] (signed on 2 November 1983). Since the Panama-UK BIT is the first but also the only available BIT among these three BITs, the further discussion might focus on the Panama-UK BIT.
19 Article 1(d)(ii), Panama-UK BIT.
SOEs has appeared since its earlier versions (1994 and 2004) and has been emphasized in some US-related IITs.21

The US model allows an SOE to be regarded as an investor under IITs. Article 2 (2) of the 2012 US model BITs further points out that a State party to the IIT should have a responsibility if “a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.” 22 Governmental authority in turn means “a legislative grant, and a government order, directive or other action transferring to the State enterprise or other person, or authorizing the exercise by the State enterprise or other person of, governmental authority.”23 However, SOEs are not considered to exercise this “governmental authority” if they act as a commercial participant in the marketplace.24 As a result, if, on the one hand, it might seem that an SOE may trigger the responsibility of its State if it acts as a governmental authority; on the other hand an SOE is qualified as an investor in its position of commercial participant in international investments.

Many other States also explicitly include SOEs in their IITs. Interestingly, those States are all “large” countries in various ways. Some of them have a big territory, such as Australia and Canada. 92% of Australian IITs and 81% of Canadian IITs define SOEs in their investor definitions, like the US Some of them have a large economy, for instance, Japan.25 Indeed, 72% of Japan-related IITs also explicitly mention SOEs in the definition of investor.26 Those “US model” IITs suggest including SOEs as protected investors but do not further indicate whether the investment by an SOE might always obtain protection under the IITs. Any other dispute is left to investor-State tribunals for further discussions. Apart from these agreements, comprehensive trade agreements with investment chapters also regulate SOEs, for instance, the Trans-Pacific Partnership (“TPP”) texts move a step further and establish an entire chapter on SOEs.27 The provisions usually require an SOE to engage in commercial activities, and avoid a government evading its obligations by delegating its authority to an SOE.28

Generally, those developed capitalized countries explicitly mention SOEs in their IITs and include SOEs as covered foreign investors. This US model to determine the identity of SOEs has been commonly and widely applied, in both BITs and investment provisions in trade agreements.

23 (n. 8), 2012 US model BITs.
24 United Parcel Service of America, Inc v Government of Canada (Second Submission of the United States, Pursuant to Article 1128 (13 May 2002), para. 9.
26 OECD survey, (n. 13).
28 State-Owned Enterprises (SOEs), Chapter Summary <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-State-Owned-Enterprises.pdf> accessed 22 December 2017. After the US’ withdraw, the renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) formed a new treaty between 11 members that incorporates much of TPP, but the provisions regarding SOEs are still under negotiation.
**b. US Model Plus: The EU Approach**

The EU has expressly renounced to adopt a one-size-fits-all model for investment agreements with third countries, and there is no EU model to determine the legal standing of SOEs. However, a common EU approach on the role of SOEs still emerges in the current investment agreement texts.

Firstly, the US model is adopted in the negotiating investment chapter of the (currently on hold) Transatlantic Trade and Investment Partnership (“TTIP”). Article 1.3 of the EU proposal of 31 July 2015 stated that “juridical person” means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association. The EU proposal makes a clear statement that the agreement will cover SOEs.

On 18 April 2018, the European Commission announced the text of the EU-Singapore Free Trade and Investment Agreement (“EUSFTA”). The EUSFTA was then reorganized into two independent agreements, the EUSFTA and the EU-Singapore Investment Protection Agreement (“EUSIPA”). Later in August 2018, the EU also followed the same approach of creating an individual investment protection agreement, separate from the main FTA, with Vietnam. The EUSIPA enhances the protection over SOEs. Article 1.2 (definition) of the EUSIPA first covers investors including “a natural person or a juridical person of one Party that has invested in the territory of the other Party.” It further defines juridical persons as “any legal entity duly constituted or otherwise organized under applicable law, whether or not for profit and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.” This provision also applies the US model to define the investment, but the supplements of the definitions further require that the investor shall carry out the economic activities in the investment. The “economic activity” refers to “activities of an economic nature except activities carried out in the exercise of governmental authority”, in particular, activities not carried out on a commercial basis or in competition with one or more economic operators.

This “EU model plus” approach thus applies the “Broches Test” relied upon by the arbitral tribunal in the BUCG to determine the legal standing of SOEs. This provision not only determines the jurisdictional issues of SOEs but also extends to the substantive activities of SOEs. SOEs are obliged to compete with other companies and run the investment in an economic and non-governmental manner. Accordingly, the EU gained practical experience from the investor-State arbitration practice, and the EUSIPA supplements the US model with the Broches Test on SOEs.

**V. The Investment Agreement between EU and China**

Although the EU approach adopts the Broches Test, it still does not fully answer the question of the amount of governmental authority necessary to qualify an investment made by the SOE as not having an economic character. The answer remains mostly left to interpretation.

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29 Towards a comprehensive European international investment policy COM(2010) 343 final.6. (5 March 2014). According to this decision, “a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable”.


31 Ibid. Emphasis added.


33 Article 1.2 (Definition) of the EUSIPA. Emphasis added.

34 Article 1.2.11, EUSIPA.
in accordance with different case facts. However, the EU approach looks at past practice of investment arbitration on the standing of SOEs and offer some guidance to dispute settlement bodies in that task, should an issue arise in practice.

The EU approach to the scope of covered investments in investment agreements will be of vital importance to the investment agreement between the EU and China. This work pointed out that, after the first two public cases on their standing, SOEs are increasingly aware of the challenges they might face in investor-State arbitration and the need to distinguish clearly their commercial character and public authority identities to obtain legal standing. They will thus keep an eye on those provisions to activate its commercial activities during its entire process of the investment.

China might also apply the EU approach to future investment agreements. Chinese SOEs attract increasing attention from other States. The 16th round of EU-China investment agreement negotiations, started in 2013, took place between 12 and 15 December 2017. While all the current BITs signed between China and EU Member States provide board definitions of “investor,” none of them expressly refers to SOEs or mentions the term “governmental control”. Nine BITs signed between China and EU Member States input the term “economic entities” to give the definition of investors. China will thus probably need to clarify the meaning of “economic entities” further. It remains doubtful whether the detailed provisions included in the “EU model” might be applied into the investment treaty between the EU and China. China has an open approach towards including SOEs under the definition of investors in IIT, as it emerges from its newly signed investment treaties. Moreover, throughout these two cases, China has also gained successful experience in the issue of the legal standing of SOEs. Consequently, it is likely that China will tend to include SOEs as the protected investors under the EU-China investment agreement.

VI. Conclusion

Generally speaking, SOEs might obtain protection under IITs when they act in a private commercial manner. When an investment dispute occurs on whether SOEs can be included in the definition of investors under IITs, in the absence of specific treaty provisions, arbitral tribunals will adjudicate on their jurisdiction in accordance with the facts, and under the guidance of legal doctrines, such as the “Brochers test”.

Nowadays, given the importance of SOEs in global economic relations, IITs increasingly include provisions that expressly expand their scope to SOEs to varying degrees. This trend appears well established and is likely to be applied to the investment agreement currently being negotiated between the EU and China, which, applying a more “experienced” approach, will probably take into account the case law of arbitral tribunal emerged in the meantime to determine the role of SOEs in the field of foreign investments.

35 The BITs were signed between China and Bulgaria, Croatia, Estonia, Germany, Lithuania, the Netherlands, Portugal, Romania, and Slovenia.
36 Investment Chapter, Australia-China Free Trade Agreement, (Date of Signature 17 June 2015), China-Canada BIT (signed 9 September 2012); China-Japan-Korea, Republic of Trilateral Investment Agreement, (signed 13 May 2012); Investment Chapter of China-Costa Rica Free Trade Agreement (signed 1 April 2010).
SESSION III

EU Investment Policy: Broader Horizons

Chair: Professor Federico Casolari
University of Bologna
Compensation of victims from the actions of transnational companies

Marine Fouquet*

I. Introduction

The arbitration award rendered in the Chevron case\(^2\) raises the question of the implementation of the liability of transnational companies. When conflicts with States arise, transnational companies often resort to international arbitration within the framework of an investment treaties rather than submit disputes to national judicial procedures.

The draft UN international treaty, currently under negotiation\(^3\) therefore aims to create a responsibility for transnational corporations by imposing a duty of care on them. The creation of a legally binding international instrument will make it possible to fill the current loopholes in international law and overcome the shortcomings of voluntary standards.

II. Investment arbitral justice hinders the compensation of victims of the actions of transnational companies

In 2009, Chevron filed an international arbitration application against the Republic of Ecuador\(^4\) under the Ecuadorian Bilateral Investment Treaty to hold Ecuador responsible for the violation of the TexPet Settlement Agreement\(^5\) and the execution of the releases. Chevron requested the arbitral panel to declare the State of Ecuador (through Petroecuador, the oil public firm part of the Ecuadorean consortium in which Texaco operated) as the exclusively liable entity for any judgment issued in the Ecuadorean litigation, Chevron vs. Aguinda. Specifically, the arbitral panel was asked to invalidate the $ 9.5 billion dollars judgement rendered against Chevron in Ecuador in 2011 that found the company guilty for its oil dumping in the Ecuador’s Amazon region where Texaco (later acquired by Chevron) operated between 1964 and 1992. Chevron’s argument is based on two grounds: first, the company lamented the violation of the US-Ecuador BIT inasmuch as the State of Ecuador did not grant a fair trial to the company in the Ecuadorean judgment. In addition, Chevron defended that it was released from any liability by the Republic of Ecuador by signing an agreement with the State in 1998 absolving the company of any future responsibility for its past operations in Ecuador. The tribunal, administered by the Permanent Court of Arbitration in The Hague, declared that the Republic of Ecuador violated international law and its treaty obligations by publishing, confirming and enforcing a fraudulent judgment against Chevron.

This arbitral award totally contradicts the judicial process conducted by the Ecuadorian courts at all levels, deeming it unfair and biased. In 2011, after proving Chevron's crime and demonstrating the damage to nature, life, and culture of indigenous peoples, Sucumbios' judge convicted Chevron and sentenced the company to pay $ 9.5 billion for repair the damage done in the Amazon\(^6\). This judgment was appealed and in January 2012 the

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\(^2\) Chevron Corp and Texaco petroleum Co v the Republic of Ecuador, [2018] 521 (PCA).
\(^4\) PCA (n 1).
Sucumbios Court of Appeal ratified the sentence\textsuperscript{7}. Chevron appealed to the National Court of Justice and, in November 2013, the judges of that court also ratified the verdict against Chevron\textsuperscript{8}. As a last resort, Chevron appealed to the Constitutional Court, arguing that its rights had been violated in the process. The 9 judges of the Constitutional Court analysed the case and found no fact setting aside the judgment. On 10 July 2018, they ratified the verdict against Chevron\textsuperscript{9}. The Constitutional Court of Ecuador has issued a long-awaited ruling in favour of those affected by the transnational oil company Chevron, which operated through its subsidiary Texaco in Ecuador between 1964 and 1990. The court rejected the protection action that the company filed in 2013. In the 151-page ruling, the court denied Chevron’s claim of violation of constitutional rights. But in parallel with the court case, Chevron had brought several actions against the plaintiffs and against the Ecuadorian state, including an international arbitration procedure.

The arbitral decision thus calls into question legal certainty. Moreover, from a strictly legal point of view, the decision was adopted on the basis of the US-Ecuador BIT of August 27, 1993, which entered into force on 11 May 1997, five years after the termination of Texaco’s operations in Ecuador. This award is consistent with the rulings of the courts of the United States, Argentina, Brazil, Canada and Gibraltar, and renders the judgment of Ecuadorian courts inapplicable in any country that respects the rule of law\textsuperscript{10}.

The situation in Chevron is not isolated. Investment treaties allow arbitral tribunals jurisdiction on the relations between States and transnational corporations, circumventing State courts.

The logic of investment agreements is to protect the investor by means of a number of standards, such as fair and equitable treatment and most favourable nation, even over public interest concerns,\textsuperscript{11} limiting the States’ right to regulate. The arbitral jurisdiction is moreover entrusted to arbitrators, “private judges” which subjects States to a control of the legality of [their] actions […] with regard to the requirements of international law of an importance comparable to that which saw, at 19th century, the transformation, in the only French legal order, of the role of the Conseil d’Etat as an advisory body as a veritable judge of the legality of the acts of the administration.”\textsuperscript{12}

Victims of the actions of transnational companies, for their part, do not have access to investor-State arbitration as the scope of international investment treaties only covers the relationship between States and investors. This leads to a paralysis of the system, because of the legal technique: that is to say, while investors have the possibility to seize arbitral justice via investment treaties or via their home States, individuals have limited means to


\textsuperscript{8} Chevron Corp and Texaco petroleum Co v the Republic of Ecuador, [2013] 34 (PCA).

\textsuperscript{9} PCA (n. 1).


\textsuperscript{12} [2004] 214 JDI.
oppose the harmful actions of transnational corporations. This State of affairs is largely at
the origin of the protest movement of the arbitration courts and investment treaties.

Civil society opposition to investor-State arbitration has brought the EU to lead a process
of systemic reform. Since the negotiations for the TTIP, the European Commission is now
negotiating a “court-like” system for the settlement of investor-State disputes which is now
included in all the newly negotiated EU trade and investment agreements, such as the one
with Canada, the CETA.13

III. The draft UN international treaty aims to create a responsibility of
transnational corporations

Beyond these different criticisms of arbitration tribunals, an intergovernmental working group
mandated by the UN14 and supported by many civil society organizations, is working on a
draft treaty that would allow transnational corporations to take responsibility for their
activities.

The draft UN treaty represents a reaction of the international order to find a solution to
compensate victims, or even protect them upstream through the principle of due diligence.
This principle imposes on companies the obligation to monitor the respect of human rights
throughout their supply chains. Although elaborated at the beginning of this century, the
principle of due diligence is today not binding on companies. The implementation of
voluntary standards, in particular the United Nations Guiding Principles on Business and
Human Rights, adopted in June 2011, is the only framework currently in place at the
international level. A binding international instrument to prevent human rights violations by
multinational companies and penalize them in the event of a breach would turn these
principles into hard law, construing an effective system for the protection of victims.

The human rights and environmental abuses caused by the activities of multinationals
are numerous: from the industrial disaster of Bhopal in India in 1984, the mining disaster of
Mariana in Brazil in 2015, and the permanent oil spill in Nigeria, the sinking of the Erika in
1999 or the explosion of the AZF plant in France in 2001. During the year 2017, 197 activists
were murdered in the world for defending their lands, forests and rivers, as well as than the
populations on those territories.15

Since June 2014, the United Nations Human Rights Council, through resolution 26/9 of
14 July 201416, has set up an intergovernmental working group, led by a coalition of States
led by Ecuador, and mandated to develop a legally binding international instrument ("UN
treaty") to regulate the activity of transnational companies and other businesses in respect
of human rights. The working session of October 2017 in Geneva, attended by 110
countries, made it possible to draw up the first tracks for a treaty taking up largely the
elements of the French law on the duty of vigilance of parent companies and contractors
from March 201717. On 20 July 2018, after three negotiating sessions, the Ecuadorian
presidency of this working group published a first draft binding treaty.

The draft introduces a duty of care applicable to large companies (over 5,000
employees), their groups of companies (subsidiaries and companies they control) and their
supply chain (subcontractors, suppliers). Parent companies and ordering companies thus

13 For a full and effective application of CETA, the ratification process under way still requires the ratification of Italy and
the opinion of the Court of Justice of the European Union.
14 UN's open-ended intergovernmental working group on business and human rights (IGWG).
15 See the Global Witness and Guardian survey, February 2018.
17 Law n. 2017-399 of 27 March 2017 relating to the duty of vigilance of the parent companies and the companies giving
order.
have the obligation to publish and effectively implement a vigilance plan to identify and prevent the risks of serious violations of human rights and the environment. Any failure to implement this plan is, therefore, a fault likely to engage the responsibility of the parent company before a national court.

The project for a binding treaty is however finding resistance on the part of States or multinationals representatives. For example, the United States or Canada does not participate in the negotiations. Russia also seems reluctant to this project, although it voted for it in 2014. The EU, for its part, is also not very collaborative in the negotiations. After boycotting the first session in 2015, the EU participated in the second session without taking part in the debates. During the third session of 2017, the EU questioned the validity of the mandate of the working group beyond the third session\(^{18}\), and wanted to put an end to the financing of the negotiating group. While the European Parliament adopted on 4 October 2018 a resolution in favour of this binding treaty\(^{19}\), at the fourth negotiating session, the EU diplomatic services and the EU Member States, pursuing the diversion strategy adopted since 2015, have not contributed to substantive discussions. The EU dissociated itself from the recommendations of the working group without opposing the adoption of the revised version of the conclusions. The presidency of the working group was then able to close the session thanks to pressure from civil society and the ability of treaty-friendly States to adopt a consensus work program, including the publication of a revised text in July 2019 and the holding of a fifth negotiating session in October 2019.

Many employers' organizations, for their part, consider that the draft treaty "counterproductive" and many believe that it "jeopardizes the consensus reached with the United Nations Guiding Principles on Business and Human Rights." Among the fears expressed by the International Organization of Employers, the risk of curbing investments in industrial, emerging and developing countries. As an alternative to this project, they seek to promote the non-binding UN Guiding Principles on Business and Human Rights.\(^{20}\)

Yet, the negotiations on the UN treaty — still ongoing at the United Nations — give hope that a legally binding system will make transnational corporations accountable for the actions and actions of their corporate groups and their Supply Chain. This new mechanism would make it possible to overcome the shortcomings of the current system of international remedies in terms of the responsibility of transnational corporations for gross human rights violations.

\(^{18}\) In view of the fact that only three sessions had been described in detail in the resolution, the United States and other States argued that the mandate of the working group should be considered terminated, a global interparliamentary network supporting the treaty in October 2017.

\(^{19}\) Many European parliamentarians, along with national parliamentarians, launched a global interparliamentary network in support of the treaty in October 2017, see <http://bindingtreaty.org/>.

\(^{20}\) Also called “Ruggie Principles” after the American jurist John Ruggie, then UN Special Representative on Human Rights.
SESSION IV

Reflections on the EU Trade Policy

Chair: Professor Isabelle Bosse-Platière
University Rennes I
What Future for “Mixity” after Opinion 2/15?

Yuliya Kaspiarovich*

I. Introduction

The European Union (EU) and its Member States negotiate and conclude international agreements not only on their own – the EU with third States and Member States with third States – but also jointly. Despite being a widespread practice, the definition of “mixed agreement” is absent from the treaties (TEU and TFEU). According to the doctrine, the said definition comprises the accords concluded by the EU and its Member States, on the one part, and by one or more third State(s), on the other part.

The nature of the legal participation of States, as Members States of the EU, in international agreements of the EU is a very complex and fascinating issue. This work will address the future of mixed agreements after the Court of Justice of the EU’s (“CJEU”) Opinion 2/15 in the light of the new generation of free trade agreements after Lisbon and the development of competences under Common Commercial Policy (“CCP”). It will be argued that in today’s difficult political context of almost legal (dis)integration of the EU, mixity has a prominent future: the “ever closer Union” does not seem to be a reality anymore. The ever more exclusive competences conferred to the EU, together with the doctrine of implied external powers, do not prevent the participation of the Member States in the conclusion of a new generation of free trade agreements. It might also happen that the Commission proposes to negotiate an international agreement on the only basis of EU exclusive competences and that the Council decides, probably for political reasons, to associate Member States to the procedure.

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3 Things are different for the EURATOM treaty, where the issue of competences is explicitly mentioned for the procedure of conclusion of international agreements. In article 102 European Atomic Energy Community (EAEC) it is provided that when the competences mobilized in an international agreement are both of the EC and Member States, they should enter the agreement together, see Consolidated Version of the Treaty establishing the European Atomic Energy Community [2012] OJ C327/1.


II. **Opinion 2/15 and AG Sharpston’s conclusions**

The Court of Justice of the EU delivered *Opinion 2/15*, on the division of competence in the EU-Singapore free trade agreement,\(^7\) on 16 May 2017.\(^8\) The European Commission submitted a request for an opinion under Article 218(11) TFEU asking whether the negotiated EU-Singapore free trade agreement was compatible with the treaties.\(^9\) The opinion is mandatory and the negotiated agreement – if the rendered opinion is adverse – may not enter into force unless either the agreement is amended, or the EU treaties are revised. In the face of the consequences of an adverse opinion, it is notable that the request for the opinion came from the European Commission, which was not obliged to do so under EU law.

In *Opinion 2/15*, the Court detailed the history and the context of the negotiations between the EU and Singapore in order to conclude the agreement: on 8 December 2006, the Commission addressed a recommendation to the Council to obtain an authorization to negotiate and conclude a free trade agreement with the countries of the Association of Southeast Asian Nations (“ASEAN”).\(^10\) The Council issued such an authorization and provided that if it were not possible to negotiate with ASEAN, the Commission could negotiate on bilateral bases with given countries.\(^11\) The authorization to negotiate with Singapore was issued on 22 December 2009.\(^12\) The negotiations started in March 2010, after the entry into force of the Lisbon treaty.\(^13\) In February 2011, the Commission addressed a recommendation to the Council with the aim to include investment protection in the scope of the agreement with Singapore.\(^14\) The Council authorized such an extension. The negotiations were then concluded for all chapters in December 2012, except for the one on investment protection, which was only finalized in October 2014.\(^15\) Approaching the conclusion of the agreement, many divergences in opinions appeared regarding the nature of the involved competences. The opposition from the civil society – through the with “STOP TTIP” initiative and the Wallonian opposition to the conclusion of the Comprehensive Economic Trade Agreement (“CETA”) with Canada – gave rise not only to a political but also to a legal debate regarding the distribution of competences under the new CCP after Lisbon. In this context, the Commission made a request for opinion to the CJEU, worded as follows:

> Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically, which provisions of the agreement fall within the Union’s exclusive competence? which provisions of the agreement fall within the Union’s shared competence? and


\(^8\) Opinion 2/15.

\(^9\) Article 218 (11) Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, is worded as follows: “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the treaties are revised”.

\(^10\) Opinion 2/15, para. 3.


\(^13\) Cremona (n 7).


\(^15\) Opinion 2/15, paras. 4-8.
is there any provision of the agreement that falls within the exclusive competence of the Member States?¹⁶

The request does not question the compatibility of the EU-Singapore free trade agreement with the EU Treaties, as it is usually the case for requests for opinions under article 218 TFEU, but only pertains to the distribution of competences between the EU and the Member States. This illustrates the desire of the Commission to bring clarity on the distribution of competences between the EU and its Member States as well as to give a response to differences with the Council. The Commission request was also supposed to make a point on the procedure for negotiation and conclusion of new generation free trade agreements. On the one hand, in the Commission’s view, the EU has exclusive competence to sign and conclude the envisaged agreement under the CCP.¹⁷ On the other hand, the Council and all the Members States, through their submitted observations:

Contend[ed] that certain provisions of the envisaged agreement do not fall within the exclusive competence of the European Union, the agreement having the characteristics of a “mixed agreement.”¹⁸

The Court started its reasoning in Opinion 2/15 on the assumption that the request for opinion is crucial in order to know if the:

envisaged agreement can be signed and concluded by the European Union alone or whether, on the contrary, it will have to be signed and concluded both by the European Union and by each of its Member States (as a “mixed” agreement).¹⁹

The CJEU then examined whether the provisions of the Singapore agreement fall within the exclusive EU competence, the shared competence of the EU and the Member States, or the competence of the Member States.²⁰ The analysis of the Court is based on Article 3(1) of the TFEU²¹ on EU exclusive competences, and Article 207 (1) TFEU, which states:

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 liberalization, 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.²²

After quoting Article 207 (1) TFEU and its already established case law in the field of CCP competences,²³ the Court stated that for a competence to fall within the CCP, it must have a “specific link” with international trade, in that it is intended to “promote, facilitate or govern”

¹⁶ Ibid., para. 1.
¹⁷ Ibid., para. 12.
¹⁸ Ibid., para. 19.
¹⁹ Ibid., para. 29.
²⁰ Ibid., from para. 28.
²¹ Article 3(1) TFEU provides: The Union shall have exclusive competence in the following areas: (…) e) common commercial policy.
²² As referred in the Opinion 2/15, para. 34 to article 207 (1) TFEU.
²³ As referred in the Opinion 2/15, para. 34 to article 207 (1) TFEU.
trade and have “direct and immediate effects” on trade.\textsuperscript{24} The Court, as well as the Advocate General (AG) Sharpston in her opinion,\textsuperscript{25} proceeded to the “international trade” link test in order to determine whether the commitments under the EU-Singapore agreement are all falling within the CCP or they are also touching upon other matters. If the AG’s conclusions found out that there exist competences that are not part of the CCP (see the table below), the Court was much more inclusive in terms of the fields that, in its opinion, are within the scope of the CCP because of a “specific link” with international trade. The outcome of the AG’s opinion (conclusions in French) and of the Court’s opinion (avis in French) are summarised below:

<table>
<thead>
<tr>
<th>Field</th>
<th>AG Sharpston</th>
<th>CJEU</th>
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<tbody>
<tr>
<td></td>
<td>CCP/other competence</td>
<td>Nature of competence</td>
</tr>
<tr>
<td>Objectives and general definitions</td>
<td>CCP</td>
<td>Exclusive EU</td>
</tr>
<tr>
<td>Trade in goods</td>
<td>CCP</td>
<td>Exclusive EU</td>
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<tr>
<td>Trade and Investment in renewable energy</td>
<td>CCP</td>
<td>Exclusive EU</td>
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<tr>
<td>Public procurement</td>
<td>CCP</td>
<td>Exclusive EU</td>
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<tr>
<td>Trade in services</td>
<td>CCP, Except transport services</td>
<td>Exclusive EU</td>
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<tr>
<td>Trade in rail and road transport services</td>
<td>Transport</td>
<td>Exclusive EU</td>
</tr>
<tr>
<td>Trade in air transport services, maritime transport services, and transport by inland waterway, including services linked to it</td>
<td>Transport</td>
<td>Shared EU/MS</td>
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<tr>
<td>FDI</td>
<td>CCP</td>
<td>Exclusive EU</td>
</tr>
<tr>
<td>Commercial aspects of intellectual property rights</td>
<td>CCP, Except non-commercial aspects</td>
<td>Exclusive EU</td>
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\textsuperscript{24}Ibid., paras. 50-52, Opinion 2/15, paras. 36-38; for more detailed analyses see: Cremona (n. 7).

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<thead>
<tr>
<th>Competition and related matters</th>
<th>CCP</th>
<th>Exclusive EU</th>
<th>CCP</th>
<th>Exclusive EU</th>
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</thead>
<tbody>
<tr>
<td>Trade and Sustainable development</td>
<td>CCP, except provisions relating to the conservation of marine biological resources and the provisions laying down fundamental labour and environmental standards</td>
<td>Exclusive EU</td>
<td>CCP</td>
<td>Exclusive EU</td>
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<tr>
<td>ISDS system</td>
<td>Shared EU/MS</td>
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<td>Shared EU/MS</td>
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<td>Investment other than FDI and all the chapters linked to it</td>
<td>Shared EU/MS</td>
<td></td>
<td>Shared EU/MS</td>
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<tr>
<td>Public procurement linked to transport services</td>
<td>Shared EU/MS</td>
<td></td>
<td></td>
<td>Exclusive EU</td>
</tr>
<tr>
<td>Non-commercial aspects of intellectual property</td>
<td>Shared EU/MS</td>
<td>CCP</td>
<td></td>
<td>Exclusive EU</td>
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<tr>
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<td>Social/environmental protection policy</td>
<td>Shared EU/MS</td>
<td>CCP</td>
<td>Exclusive EU</td>
</tr>
<tr>
<td>Termination of bilateral agreements between certain MS and Singapore</td>
<td>Exclusive MS</td>
<td></td>
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<td>Exclusive EU (functional succession)</td>
</tr>
</tbody>
</table>

The Court of Justice and the AG came to the same conclusion that the agreement between the EU and Singapore does not entirely fall within the exclusive EU competences. They also reached the same outcome regarding the competence in the field of non-direct foreign investments (mostly portfolio investments). However, there is an important difference between the opinion of the AG and the opinion of the Court:

The Advocate General found greater areas of shared competence in the agreement, and even one clause (on the termination of Member State bilateral investment treaties) that in her view was not within EU competence at all, but was an exclusive Member State competence. The Court of Justice held that all aspects of the agreement fell within exclusive EU competence – on the basis either of Article 3 (1) e) TFEU (the CCP) or of Article 3 (2)

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26 Opinion 2/15, para. 305; Opinion of AG Sharpston, para. 570.
TFEU – except for (i) the provisions on investment protection insofar as they relate to non-direct investment; (ii) institutional and dispute-settlement provisions insofar as they relate to non-direct foreign investment; and (iii) the provisions on ISDS.28

This outcome suggests that in the future, it should be possible to separate all the areas covered by the CCP or otherwise under the scope of exclusive EU competences in order to conclude (a) EU-only agreements; and (b) mixed agreements on investment protection in a broad sense. This implicit advice of the Court, which can be found in Opinion 2/15, was followed in practice: The Commission proposed the conclusion, in April 2018, of two EU-Singapore agreements: one on trade, the other on investment.29 The former being a “Free Trade Agreement between the European Union and the Republic of Singapore,”30 and the latter, an “Investment Protection Agreement between the European Union and its Member States, on the one part, and the Republic of Singapore, on the other part.”31

In Opinion 2/15 the Court is only addressing the question on the distribution of competences (as asked by the Commission) but not the question on the compatibility of the envisaged agreement with the treaties. As the Court expressly noted, the compatibility of the provisions on the investor-State dispute settlement clauses with EU law, remains to be decided. The pending Opinion 1/17 requested in regard to such clauses in CETA will clarify this question.32

III. Debate on the Future of “Mixity”

After analysing all the chapters of the EU-Singapore agreement, the Court concluded that the provisions dealing with non-direct investment fall within the shared competence of the EU and its Member States:

“It follows that Section A of Chapter 9 of the envisaged agreement cannot be approved by the European Union alone.”33

This paragraph produced a huge number of comments from legal scholarship regarding the end of s.c. “facultative mixity.”34 The distinction between two forms of mixity — “obligatory and facultative” — was first discussed by Judge Allan Rosas.35 According to Rosas, “obligatory mixity” arises where a mixed agreement is required because the EU has exclusive competence over one area of the agreement, but no competence at all over another. In this case, the EU naturally needs the Member States to fill in the remaining areas of competence. “Facultative mixity”, on the other hand, arises when the agreement falls

28 Cremona (n. 7).
32 Opinion 1/17, pending, request filed 7 September 2017, asking especially whether the ISDS provisions under CETA are compatible with the treaties, including fundament rights. For the official request, see the web site of Ministry of Foreign Affairs of Belgium: <https://diplomatie.belgium.be/fr/newsroom/nouvelles/2017/le_ministre_reynders_introduit_demande_avis_ceta> accessed 24 January 2019.
33 Opinion 2/15, para. 244.
within a shared competence between the EU and its Member States. There is then a choice, usually political, as to which one will exercise this competence. Therefore, agreements falling within the shared competences of the EU and its Member States can be concluded either as mixed agreements (Association Agreements, for example), or by the EU alone (agreement with Kosovo, for political reasons).

Yet, the case law of the CJEU following Opinion 2/15 demonstrated that “facultative mixity” is still alive, although entrusted to the political choice of the EU’s institutions and its Member States. This was also the position of AG Sharpston in her opinion:

Accepting that proposition does not imply that the European Union enjoys an unfettered right to assert external competence over any area of shared competence listed in Article 4 irrespective of whether it has chosen to exercise that right internally. At the hearing, the Council emphasized that whether the European Union or the Member States exercise external competence to conclude a particular international agreement in an area of shared competence is ‘a political choice’. As I see it, the legal safeguards underpinning that political choice lie in the detailed procedures set out in Article 218 TFEU. Article 218 (2) provides that ‘the Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them’. Subsequent paragraphs indicate that the opening of negotiations (Article 218 (3) TFEU), the signing of the agreement (Article 218 (5) TFEU) and its conclusion (Article 218 (6) TFEU) each require separate Council decisions – that is, decisions of the Member States acting in their capacity as members of the Council which authorize the appropriate EU institution to act. Throughout the procedure, the Council acts by qualified majority save for certain areas where unanimity is required (Article 218(8) TFEU); and conclusion of the agreement in so far as it represents an exercise of EU external competence normally also requires the consent of, or at least consultation with, the European Parliament (Article 218 (6) (a) and (b) TFEU, respectively).

It follows that an international agreement covering areas that fall within shared external competence that is eventually signed and concluded by the European Union alone is conceptually totally different from an international agreement that covers only areas falling within the European Union’s exclusive external competence. In the former case, the 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. In the latter case, they have no such choice, because exclusive external competence already belongs to the European Union.

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36 Ankersmit (n. 34).
40 Opinion of AG Sharpston, para. 7.
In sum, the EU-Singapore agreement could not be concluded by the EU alone without the explicit consent of the Member States within the Council. That conclusion had already clearly emerged from the discussion in the COREPER ("Comité des Représentants Permanents"),\(^{41}\) the EU could not conclude the EU-Singapore agreement alone. Furthermore, almost all Member States submitted comments to the Court in this procedure and they all argued in favour of mixed agreement to be concluded with Singapore.\(^{42}\)

This post Opinion 2/15 debate on the future of mixity was almost only concentrated on the issue of “facultative mixity,” whether its nature has changed and whether after 16 May 2017 it would become mandatory to conclude mixed agreements when shared competences are mobilised. As the CJEU almost accidentally stated in its Opinion 2/15, when shared competences are used to conclude an international agreement, the EU cannot conclude it alone.\(^{43}\) This conclusion was extensively commented by EU legal scholars that put the Court in a delicate position. The situation was clarified with the following case of the CJEU:

Admittedly the Court found, in paragraph 244 of (Opinion 2/15), 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.\(^{44}\)

Thus, the issue raised by the Opinion 2/15 was settled by the Court in favour of the usual interpretation of “facultative mixity”. In other words, when an international agreement is falling partly or wholly in the field of shared competences, the mixity is not a requirement. The choice is largely made within the Council, also the reason why the procedural question is extremely important in the process of negotiation.\(^{45}\) The procedure for concluding an international agreement cannot fully be found in the article 218 TFEU as it also follows internal EU legal basis for legislative activity. It is also worth to remember the theory of so-called “implied” powers,\(^{46}\) when shared internal competences become exclusive external competences through the adoption of secondary EU law.\(^{47}\)

David Kleimann and Gesa Kübek argue that Opinion 2/15 has the potential to facilitate, in the future, the conclusion of EU-only international agreements; while it also

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\(^{41}\) Ibid., paras. 74-75.

\(^{42}\) Opinion 2/15, see the summary of the main observations submitted to the Court, especially para. 19 and following.

\(^{43}\) Opinion 2/15, para. 244.

\(^{44}\) Germany v Council (n 39).


\(^{46}\) Case 22/70 Commission v Council [1971] EU:C:1971:32 9 (ERTA), <https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?isOldUri=true&uri=CELEX:61970CJ0022>. Another good example of this theory of “implied” powers can be found in the Opinion 2/15 as the CJEU recognizes transport services as exclusive EU competence despite the fact that they are not mentioned in the Article 207 TFEU on Common Commercial Policy or other treaty’s provisions.

\(^{47}\) Codification of ERTA judgement: Article 3(2) TFEU, Article 216 (1) TFEU.
entails a number of contradicting elements that may add confusion over the legal parameters of post-Lisbon EU external relations conduct." 48

The critics raised against the procedure for negotiation and conclusion of the EU international agreements will be further discussed below.

IV. How should the EU and its Member States negotiate new generation agreements?

As already discussed, the Court in Opinion 2/15 seemed to have invited the Commission to change its approach on the negotiation of a new generation of free trade agreements in concluding two different types of agreements: one exclusively on trade (EU-only agreement) and the second on investment protection (mixed agreement). 49 The Court did not make such a suggestion explicitly. Nevertheless, the fact that only the competences linked to investments are considered shared, and thus need mixity, already implicitly suggests the conclusion of two agreements. Following Opinion 2/15, the design of new generation free trade agreements was thus changed to accommodate this consideration. Particularly, the Commission has “split” the EU-Singapore FTA into two agreements: (a) a comprehensive EU-only trade agreement; and (b) a mixed investment agreement concluded by both the EU and its Member States.

Can this approach be considered a model for future EU comprehensive free trade agreements? The procedure in Article 218 TFEU, for the negotiation and conclusion of international agreements by the EU, is usually considered not sufficiently transparent. 50 Civil society is also blaming the EU for not listening enough to their demands during the negotiation procedure. 51 On this basis, a regional parliament (Wallonian) of Belgium refused to give its consent to the federal government for the signature of the CETA agreement, thus paralysing the signature process in the Council. 52 Most of the scholarship considered this to be a ‘crisis’ for the EU and a real threat for the unity of its external representation. 53 Elsewhere a completely different opinion was defended, 54 in the sense that the Wallonian episode should be understood an expression of the more global problem of the perception of the EU’s legitimacy to conclude international agreements with third States and a lack of public consultation/participation to negotiations. According to that reading of the CETA facts, Wallonia’s opposition could be considered as a chance for the European project and not as a problem or weakness for the unity of EU external representation.

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49 Ibid.; Cremona (n. 7).
52 Guillaume Van der Loo, Jacques Pelkmans “Does Wallonia’s veto of CETA spell the beginning of the end of EU trade policy?” [2016] CEPS Commentary.
To what extent will the EU institutions be allowed to act without the involvement of national parliaments when concluding free trade agreements with Singapore, Canada, the US or, potentially, China?\textsuperscript{55}

That would probably be very difficult. As the CCP encompasses a much broader scope than purely ‘trade’ matters, the new generation of free trade agreements will embrace ever more competences which before belonged to national/regional parliaments. For the same reason that regional entities of the Member States are not accepting anymore the exercise of their former competences by their national executive power (Council) on the supranational EU level.\textsuperscript{56}

As Robert Post argued in his contribution to the collective book on “The Past and the Future of EU Law”:

I suggest that in ERTA the ECJ was driven by the goal of perfecting the European polity by theorising the circumstances in which the unity of external politics was necessary in order to safeguard the conduct of internal politics.\textsuperscript{57}

It could be argued that, while the CCP after Lisbon and the ever more developed doctrine of implied EU powers to conclude international agreements with the rest of the world should be a logical path for less mixity in the EU external relations, the reality is completely different. The new generation of EU comprehensive free trade agreements is designed and concluded, at least partly, as mixed agreements. This not only because of their large scope, but also because of internal political reasons and legitimacy issues inside the UE. If at the beginning of the European integration process, the implied external power’s doctrine (ERTA judgement)\textsuperscript{58} allowed the EU, by expanding its competences externally, to consolidate its politics internally; today’s state of the EU – (dis)integration from inside – leads to an erosion of the external dimension of the European action. In other words, the attribution of ever more competences to the EU does not enhance the unity of its external representation.

In this scenario, mixed agreements have a more promising future in the EU than ever. Another plausible option would probably be to conclude separate agreements for different kind of competences: EU-only agreements for the EU-only competences, and Member States agreements for mixed competences.

\textsuperscript{55} Thym (n. 53).
\textsuperscript{56} Example of Wallonia region opposition to the CETA agreement as discussed above.
\textsuperscript{58} ERTA (n. 46).
I. Introduction

The so-called mega-regional trade agreements, also referred to as “mega-regionals”, between the European Union and third States have been subject to negative public sentiment in recent years due to either alleged lowering of consumer protection and food safety standards, or to the envisaged dispute settlement mechanisms for investments. Yet, such international agreements are primarily aimed at filling the lacunae left by the failure to reform the World Trade Organization (“WTO”) and at consolidating multiple regulatory layers. Of course, legitimate concerns of globalisation should be addressed – constructively and with substance.

Current criticism of the new EU free trade agreements (“FTAs”) drives political stakeholders away from comprehensive approaches towards increasing restriction and fragmentation of regulatory issues contained in such agreements. On many points, one could even get the impression that the discourse has caved in to populist sentiments, often

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2 E.g., the Transatlantic Trade and Investment Partnership (“TTIP”), the Comprehensive Economic and Trade Agreement (“CETA”), and other agreements, such as the ones with Japan, Mexico, or Singapore.


leading to almost contradictory narratives in the action of the different EU Institutions\textsuperscript{5} as well as its Member States. This contribution suggests five points of discussion for moving forward:

1. From the perspective of a progressive development of international law and the volatility of international relations, the creation of regional arrangements seems indispensable for ensuring stable economic growth, in particular against the backdrop of an increasing standstill in the advancement of global trade law within the framework of the WTO.\textsuperscript{6} In turn, this might create impetus for change at the universal level.

2. The EU must consolidate the interests of its Member States through the conclusion of mega-regionals which, in turn, will lead to a strengthening of the Union in its core competences and provide for deeper integration, as opposed to nationalism and protectionism over trade and investment. Considering them “mixed agreements” with a \textit{de facto} veto of even the smallest of regional entities within states renders treaty negotiation useless, at least in the current political environment.

3. By turning away from a universal regulatory framework and towards fragmented regimes,
   a. additional regulatory hurdles are being put in place, in particular for small and medium sized companies (as opposed to the alleged achievement of regional job protection and safety standards) – particularly in the area of process digitalisation, this runs counter to a free and integrated European market;
   b. unfair competition is facilitated through unilateral trade policies and subsidies (as opposed to fairer trade);
   c. a universal regulatory basis for innovations of the digital age such as “smart contracts”, is made more difficult, if not impossible.

4. Securing international investment protection, be it through arbitral tribunals or a credible investment court system, is necessary, should the structural argument against protection of foreign investors under international law not prevail.

5. The possibility of referring investors to independent arbitral institutions or courts opens up regular diplomatic channels of the EU and creates the freedom for cooperation in other areas. From the perspective of States and an international rules-based system, this is the primary added value of the creation of investment protection mechanisms.

\textbf{II. Potential of Regional Arrangements}

It has been widely attested that the WTO is at a standstill.\textsuperscript{7} Digitalisation and technological developments are not, however. Neither is the transition of capital importing to capital

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\textsuperscript{5} To borrow from the conceptual discussion of public international law, one might speak of a “fragmentation” taking place between individual bodies, as Marcus Klamert suggested with regard to different areas of EU law at the Austrian Meeting of EU Law Scholars (Österreichischer Europarechtstag) in Seefeld, Tyrol, in September 2018.


\textsuperscript{7} See, inter alia, Stefan Griller, Walter Obwexer, and Erich Vranes, “Mega-Regional Trade Agreements. New Orientations for EU External Relations?” in \textit{id} (eds), \textit{Mega-Regional Trade Agreements. CETA, TTIP, and TiSA. New Orientations for EU External Economic Relations} (OUP 2017), pp. 1-2. This feeling is shared by practitioners within the organisation itself:
exporting countries. Many modern products are no longer produced in a single country but depend on components from multiple markets. The new approaches to free trade of the US and other major economies, such as China, also require that the EU develops new strategies, if it wants to keep its head above the water.8

By negotiating and concluding agreements between the Union and other economic powers or regions, the EU can both strengthen bilateral relationships and position itself as a relevant economic player by profiting from “first-mover advantage.”9 Putting mega-regionals at the top of the agenda, the EU can shape their terms, give them a positive spin, and endow them with “the power to create, in and of themselves, more observance.”10 After all, in international law more than anywhere else: “Words are politics.”11 The EU could, ultimately, establish new best practices that would eventually lead to the progressive development of universal mechanisms.12 Once trade standards in EU FTAs with major economic powers, such as the United States or Canada, are implemented, it will be easier to nudge other States towards such best practices.13 This will provide opportunity to break open status quo biases in international trade law and redefine concepts and approaches: “When vocabularies change, things that previously could not be said, are now spoken by everyone; what yesterday seemed obvious, no longer finds a plausible articulation. With a change of vocabularies, new speakers become authoritative.”14

Guided by “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”,15 EU contributions to international economic law should easily seem a desirable addition to the currently applicable rules at the universal level. Under the assumption to act liberally, the Union could become a guiding force within the process of globalisation, adding layers of human rights and rule of law to international economic relations.

III. Deeper Integration

The EU position as a global player might also have the desirable effect that its Member States more strongly identify with an overall “corporate identity” based on a coherent foreign trade and investment policy. As economic growth belongs to the core survival interests of any State,16 sufficient incentives to promote views based on community values might have

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13 See supra n 8. With regard to the inclusion of investment protection mechanisms see Schill (n. 3), p. 117.

14 See Koskenniemi (n. 11).

15 Article 21 TEU.

the effect of supplanting the current draw of nationalism and intra-EU protectionism,\footnote{17} with the governments of Member States falling in line with the goals of the Union.

At the same time, concepts as “mixity” of international agreements endanger the credibility of the Union as a whole and the distribution of competences should be revisited at the political level.\footnote{18} While some might hail the recent conclusions of the ECJ on the topic in \ref{19} as a victory for democratic legitimacy,\footnote{20} the de facto veto of even the smallest of regional entities within States renders treaty negotiation useless, at least in the current political environment.\footnote{21}

Current concerns of Member States over their sovereign representation are already slowly being tested at various levels. Still, much coordination among – and convincing of – Member States must still take place at the level of “corridor” or “hallway diplomacy.” The representation of interests through the EU as an international organisation – through the High Representative of the Union for Foreign Affairs and Security and the European External Action Service (EEAS), for example – should become the norm, as opposed to remaining the exception reserved for minor issues where States are easily willing to cede.

Following the refugee crisis of 2015, lines of friction between Member States came to light, most visibly in the form of the “Visegrád Group.”\footnote{22} At the same time, these States also tend not to lead the way in corporate culture.\footnote{23} Rebranding Union action by creating successes in the economic sector, in particular international trade and investment, provides a promising opportunity for the creation of impetus towards unification. If States are

\begin{thebibliography}{99}
\bibitem{79} See, generally, on the impact of state interest on the development of international law, Markus Beham, \textit{State Interest and the Sources of International Law: Doctrine, Morality and Non-Treaty Law} (Routledge 2018).
\bibitem{18} For arguments with regard to provisions on procedural investment protection \textit{de lege lata} see Hoffmeister (n 3), pp. 56-60.
\bibitem{19} \textit{Opinion 2/15, Free Trade Agreement with Singapore} [2017].
\bibitem{22} Czech Republic, Hungary, Poland, and Slovakia.
\end{thebibliography}

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to see the benefits of collective decision-making in their balance sheets, it might seem more likely that they will favour multilateralism over unilateralism.

IV. Universal Regulatory Frameworks

Fragmented regulatory regimes, in particular through different – and sometimes even competing – measures of the EU Member States, risk leading to a disintegration of the European idea altogether. While populist domestic politics are increasingly successful in making nationalist and protectionist ideas attractive, they are ultimately harmful for the general electorate, isolating them from the potential of supra-regional economic growth and alleviated transnational commercial activities. The EU must succeed in transporting this message to all levels of society. To date, the discussion within civil society has been controlled by the criticism of perceived centralist subjugation.

Regulatory measures at the domestic level create hurdles for small and medium-sized companies, in particular, whereas digitalisation could help create easily accessible and cross-regionally applicable standards. These enterprises will be hit much harder than multinational corporations that are used to navigate diverse markets. For individual citizens, the incompatibilities between social security and health insurance systems from one Member State to another as a barrier to freedom of services are already a case in point today.

Equally, unilateral trade policies and subsidies create unfair competition that will, ultimately, lead to migration of company seats and capital. Mega-regional solutions would instead provide an ample mechanism to tackle the problem at its core, anticipating where supranational solutions are required. It is essential that lacunae are closed as and where they arise and are substituted with effective measures.

It is further doubtful, whether challenges of the digital age such as “smart contracts” can be sufficiently handled at the domestic level, considering the know-how required for their implementation and their appeal for cross-border application such as data transaction in areas ranging from banking to the health sector. The trend towards legal tech is increasing and numerous governments and law firms are working on solutions ranging from block chain land registers to online arbitration. The current patchwork of legal categorisations of cryptocurrencies is a case in point, be it from a commercial contractual or tax perspective. The global reach of these new technologies clearly demonstrates the need for a EU-wide regulatory effort inclusive of the entire Union.

V. Need for Investor-State Dispute Settlement

The discussions surrounding CETA and other mega-regional solutions so far revolved around the idea of creating a centralised investment court system. While NGOs and the yellow press attempted to discredit the agreement and investor-State dispute settlement altogether (or arbitration in general, for that matter), practical experience and empirical evidence suggest that much of this criticism is unfounded. As to the alleged lack of transparency of investment arbitration, efforts to alleviate this deficiency – originally perceived of as one of the greatest

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24 Regarding the validity under German law, e.g., see generally Martin Heckelmann, “Zulässigkeit und Handhabung von Smart Contracts” (2018) 71/8 Neue Juristische Wochenschrift, p. 504.
benefit of arbitration in the guise of confidentiality – have been legion. While it will be hard to find many domestic courts that publish their awards online or live-stream hearings as in the recent Vattenfall case, the allegation of investment tribunals as “shadow courts” prevails. The additional transparency safeguards in TTIP and CETA are regularly ignored.

This debate has recently been surpassed by additional, more technical issues brought about by Union law. The Achmea decision of the Court of Justice emphasises the current friction between an established framework of BITs among Member States of the EU and what the Union envisions for an EU investment acquis. However, the arguments quickly reveal a political lining, when the Court of Justice unconvincingly attempts to differentiate commercial from investment arbitration through its legal basis. As Judge Brower pointed out at the 2018 American Society of International Law Annual Meeting, anyone dealing with these issues in practice knows that the distinguishing factor is not the nature of the underlying basis for an arbitration but whether one of the parties to a dispute is a sovereign entity.

While the reasoning of the Court of Justice seems to aim at securing the autonomy and integrity of the EU legal system, it creates legal uncertainty and, striking down intra-EU investment proceedings, ultimately leaves EU investors in other Member States in a legally less fortunate position than investors from outside the Union. Only by establishing an investment protection mechanism that integrates the concerns of both the EU itself and its Member States as well as investors, can there be a level playing field for each and every foreign investor in a globalised economy. Until then, the uncertainty stemming from the case law of the Court of Justice and the policy of the European Commission will cause unrest for investors threatened by oftentimes quite outrageous regulatory measures by EU Member States.
In light of the current position of the European Commission and the Court of Justice, the only possibility seems the transposition of investor-State dispute settlement to the level of an institutionalised investment court system – an endeavour that the EU tries to promote at the universal level, most prominently in UNCITRAL Working Group III\(^{38}\) and provisions of its most recent FTAs.

The main concerns of the Union with the current system have been identified in

“the lack of consistency and predictability flowing from the ad-hoc nature of the system; significant concerns arising from the perception generated by the system; limited systemic checks on correctness and consistency in the absence of an effective appeal mechanism; the nature of the appointment process impacting the outputs of the adjudicative process; significant costs; and, a lack of transparency”.\(^{39}\)

However, in addressing any of these concerns through a novel framework it will also be necessary to then take additional measures, for instance, by ensuring an umbrella provision that equally grants redress to investors that undertook investments under the expectation of previous bilateral investment treaties\(^{40}\) as well as the strictest quality standards in creating the list of “judges" set to serve on a permanent “investment court.”\(^{41}\) Irrespective of the number of safeguards attached, rather than integrating the “arbitration community,” the appointment of “judges” by States, as envisioned in the EU FTAs, will negatively impact on the “trust” deriving from the traditional party-appointment, perceived primordial benefit of the system.

Nothing speaks against addressing any of the Commission’s concerns, though it is questionable whether an institutionalised court system with State-appointed judges will be more than window-dressing over States getting back their ground. What is needed is a pragmatic discussion on what works and what needs to be improved. The Union itself has little institutional experience with arbitral practice. Of course, this is not to say that the individuals dealing with the questions within the Commission and other bodies of the EU are not highly knowledgeable; but they could pursue a more integrative discussion involving all stakeholders, including the “arbitration community.”

Simple reference to the rule of law and “the principle of mutual trust between the Member States”\(^{42}\) is superficial, as any cursory assessment of domestic legal systems of the Member States illustrates. The Commission itself seems unconvinced whenever it is not talking about investment protection.\(^{43}\) Public international law inherently carries the presumption of


\(^{41}\) Comparisons with the European Court of Human Rights seem unconvincing in light of the comparatively low compensation as opposed to what is at stake in proceedings regarding foreign investment.

\(^{42}\) Case C-284/16, Slovak Republic v Achmea BV [2018], para. 58.

partiality of judicial organs towards their home State, irrespective of the character of a State.\textsuperscript{44} Against this background, the argument that international protection is only justified in relation with developing States is as self-righteous as it is neo-colonial\textsuperscript{45} and has rightly been called out as European legal hegemony.\textsuperscript{46} It also ignores the deficiencies in the rule of law present in many EU Member States.\textsuperscript{47}

\section*{VI. Purpose of international dispute settlement}

International law as a rules-based system finds its ultimate recognition in the subjection of States to binding adjudicatory bodies such as arbitral tribunals, the International Court of Justice, or other dispute settlement mechanisms. Each of these mechanisms concurs to the peaceful settlement of disputes by depoliticising the controversies arising between States.\textsuperscript{48}

Investor-State dispute settlement allows for an automated mechanism for investors seeking redress and a foreseeable risk that host States may take into account when making regulatory decisions. The abundance of publicly available case law makes it increasingly easier to pass judgment on which side of the award one will end.\textsuperscript{49} The argument of inconsistency is neither unfamiliar to domestic courts (and, arguably, not \textit{per se} a bad thing), nor is it necessarily true.\textsuperscript{50} Rather, primary redress within domestic legal systems leave the investor facing even more fragmented layers of protection.\textsuperscript{51}

Taking into account \textit{Achmea}, when Joost Pauwelyn and Rebecca Hamilton recently authored a publication on the “exit” from international tribunals,\textsuperscript{52} they might have added the EU as an additional driving force behind such trends.\textsuperscript{53} Stephan Wilske has recently and pointedly referred to this as a manifestation of “Old Testament jealousy”.\textsuperscript{54} Investment tribunals have increasingly offered resistance against this tendency.\textsuperscript{55}

\begin{footnotesize}
44 See ILC Articles on Responsibility of States for Internationally Wrongful Acts, article 4(1).
47 See \textit{supra} n. 43 and accompanying text. Compare also the arguments brought forward by Schill ibid, pp. 116-7.
48 See in this regard also Schill (n. 3), p. 117. This purpose is arguably explicitly recognised in article 27 of the ICSID Convention: “1. No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. 2. Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”
49 See on this the idea of “multilateralisation” of international investment law also Stephan W Schill, \textit{The Multilateralization of International Investment Law} (CUP 2009).
50 Anyone who has ever drafted a submission in an investment arbitration case will know the boilerplate character of sections on the standard of equitable treatment, for example. Against this background, the prospect of “total normative chaos” as was suggested by one of the comments during the LAwTTIP workshop appears at least a mild exaggeration.
51 See also Klages (n. 43), p. 218.
\end{footnotesize}
As has been pointed out in the literature, the alternative to the current system "is either compulsory State-to-State arbitration, which requires the claimant State either to take an adversarial posture with respect to the host-State or to leave its injured national without a remedy, or direct diplomatic and/or economic intervention by the claimant State."56 None of these outcomes seem desirable in a world fraught with the complexities of international relations, be it from the pragmatic perspective of State resources or for the purpose of nurturing friendly diplomatic ties.57

VII. Conclusion and Outlook

The area of trade and investment currently presents one of the most critical legal challenges facing the European Union. Oftentimes, one might have the impression that political decisions are substituted by sophisticated legal argumentation.58 Information policy stands out as a central challenge for the EU if it seeks a trade and investment strategy that is guided by factual arguments59 and aspirations of universality in the regulatory system. The main places for future emphasis should be:

1. The conclusion of mega-regionals can give the EU “first-mover advantage” and help implement its community values at the universal level;
2. a strong Union needs a strong external economic profile;
3. uniform regulation within the EU alleviates transnational commercial activities, thereby facilitating supra-regional economic growth;
4. a serious, fact-based evaluation of the investor-State dispute settlement is necessary, taking into account concerns of all sides;
5. doing away with means of international dispute settlement will only increase frictions running through international relations.

In order to ensure greater legitimacy to the actions of the EU, the integration of relevant stakeholders into this process, in particular national interest groups such as the chambers of industry and commerce, is quintessential. At the same time, a responsible approach to existing fears about mega-regionals is of the essence, considering that it has not been possible to create consciousness about the economic freedoms or the related creation of stable economic growth among the wider public so far.

Union law currently faces a credibility issue as to the quality and coherence of its trade and investment policy. While the instruments for implementing new strategies towards a “European Path” in this area are readily available, the overall discussion can only be won over with arguments in an open discussion. So far, unfortunately, it has only been driven by etatist agendas at the emotional level.

57 This consideration of states regarding protection of rights of individuals is suggested through the absence at the international level of institution of situations by one state against another before the International Criminal Court, the relatively small number of inter-state proceedings under article 53 of the European Convention on Human Rights at the level of the Council of Europe, and an even smaller number of proceedings under article 259 TFEU at the EU level.
58 Compare in this regard Stöbener de Mora (n. 40). p. 365.
59 See in this regard also Schill (n. 3), pp. 115-6.
SESSION V

The Future of the EU Investment Policy

Chair: Professor Isabelle Bosse-Platière
University Rennes I
The Fate of ICS Clauses in Light of Achmea

Rodolfo Valentino Scarponi

I. Introduction

Legal issues relating to the so-called “intra-EU BITs” – that is, Bilateral Investment Treaties among EU Member States – have given rise to heated debates among European Institutions, Member States, arbitral tribunals and private investors about their consistency with European law.

Before their accession to the European Union, almost all accessing Central and Eastern European States concluded many Bilateral Investment Treaties (BITs) with the then EU Member States in order to attract investment into their countries. After the enlargement of the EU in 2004-2007, these agreements became “intra-EU” treaties. As mentioned the validity of these agreements has been challenged by many Member States and by the EU Commission with amicus curiae briefs in arbitral proceedings started by private investors both in relation to the competing standards of protection that these agreements can include in relation to EU law, and as regards the Investor-State Dispute Settlement (ISDS) clauses usually contained therein. The Commission has also started infringement proceedings against five Member States to force them to terminate their intra-EU BITs.

On 6 March 2018, the Court of Justice of the European Union (CJEU) in Achmea ruled the incompatibility with EU law of the Dutch-Slovak BIT. Many questions remain however unanswered on the fate of ISDS in intra-EU BITs. These include, in particular, the scope and implications of the ruling in relation to: (a) the general legality of ISDS clauses in intra-EU BITs under EU law; (b) the general legality of ISDS clauses in extra-EU BITs under EU law; and (c) the proposed Investment Court System (ICS) clauses included in the new generation EU Free Trade Agreements (FTAs).

Achmea highlighted that the CJEU intends to preserve the constitutional structure of the EU and the autonomy of EU law. It seems that, in the opinion of the Court, the relationship between EU law and investment treaties is a conflictual one and must be addressed on the basis of a rule of conflict guaranteeing the primacy, the autonomy, and the allocation of powers of EU law. Specifically, the main concern for the CJEU was that a tribunal other than...
a European court could potentially give a final interpretation of EU law, breaching the monopoly conferred on the CJEU in this regard, pursuant to Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

The present work explores the rationale of Achmea, in the light of the long-standing case-law of the CJEU. It argues that Achmea could impact on the future of the ICS mechanism provided in the Comprehensive Economic and Trade Agreement (CETA) and in other FTAs under negotiation. The following paragraphs will contextualize Achmea in the case law of the CJEU to understand to what extent and under which conditions the European Court may uphold the legality of an international tribunals under EU law. The paper concludes that the CJEU arguments in Achmea may ultimately indicate that the ICS will be held incompatible with EU law.

II. The Achmea Case

a. Background

The case in Achmea was brought in 2008 by Achmea Bv (formerly Eureko), a Dutch investor operating in the insurance sector based in the Netherlands, against Slovakia. Eureko started an arbitration proceeding against the Netherlands under Article 8 of the Dutch-Slovakia BIT, claiming that the respondent State government had violated its right under that agreement by reversing the liberalisation of the Slovak insurance market. Slovakia raised the "intra-EU jurisdictional objection" maintaining that, after its accession to the EU, the arbitral clauses of Article 8 of the BIT had become incompatible with EU law, that the BIT was invalid, and that the arbitral Tribunal had no jurisdiction to decide the matter in question. The Commission, which intervened in the arbitral proceedings with an amicus curiae brief, analogously maintained that intra-EU BITs amount to an anomaly within the EU internal market, being contrary to the principle of mutual trust between Member States; in breach the principle of non-discrimination according to Article 18 TFEU; and directly infringing the monopoly of the CJEU on the interpretation and application of EU law.

The arbitral tribunal, in a provisional award on jurisdiction, dismissed all of the Commission’s objections, and in its final award on merit of 7 December 2012 condemned Slovakia to pay damages to Achmea for its breach of the BIT. Slovakia brought an action to set aside the award before the national court of Frankfurt am Main, where the arbitral tribunal was seated, which confirmed the award. Slovakia then appealed the decision before the Bundesgerichtshof, the German Federal Court of Justice, which referred the case to the CJEU for a preliminary ruling on the compatibility of the contested BIT with EU law, particularly in regard to Articles 18, 267 and 344 TFEU.

b. The CJEU’s Ruling

The CJEU ruled that

“Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as


8 Eureko, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), paras. 177 et ss.

9 Eureko, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010).
Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.”

In its reasoning, the CJEU firstly stated that, according to its case-law, an international agreement cannot affect neither the allocation of powers as provided by the EU Treaties, nor the ‘autonomy’ of EU law, as expressed, among others in Article 344 TFEU. The Court went on to emphasise the ‘autonomy’ of the EU legal order both towards the Member States’ national laws and towards international law. The concept of ‘autonomy’ of EU law is intrinsically linked to its constitutional structure, and it is, therefore, fundamental to preserve the essential characteristics of primacy over Member States’ national law and direct effect. Thus, the Court claimed that the EU’s legal order is founded on a set of shared common values among Member States, and this characteristic justifies the existence of the principle of mutual trust among them, and their obligation to ensure the application of and respect for EU law due to sincere cooperation. In the Court’s opinion, the autonomy and the essential characteristics of the EU’s legal order can be preserved only by the European judicial system – comprised of national courts and tribunals and the CJEU – which has to ensure the consistency and uniformity in the interpretation of EU law. In this view, the “keystone” of the said judicial system is the preliminary ruling procedure pursuant to Article 267 TFEU.

The Court went on to recall that pursuant to Article 8, paragraph 6, of the BIT in question, the arbitral tribunal in Achmea had to decide the dispute taking into account, amongst others, the domestic law of the contracting parties and the other relevant agreements in force between them. As a consequence, that tribunal was called to interpret EU law “regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States”. However, the Court stated that, considered that such the tribunal did not form part of the judicial system of the Member States in the sense of Article 267 TFEU, it could not refer interpretative questions to the CJEU for a preliminary ruling. The CJEU further observed that Article 8 of the BIT made it possible that national courts of Member States could also not review the final award.

For these reasons, the Court eventually found that Article 8 of the BIT could have an adverse effect on the autonomy of EU law, and that

“Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.”

The following part of this paper will deal with the arguments concerning the autonomy of the EU legal order, and their possible implications for Investment Court System ("ICS") clauses.

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10 Achmea (n. 3), para. 62.
11 "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."
12 Achmea (n. 3), paras. 35 et ss.
13 Achmea (n. 3), para. 41.
14 Achmea (n. 3), paras. 45 et ss.
15 Achmea (n. 3), para. 60.
III. What is the ICS?

Since 2015, the European Commission has started including clauses foreseeing the creation of an ICS in the negotiating texts of all new EU FTAs. That was the case for the Transatlantic Trade and Investment Partnership (TTIP), CETA, the EU-Singapore FTA, and the EU-Mexico FTA.

The ICS is a permanent court-like institution which replaces the traditional ISDS clauses in investment protection treaties. The aim of the ICS is to “institutionalise” arbitral dispute settlement mechanisms. The ICS is comprised of a Tribunal and an appellate body, and, in the view of the Commission, it represents an answer to the certain concerns relating to ISDS provisions, namely, the lack of transparency, legal certainty, and correctness.16

The most relevant features of the ICS are:

a. the members of the permanent body will be nominated by the EU and the other State party to the agreement;

b. the members hearing a case will be appointed by means of a clear and randomised procedure;

c. the provision of specific grounds of appeal according to which the Appellate Tribunal can review the decision of first instance;

d. the provision of ethical and behavioural commitments guaranteeing the independence and impartiality of the members;

e. the adoption of rules ensuring the transparency of the proceedings, providing hearings open to the public, and the availability of all the proceedings’ documents on a public website.17

IV. The CJEU’s Settled Case-Law

Under the settled case law of the CJEU preceding Achmea the conclusion of a treaty providing for the creation of an international Court with the power to interpret the treaty’s provisions is not in principle incompatible with EU law, for as long as the autonomy of the EU’s legal order is not affected.18

In Mox Plant,19 the CJEU found that its exclusive jurisdiction, based on Article 292 of the Treaty establishing the European Community (now Article 344 TFEU), was fundamental to preserve the autonomy of the EU legal order. Consequently, international agreements could in no case affect the allocation of responsibilities defined in the Treaties, and the exclusive jurisdiction of the CJEU to interpret and apply EU law in case of disputes among Member States.20 In Opinion 2/13 the CJEU found that the preservation of the EU constitutional legal order imposes that a Court other than the CJEU cannot be invested with the power to give interpretations of EU rules binding the EU and its institutions, which remains under the exclusive jurisdiction of the CJEU.21

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17 Comprehensive Economic and Trade Agreement (CETA), European Commission, chapter 8, section F, articles 8.22 et ss.
18 Achmea (n. 3), para. 57; Opinion 1/09 (n. 6), paras. 74, 76; Opinion 2/13 (n. 6), paras. 182-3.
19 ECJ Case No. C-459/03.
20 Ibid., para. 123.
21 (n. 6).
In Opinion 1/09 the Court decided that the CJEU itself and the Courts and tribunals of the Member States, defined as “the guardians” of the legal order, constitute the “judicial system of the EU”. A Patent Court provided with the power to interpret EU Directives and Regulations and other provisions concerning the internal market, competition law and the fundamental rights and other general principles of EU law although being placed outside such judicial system, thus violated the autonomy of the EU legal order and the uniform interpretation of EU law. As underlined by some commentators this argument is similar to the one followed by the Court in Achmea, to distinguish BIT investment arbitration from commercial arbitration, previously considered to be consistent with EU law. According to the CJEU, the difference lies in the fact that commercial arbitration originates in the freely expressed wishes of the parties. Investment arbitration instead would be based on a Treaty by which Member States agree to remove from the jurisdiction of their own Courts, and hence from the European system of judicial remedies, disputes which may concern the application and/or interpretation of EU law. The Court’s argument seems to put the focus on the duties incumbent on Member States by virtue of their participation in the EU. Thus, the CJEU in Associação Sindical dos Juízes Portugueses stated that in accordance, inter alia, with the principle of sincere cooperation, enshrined in Article 4(3) TEU, Member States are obliged to ensure in their respective territories the effective application and respect for EU law.

It follows that, to preserve the uniform interpretation and application of EU law and its autonomy, Member States have to retain their jurisdiction on fields covered by EU law and cannot divest their Courts of the powers to hear disputes falling therein by transferring them to a Court external to the EU judicial system. As highlighted above, the Court assessed that the keystone of the EU judicial system is the preliminary ruling pursuant to Article 267 TFEU, which guarantees the uniform interpretation of EU law and is an indispensable condition to ensure the exclusive competence of the CJEU to give binding interpretations of EU law. Thus, the Court emphasised in Opinion 1/09 that the judicial systems taken into account in Opinions 1/92 and 1/00 were compatible with EU law because they provided “particular powers to the courts of third countries to refer cases to the Court for a preliminary ruling”, and, consequently, “did not affect the powers of the courts and tribunals of Member States in relation to the interpretation and application of European Union law, nor the power, or indeed the obligation, of those courts and tribunals to request a preliminary ruling from the Court of Justice and the power of the Court to reply”.

Overall, the CJEU’s settled case-law shows that Member States could in principle confer jurisdiction to an international Court on matters of EU law, provided that the autonomy of EU law and the exclusive competence of the CJEU to give binding interpretation of this law are preserved.

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22 Ibid.
23 Ibid., para. 66.
24 Ibid., para. 71.
25 (n. 4), pp. 369-70.
26 C-284/16, Achmea (n. 3), para. 55.
27 C-64/16, Associação Sindical dos Juízes Portugueses, para. 34.
28 In the same vein see Opinion 2/13 (n. 5), para. 176, pp. 236-7.
29 Opinion 1/09 (n. 5), para. 77.
30 Opinion 1/92 on the 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, ECJ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CV0001.
32 Opinion 1/09 (n. 5), para. 77.
V. Is the ICS compatible with EU law?

In light of the aforementioned case-law, the compatibility of ICS clauses of so-called “FTAs of new generation”33 with EU law appears questionable.

First of all, it needs to be assessed whether the ICS would be invested with the power to interpret EU law. The CJEU, indeed, stated the compatibility with EU law of an international court set up by an international agreement to give binding interpretations only of its provisions.34 The EU’s proposal for the creation of an ICS in the Transatlantic Trade and Investment Partnership (“TTIP”) agreement with the US35 stipulates that “the Tribunal shall apply the provisions of this Agreement and other rules of international law applicable between the Parties”.36 Furthermore, according to Article 13(3) Section 3 of the TTIP:

“For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.”

The CETA proposal,37 in the same vein, indirectly excludes domestic law from the applicable law. Article 8.31 recalls only the application of the provisions of CETA itself, as interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties (“VCLT”), and the other rules and principles of international law applicable among the parties. Thus, on the international stage, EU law amounts to a domestic law not applicable to third countries which do not belong to the EU. On the other hand, according to the said proposals, the domestic law of the parties may only be considered “as a matter of fact.”38 The same provisions can be found in the EU-Mexico FTA proposal39 and in the EU-Singapore Investment Protection Agreement (“EUSIPA”) proposal.40 It appears that these provisions intend to exclude any discretion of the ICS to interpret the domestic laws of the parties. The ICS Tribunal of first instance, should indeed apply the domestic law of the parties following “the prevailing interpretation given to the domestic law by the courts or authorities of that Party.”41

It remains however difficult to imagine how a domestic legal provision could be applied only “as a matter of fact”. Article 8.28(1)(b) of CETA, Article 29(1) Section 3 of TTIP, Article 3.19 Chapter 3 of the EU-Singapore IPA, and Article 30 Section X of the EU-Mexico FTA provide an appellate body which could review the award of the first instance in cases of “manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law.” In this way, the appellate body could be surreptitiously called to give its own interpretation of EU law.

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34 Achmea (n. 3), para. 57; Opinion 1/09 (n. 5), para. 74; Opinion 2/13 (n. 5), para. 182.
36 Ibid., article 13(2), section 3.
38 EU TTIP Proposal, supra (n. 33), article 13(3), section 3; Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement, supra (n. 35), article 8.31(2).
39 Modernisation of the Trade part of the EU-Mexico Global Agreement, EU Commission, 21 April 2018, see section X, article 15.
40 EU-Singapore Investment Protection Agreement EU Commission, 18 April 2018, see chapter 3, article 3.13, para. 2, ft. 7.
41 EU TTIP Proposal, supra (n. 33), article 13(3), section 3; Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement, supra (n. 35), article 8.31(2).
Other provisions of the aforementioned agreements also state that the ICS Tribunal should follow the prevailing interpretation of the domestic law given by the courts and authorities of the party concerned. Without a mechanism granting the previous involvement of the CJEU or the previous exhaustion of domestic remedies, in some cases there might not be a *prima facie* “prevailing” interpretation of EU law.

Moreover, in Opinion 2/13, the CJEU stated that the question of whether it had already given an interpretation of EU law on a matter identical to the one relevant in a proceeding brought before the international court (in that case, the European Court of Human Rights) could only be solved by the CJEU itself: conferring that power to an external court amounted to a violation of the autonomy of the EU legal order.

From another standpoint, it might be too formalistic to reduce the scope of the Achmea ruling only to those agreements explicitly indicating EU law as applicable law, considered that the CJEU did not examine in detail if the dispute involved an interpretation of EU law. Therefore, the incompatibility with EU law found derives from the mere fact that Member States remove from the jurisdiction of the European judicial system disputes arising in “fields covered by EU law”, which might potentially (hypothetically) entail the application and/or interpretation of EU law. In this regard, it is worth noting that AG Wathelet, in his conclusions, explicitly excluded that disputes arising under the BIT in question concerned the application and interpretation of the TEU and the TFUE because, in the first place, the jurisdiction of the arbitral Tribunal was limited to ruling on breaches of the BIT and, in the second place, the scope of the BIT, on the one hand, and of the TEU and the TFEU, on the other hand, were different.

CETA and TTIP’s substantive provisions and fields covered by EU law are complementary and overlap. As underlined by some commentators

"CETA most definitely operates in a field covered by EU law, particularly the free movement provisions and bits and pieces of internal market law. It would force Member States to do things that are unlawful under EU law - discriminate between companies from different Member States (this follows from the simple fact that it is perfectly possible to qualify as a Canadian investor under CETA at the same time as being considered a European company under EU Law). It would compel Member States to pay damages for actions that are perfectly lawful under EU Law.”

Furthermore, under the ICS, investors can challenge not only EU acts and decisions, but also national acts. Article 51 of the Charter of Fundamental Rights of the European Union, stating that the Charter itself applies to the national acts only when the Member States are implementing EU law, has been interpreted very broadly by the CJEU. In *Åkerberg Fransson* the Court stated that “the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist

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42 Opinion 2/13 (n. 5).
43 Opinion 2/13 (n. 5), paras 238-9.
44 Achmea, (n. 3) para. 55; Associação Sindical dos Juízes Portugueses (n. 24), para. 34.
45 Achmea (n. 3), Opinion of AG Wathelet, delivered on 19 September 2017, paras. 173, et ss.
which are covered in that way by European Union law without those fundamental rights being applicable." It follows that national acts may or may not directly implement EU law, but if they interfere somehow with EU law or affect its “effet utile”, the European fundamental rights should be enforced. The Court in its case law defined many different criteria, identifying links that could trigger the applicability of the Charter to national acts. Thus, the scope of the Charter is strictly connected to the specific circumstances of the case, and the interpretation given by the CJEU. It seems that in disputes revolving around national measures of the Member States, the ICS Tribunal could have to decide on the scope and interpretation of EU fundamental rights, which may affect its autonomy and uniform application. EU fundamental rights certainly cannot be considered “as a matter of fact” given that, as mentioned, their scope is strictly linked to the CJEU’s case-by-case interpretation of EU law.

If the ICS is invested with the power to interpret EU law, it should be assessed whether it could be considered part of the European judicial system. The answer seems to be negative. ICS is an international Court established by means of a multilateral treaty, and it is “an organisation with a distinct legal personality under international law”. Thus, by definition, it could not be deemed to be a Court of a Member State. Similarly, it seems that in the light of Achmea, the ICS clauses of the new FTAs could be deemed to be incompatible with EU law, because they could entail the power of a Court external to the European judicial system to interpret the EU law itself, affecting the EU law autonomy and the CJEU’s jurisdiction.

A possible solution could be to provide a mechanism, similar to the preliminary ruling envisaged by Article 267 TFEU, granting the prior involvement of the CJEU in disputes dealing with the interpretation of EU law. However, such a solution seems to be very much at odds with the purpose of ICS clauses, which aim to prevent the submission of a dispute to the domestic laws and Courts relating to the parties in dispute. Also, this would be unacceptable in terms of third countries not bound by EU law.

This point seems not to constitute an issue for the European Commission, which seems to take the view that Achmea does not affect EU agreements with third countries.

Moreover, some arguments followed by the CJEU in its decisions, if further developed, could lead the Court itself to declare the compatibility of CETA with EU law. In Achmea, indeed, the Court stated, recalling Opinions 1/09 and 2/13, that

“the competence of the EU 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 agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected.”

Some commentators argue that the participation of the EU to international dispute settlement seems to be encouraged, normatively and constitutionally, by the EU Treaties,

48 Ibid., para. 21.
49 Translation from French of practical effect.
50 See Nicole Lazzerini, La Carta dei diritti fondamentali dell’Unione europea: I limiti di applicazione (Franco Angeli Edizioni, Milano 2018); Benedikt Pirker, Mapping the Scope of Application of EU Fundamental Rights: A Typology, European Papers 3(1) 2018, pp. 133-56: The Author identifies four criteria triggering the applicability of the Charter according to the CJEU case-law: i) the “criterion of the character of the rule of national law”, ii) the “criterion of the convergence of objectives”, iii) the “criterion of the impact on EU law”; iv) the “criterion of the density of EU regulation.”
51 Opinion 1/09 (n. 5), para. 71.
52 Ibid.
53 Achmea (n. 3), para. 57; Opinion 1/09 (n. 5), para. 74; Opinion 2/13 (n. 5), para. 182.
given that some broad conditions are respected.\textsuperscript{54} The Court, as described above, has given a very strict interpretation of these conditions, based on the concept of the ‘autonomy’ of the EU. Nonetheless, the Court could decide on the compatibility of CETA with EU law\textsuperscript{55} to balance the autonomy of the EU legal order with other principles and primary norms, which could amount to a “constitutional mandate” for the participation of the EU to international dispute settlement.\textsuperscript{56}

\textbf{VI. Conclusion}

The arguments followed by the CJEU in \textit{Achmea} and in the other decisions described above may entail the incompatibility of ICS clauses with the EU law. By means of CETA, TTIP, and the other FTAs currently being negotiated, the EU and its Member States remove from the jurisdiction of the European judicial system questions falling in fields covered by EU law, in so affecting the autonomy of EU law and the exclusive competence of the CJEU to interpret the EU law itself must be preserved. The aforementioned agreements also do not exclude that they ICS could interpret the EU law, neither they provide any mechanisms that effectively ensure the exclusive jurisdiction of the CJEU to give final binding interpretations of EU law.

Yet, the CJEU does not exclude in principle the conclusion of a treaty which provides the institution of a court with the power to interpret treaty provisions.\textsuperscript{57} Furthermore, the participation of the EU to international dispute settlement seems to be constitutionally encouraged by the EU treaties, given that, above all, the EU law autonomy is preserved.\textsuperscript{58} In this sense, the inclusion of foreign direct investment in the Common Commercial Policy by the European Treaties could be evidence of the intention of the drafters of the latter that the EU would be involved in dispute settlement mechanisms usually provided therein.\textsuperscript{59}

The European Commission appears to be of the idea that \textit{Achmea} only pertains to the ‘internal’ relations of the EU and does not affect EU agreements with third countries.\textsuperscript{60} It could be argued that on the external stage the principle the conditions of EU law autonomy and of the exclusive jurisdiction of the CJEU are less demanding than on the internal stage where they are strictly connected to other fundamental EU principles like sincere cooperation and mutual trust. This could lead the CJEU to consider the ‘autonomy’ requirement as less demanding if the jurisdiction of an external court stems from an international treaty concluded with a third country. On this basis, it is possible that, in assessing the compatibility of the ICS with EU law, the Court will consider that, on the external stage, EU autonomy must be balanced against the fact that the EU Commission and Member States are acting on a ‘constitutional mandate’\textsuperscript{61} to ensure the effective participation of the EU in international dispute settlement.

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\textsuperscript{55} The CJEU is requested to provide an opinion regarding the compatibility of the ICS contained in CETA with respect to: (i) the exclusive competence of the CJEU, pursuant to Article 267 of the Treaty on the Functioning of the European Union, to give a binding interpretation of EU law; (ii) the general principle of equality and the practical effect (“effet utile”) of EU law; (iii) the right of access to Courts; and (iv) the right to an independent and impartial judiciary.
\textsuperscript{56} \textit{Supra} (n. 54).
\textsuperscript{57} \textit{Achmea} (n. 3), para. 57; \textit{Opinion 1/09} (n. 6), paras. 74, 76; \textit{Opinion 2/13} (n. 6), paras. 182-3.
\textsuperscript{58} (n. 54).
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
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The Achmea Judgment and Mutual Mistrust – Toward a Complete Transition of the Intra-EU Investment Protection System

Raymundo Tullio Treves*

I. Introduction – the Achmea judgment not as an end-point, but as a trigger for a proper transition

On 6 March 2018, the Court of Justice of the European Union (CJEU) delivered its much-awaited judgment in the Achmea case deciding that:

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.2

The judgment was received by all — the EU Commission,3 EU States acting as respondents in pending arbitrations arising from bilateral investment treaties between EU Member States ("intra-EU BITs") and the Energy Charter Treaty ("ECT") in intra-EU arbitrations4 and scholars5 — as putting an end to a pain-staking debate regarding the compatibility of investor-State dispute settlement (ISDS) mechanisms in intra-EU investment treaties with EU law.

However, recent developments seem to point out that the debate on the compatibility of ISDS in intra-EU investment treaties with EU law has only reached an end from the view point of EU law and its court system. The CJEU judgment, in fact, did not aim at and may not, on its own, reach the effect of terminating all existing intra-EU BITs and it does not have the legal effect of terminating all pending intra-EU BIT arbitrations.

Recent arbitral awards and decisions in intra-EU BIT arbitrations are the living proof that the CJEU decision on its own is not sufficient to dismantle the arbitration system created by the still in force BITs and by the ECT. Arbitral tribunals have, in fact, addressed the issue of the impact of the Achmea decision on their ongoing proceedings and on their jurisdiction and have, so far, consistently decided that their jurisdiction was not impaired by the CJEU’s decision.6 The Member States, on the other hand, have also recently issued

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2 C-284/16 Slowakische Republik (Slovak Republic) v. Achmea BV [2018] ECR, para. 62.
6 Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID ARB/14/1, Award, 16 May 2018, paras. 678-683, https://www.italaw.com/cases/6608; Vattenfall II, ICSID Case No. ARB/12/12, https://www.italaw.com/cases/1654,
communications in which they set forward their interpretation of the Achmea judgment and their intention as regards the future livelihood of the still existing intra-EU BITs. These communications are a further proof of the fact that the CJEU’s judgment on its own is not sufficient to force the arbitrators to dismiss the pending arbitrations arising from intra-EU investment treaties.

This paper does not seek to describe the recent developments that have occurred since the rendering of the Achmea judgment with the final aim of criticising the CJEU’s judgment or the recent arbitral awards. Rather, the aim of this paper is to point out that the most important effect of the Achmea judgment is to have triggered what may be the actual and proper transition from a system of investment protection in the EU based on bilateral and multilateral treaties to a system of intra-EU investment protection based exclusively on the EU Treaties, the Charter of Fundamental Rights of the European Union and EU legislation. The opposing interpretations of the EU institutions, the CJEU and international investment arbitrations highlight that the overlap between investment protection systems, each one with its own system of dispute settlement (national courts supervised by the CJEU and international arbitral tribunals), may not be solved exclusively by and through the interpretation offered by adjudicatory bodies. Instead, the only solution that could lead to legal certainty seems to be action by the subjects that created both systems: the Member States.

The Achmea judgment may thus have finally triggered a moment of transition between two systems by requiring, implicitly, Member States to take the necessary actions to comply with its interpretation of the TFEU. Without State action, the risk is that EU investors will be forced into a seamlessly endless cycle of proceedings: arbitrations that lead to awards, that lead to enforcement proceedings in EU courts or to annulment proceedings, that may lead to non-enforcement or to annulment or trigger new interpretations by the CJEU.

It is argued here that while States decide and agree on the actions to be taken, all the stakeholders in the EU cross-border investment protection appear to be doing exactly what they are supposed to be doing: ie. following the rules that govern them. Thus, the fact that arbitral tribunals are analysing their own jurisdiction autonomously should be welcomed; the fact that EU national courts are applying and will apply the Achmea judgment, should be seen as normal and welcomed; the fact that respondent States will try to annul awards arguing the applicability of the CJEU’s decision is part of the normal functioning of arbitration and as such it should be welcomed; the fact that a national court may request a new preliminary ruling from the CJEU should also be welcomed as a normal and healthy sign of the functioning of the EU system.


As normal as it may be, this moment of transition should impose a particular responsibility on practitioners advising EU investors. In fact, as much as intra-EU treaty arbitration appears not to have disappeared yet, investors should be warned of the risks of long national court litigation and also of possible Member State intervention during the arbitral proceedings.

This paper proceeds as follows. First, it outlines the reasoning of the CJEU in the *Achmea* judgment. Second, it analyses four recent arbitral awards or decisions addressing specifically the applicability of the *Achmea* judgment. Third, it discusses the risk of non-enforcement or of annulment of the EU national courts’ awards and the risk that EU national courts request a new preliminary ruling by the CJEU. Fourth, it addresses the risk of a paradox in ICSID arbitrations. Fifth, it summarises the EU Commission’s July 2018 Communication and the Member States’ Communications of January 2019. Finally, it draws some conclusions.

### II. The Achmea judgment

On 6 March 2018, the CJEU granted its decision in the *Achmea* case. The judgment was a preliminary ruling requested by the German Bundesgerichtshof (BGH) on whether: Articles 344 and 267 TFEU precluded the application of a provision in an intra-EU BIT

under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date. \(^8\)

and, if the first two questions were answered in the negative, on whether the

first paragraph of Article 18 TFEU preclude[d] the application of such a provision under the circumstances described in question 1. \(^9\)

The BGH requested the preliminary ruling by the CJEU while deciding a case on the request by the Slovak Republic to set aside the arbitral award in the *Achmea v Slovak Republic* arbitration of 7 December 2012 \(^10\) that had been rendered against it by a tribunal constituted pursuant to the BIT between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic. \(^11\) The seat of the arbitration in the *Achmea* case was Frankfurt and the annulment proceedings had been initiated pursuant to Section 1059(2) of the Zivilprozessordnung.

The CJEU began its argument by highlighting the main principles of EU law that Articles 267 and 344 TFEU aim at preserving. According to the Court: (i) an international agreement should not “affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court;” \(^12\) (ii) the autonomy of EU law over both national law of the Member States and international law.

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9. Ibid. para. 23.


12. C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* [2018] ECR, para. 32.
derives from the constitutional structure of the EU and the nature of EU law;\(^\text{13}\) (iii) the principles of mutual trust and of sincere cooperation govern the relationship between Member States and derive from the fact that all Member States share common values and imply that each Member State trusts that the other will implement those common values and EU law in its own territory;\(^\text{14}\) (v) finally, the Treaties have established a judicial system based on a constant dialogue between courts and tribunals of Member States and the CJEU “intended to ensure consistency and uniformity in the interpretation of EU law.”\(^\text{15}\)

Having set out these principles, the CJEU stated that in order to answer the question on whether Article 344 and 267 TFEU precluded the application of provisions such as that of Article 8 of the Netherlands/Slovak BIT, at least one of three questions had to be answered in the positive. The three questions were: (1) “whether the disputes which the arbitral tribunal mentioned in Article 8 of the BIT is called on to resolve are liable to relate to the interpretation or application of EU law;”\(^\text{16}\) (2) “whether an arbitral tribunal such as that referred to in Article 8 of the BIT is situated within the judicial system of the EU, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU;”\(^\text{17}\) and (3) “whether an arbitral award made by such a tribunal is, in accordance with Article 19 TEU in particular, subject to review by a court of a Member State, ensuring that the question of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling.”\(^\text{18}\)

Regarding the first question, the CJEU decided that although a BIT-arbitral tribunal was requested to decide upon violations of the BIT, it “may be called upon to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms […].”\(^\text{19}\)

In regard to the second question, the CJEU decided that a BIT-arbitral tribunal cannot be considered as a court or tribunal of a Member State pursuant to Article 267.\(^\text{20}\) Consequently, such arbitral tribunals cannot request preliminary rulings to the CJEU in case of application of EU law.\(^\text{21}\) This finding by the Court is one of the major differences with the interpretation that the Advocate General Wathelet had suggested. The Advocate General, in fact, argued quite extensively that BIT-arbitral tribunals met all the requirements to be considered as courts or tribunals of a Member State. Namely, according to the AG, the arbitral tribunals could be considered: established by law, permanent, of compulsory jurisdiction, following an \textit{inter partes} procedure, applying rules of law in the settlement of disputes and composed of independent and impartial arbitrators.\(^\text{22}\)

As far as the third question was concerned, whether arbitral awards made by such BIT-tribunals would be subject to review, the Court decided that the judicial review of a BIT award depends on the national law of the seat of arbitration, which, according to the UNCITRAL Arbitration rules applicable according to the BIT in this case, may be chosen by the arbitral tribunal.\(^\text{23}\) The possible judicial review of an arbitral award is, however, always limited.\(^\text{24}\)
On the issue of the consequences of the limited judicial review of arbitral awards, the Court distinguished between international commercial arbitrations and BIT arbitrations. According to the Court, a limited review of commercial arbitral awards was justified in light of “requirements of efficient arbitration proceedings” and only “provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling.” The Court, however, considered that such reasoning cannot be applied to BIT-arbitral awards because of the inherent difference between commercial arbitration and BIT arbitration:

while [commercial arbitrations] originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies, which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, [...] disputes which may concern the application or interpretation of EU law.

A possible interpretation that may be given to the seemingly artificial distinction drawn by the CJEU may be that while commercial arbitration regards disputes that may otherwise be solved in national courts on the basis of national and EU law, BIT arbitration regards disputes that may only be solved through the dispute settlement mechanisms created by the treaty. The Court seems to say that Member States have created rights with the BITs, but instead of creating judicial remedies for the preservation of such rights, as required by Article 19 of the TEU that would allow the CJEU’s supervision, Member States have created arbitral tribunals, which are not part of the EU’s system of judicial remedies. In this case, therefore, investors may only choose arbitration to solve investment disputes and thus their choice is not “free.” In this context, a limited review by national courts implies, according to the Court, a limited possibility of reviewing potential decisions on EU law by tribunals that are not part of the EU judicial system and that have exclusive competence on such disputes. This possibility, according to the Court, implies an unbearable risk for the autonomy of EU law and thus dispute settlement clauses such as Article 8 of the Slovak/Netherlands BIT are precluded by Articles 267 and 344 TFEU.

Having reviewed the characteristics of BIT-arbitral tribunals, in fact, the CJEU argued that:

by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.

Finally, the Court concluded that:

Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation [...] In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.

25 Ibid., para. 54.
26 Ibid., para. 55.
27 Ibid., para. 56.
28 Ibid., paras. 58-59.
The reasoning adopted by the CJEU in explaining the difference between commercial arbitration and investment arbitration and in concluding for the incompatibility of the BIT with EU law is interesting. It appears to be structured more as a judgment which aims at assessing liability for a breach of EU law than as a judgment interpreting EU law. The Court, in fact, insists on the role of the Member States in having entered into BITs that allow a possible breach of the autonomy of EU law, instead of simply discussing the interpretation of a certain TFEU provision in light of a provision in another international agreement.

Consequently, the CJEU’s judgment appears to be centred around two main points: deciding that arbitral tribunals are not courts or tribunals of Member States pursuant to Article 267 TFEU; and assessing and assigning the responsibility of the incompatibility with EU law of BIT provisions such as Article 8 of the Netherlands/Slovak BIT to the EU Member States. And these two main points appear to reveal the possible political aim of the Court: trigger Member State action to terminate the still in force intra-EU BITs.

Had the Court been concerned solely with the risks for the autonomy of EU law, the Court could have followed the AG’s interpretation and considered the BIT-arbitral tribunals as courts or tribunals of Member States. In this manner, the arbitral tribunals would have fallen within the scope of Article 267 TFEU and could have or would have had to refer questions on the interpretation of EU law to the CJEU. The Court in this case could have directed its interpretation towards arbitral tribunals, arguing that a provision such as Article 8 of the BIT would be compatible with EU law if arbitral tribunals would refer to the CJEU questions on the interpretation and application of EU law. However, following this path would have allowed in the long run the investment protection system based on intra-EU BITs to continue living alongside the EU system of investment protection.

The CJEU’s judgment, instead, seems to reveal that the political goal that the Court aimed at achieving was not the coexistence of systems of investment protection, but the elimination of the system based on intra-EU BITs and the prevalence of the EU system. Following, in fact, the CJEU’s reasoning and interpretation of Article 267 and 344 TFEU, it appears that the main addressees of the obligations that derive from the judgment are the Member States. The Court is coherent in not considering arbitral tribunals part of the EU judicial system and does not aim at restraining their future decisions. The CJEU’s judgment, in fact, is not addressed to the arbitral tribunals: it does not, for example, argue that the arbitral tribunals should decline jurisdiction. It could be said that the CJEU respects the arbitral tribunals’ power to determine their own jurisdiction.

The CJEU’s judgment, instead, is addressed to the Member States and aims at binding them. This is perfectly in line with an Article 267 TFEU proceeding.29 The interpretation of EU law by the CJEU is, in fact, considered declaratory, it is compulsory on the Court that requested the preliminary ruling and it has erga omnes effects on whoever wishes to apply the interpreted provisions. Most significantly in this case, if a Court decision implies the incompatibility of State action with EU law, the State must take all necessary measures to conform with the decision as if the decision had ascertained its breach of EU law.30

III. Arbitral Tribunals are not applying the Achmea judgment

Since the Achmea decision, several arbitral tribunals have been and are still confronted with the issue of the effect of the ruling, if any, on their proceedings. Four arbitral tribunals have already issued public decisions on this question. All four of these cases were in very

30 Ibid.
advanced stages of the proceedings when the CJEU’s decision was rendered. Namely, the written proceedings were closed and the hearing on the merits had already taken place.

The first decision is the Masdar Solar & Wind Cooperatief UA v Kingdom of Spain, ICSID Case No. ARB/14/1, Award issued on 16 May 2018. This is an Energy Charter Treaty case heard pursuant to the ICSID Convention. The second decision came in the Vattenfall and Others v Federal Republic of Germany (Vattenfall II), ICSID Case No ARB/12/12, Decision on the Achmea Issue, 31 August 2018. This is also an Energy Charter Treaty arbitration administered under the ICSID Convention. The third decision is even more recent, and it is the UP and CD Holding Internationale v Hungary, ICSID Case No ARB/13/35, Award, 9 October 2018. This case arose from the France/Hungary BIT and was administered under the ICSID Convention. The fourth decision is the Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v The Italian Republic, SCC Arbitration V (2015/095), Final Award of 23 December 2018. This case is also an ECT arbitration but conducted under the arbitration rules of and administered by the Stockholm Chamber of Commerce.

In all four arbitrations, the arbitral tribunals decided that the Achmea judgment, for a variety of reasons, did not apply to their arbitration and in any event did not impair their jurisdiction. Independently of the legal reasoning behind these decisions, the conclusion is not surprising and appears to arise from a mutual mistrust between investment protections systems. As the CJEU did not consider arbitral tribunals part of the EU judicial system, in the same manner arbitral tribunals do not consider themselves to be operating within the EU system and thus consider themselves not applying EU law and not bound by EU law.

a. Masdar v Spain

Following the CJEU’s decision, the Masdar v Spain Tribunal was requested by the Respondent to reopen the proceedings to consider the impact of the Achmea decision.31 In this case, the Respondent had already made jurisdictional objections on the basis of the incompatibility of the ECT with the TFEU in an intra-EU case. The award deals separately with the issue of jurisdiction and the issue of the effect of the Achmea decision. In particular, the Tribunal decided that the CJEU’s decision did not apply in this case because it could be distinguished. The Tribunal argued that the Achmea decision targeted only BITs between two Member States. The ECT, instead, is a multilateral treaty in which the EU is a party and in which there are also non-EU parties.32

b. Vattenfall v Germany (Vattenfall II)

The Vattenfall II Tribunal decided to issue a separate Decision on the Achmea Issue (the “Decision”).33 This Decision was rendered after the Respondent raised objections to the jurisdiction of the Tribunal based on the incompatibility between the ECT and intra-EU arbitration following the rendering of the Achmea decision.34 The Respondent in this case had not raised such objections before.35 The EC had participated as a non-party and had raised the issue, but Respondent had not raised the jurisdictional challenge until the issuance of the CJEU’s decision.36 The Tribunal allowed the objections to be raised pointing

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31 Masdar Solar & Wind Cooperatief UA v Kingdom of Spain, ICSID Case No ARB/14/1, Award, 16 May 2018, paras. 669-676, https://www.italaw.com/cases/6608.
32 Ibid., paras. 678-683.
35 Ibid., para. 18.
36 Ibid., paras. 11-13, 81-83.
out in particular that it had a duty pursuant to ICSID Rule 41(2) to assess its jurisdiction ex officio and that even if the Respondent had not raised the issue, “the tribunal notes that in respect of the issue of intra-EU investor-State arbitration under the ECT and any implications of EU law, the Tribunal would have exercised its power to examine its jurisdiction ex officio, even in the absence of a jurisdictional objection by Respondent.” In this manner, the Vattenfall Tribunal dealt with any “timeliness” objection.

The Tribunal went on to decide whether it should apply the CJEU’s decision. It stated that in order to determine “whether the ECJ Judgment has legal implications for this Tribunal’s jurisdiction, […] the Tribunal must refer back to the source of its jurisdiction.” Thus, as a first step, it decided that it was necessary to evaluate what was the law applicable when examining its jurisdiction. The Respondent and the European Commission, in fact, argued that EU law and consequently the CJEU judgment applied to the issue of jurisdiction because Article 26(6) ECT and Article 42(1) ICSID Convention governed the applicable law and stated that the Tribunal should apply the “applicable rules and principles of international law.”

The EC had also argued that EU law becomes applicable to the Tribunal’s jurisdiction by operation of Article 31(3)(c) VCLT, which requires the Tribunal to interpret the ECT taking into account “any relevant rules of international law applicable in the relations between the parties.”

The Tribunal, however, stated that Article 26(6) ECT and 42(1) ICSID Convention regarded the law applicable to the merits and not to the jurisdiction. According to the Tribunal, the jurisdiction was governed solely by the dispute settlement clause, ie Article 26 ECT, interpreted in accordance with principles of international law. These principles are those set out in the VCLT. Instead, according to the Tribunal: “EU law does not constitute principles of international law which may be used to derive meaning from Article 26 ECT, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT.” Thus, EU law was not part of the law applicable to the question of jurisdiction.

The Tribunal then went on to determine whether EU law and in particular the CJEU judgment could be relevant in the interpretation of Article 26 ECT in light of the Article 31(3)(c) VCLT argument. As regards the Article 31(3)(c) VCLT argument, the Tribunal first stated that EU law is international law and that an ECJ judgment is by consequence International law:

Since the ECJ is empowered by the EU Treaties to give preliminary rulings on the interpretation of EU law, including the EU Treaties […] the Tribunal considers the ECJ Judgment’s interpretation of the EU Treaties likewise to constitute a part of the relevant international law.

However, the Tribunal stated that it is not possible to apply Article 31(3)(c) VCLT because the correct starting point for the interpretation of Article 26 ECT is the general principle of interpretation in Article 31(1) VCLT: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object

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37 Ibid., para. 106.  
38 Ibid., paras. 95-107.  
39 Ibid., para. 108.  
40 Ibid., para. 110.  
41 Ibid., para. 111.  
42 Ibid., paras. 113-122.  
43 Ibid., paras. 123-129.  
45 Ibid., para. 133.  
46 Ibid., para. 148.
and purpose.”47 The Tribunal thus criticised the EC’s interpretation of how the VCLT article would apply, arguing that it would lead to the re-writing of a clause of the ECT and it would potentially allow for different interpretations of the same ECT provision.48 Moreover, the Tribunal argued that it could not “take into account” (as stated by Article 31(3)(c) VCLT) EU law and in particular the judgment of the CJEU in interpreting the ECT because the judgment of the CJEU did not set out a clear rule of international law.49 It appeared unclear from the judgment if it applied only to BITs or also to the ECT.50 As regards whether the CJEU judgment in Achmea referred also to the ECT, the Tribunals argued that it probably did not.51 And it agreed with the Masdar v Spain tribunal arguing that while the AG had addressed the issue of the compatibility of the ECT with EU law, the CJEU’s judgment was silent on the subject.52

Having determined that the applicable law to the question of its jurisdiction was essentially Article 26 of the ECT, the Tribunal then carried out its interpretation of said Article in accordance with Article 31(1) VCLT pursuant to its ordinary meaning, in its context and in light of its object and purpose.53 The Tribunal concluded that Article 26 ECT did not contain any carve-out for intra-EU arbitrations “in particular regarding the opportunity for an EU investor to pursue arbitration against an EU Member State. Indeed, the terms of Article 26 ECT give not the slightest hint that any such exclusion is possible.”54

Of the utmost significance is the following statement by the Tribunal:

[...] The Tribunal emphasises that this interpretation exercise is carried out from the perspective of the ECT, as is required by international law. In reaching its conclusion regarding the meaning of Article 26 ECT, the Tribunal does not deny the existence or effectiveness of EU law. To the extent that the EC or EU Member States saw an incompatibility between EU law and the dispute resolution provisions of the ECT at the time of negotiation of the treaty, or to the extent that they now see such an incompatibility, it was and is incumbent upon them to take the necessary action to remedy that situation. It is not for this Tribunal to redraft the treaty which has been agreed by the Contracting Parties to the ECT.55

This statement is of the utmost significance because it underlines that the arbitral tribunal is part of another system of investment protection, different from the EU system, and thus it does not consider itself bound by EU law, in the same manner as the CJEU did not consider arbitral tribunals as being part of the EU judicial system. The statement, moreover, is a clear statement, now from an arbitral tribunal, but in unison with the CJEU’s judgment, of the need for action by the States, which are the only subjects that may modify the treaties.

48 Ibid., paras. 154-155.
49 Ibid., para. 159.
50 Ibid., paras. 161-164.
51 Ibid., para. 162: “In particular, the ECT is not an agreement concluded “between Member States”, as referred to by the ECJ. The ECT is a bilateral treaty, to which the EU itself is a party, alongside its Member States. Unlike the Dutch-Slovak BIT, the ECT is a “mixed agreement” between both Member States and third States, in addition to the EU itself. The wording of Article 26 ECT is different to Article 8 of the Dutch-Slovak BIT. In addition, the ECT contains different provisions impacting upon the interpretation of the treaty provisions in their context.”
54 Ibid., para. 207.
55 Ibid., para. 208.
The Tribunal, finally, carried out its own analysis of the jurisdictional objection based on a conflict with EU Law. It found that it had jurisdiction despite the case involving intra-EU parties.56

The Tribunal concluded by stating that the issue regarding the alleged unenforceability of an award that would not apply the CJEU’s judgment and the issue of potential breaches of EU law by a claimant pursuing an arbitration notwithstanding the CJEU’s decision are not issues of jurisdiction. The Tribunal stated that it only has the obligation of performing its mandate granted by the ECT or the BIT: “the enforceability of this decision is a separate matter which does not impinge upon the Tribunal’s jurisdiction.”57 As regards possible EU law violations, the Tribunal stated that it is only concerned with the implications of the CJEU judgment on its jurisdiction. It considered instead that it is not appropriate for the Tribunal to speculate on possible breaches by the Claimant of EU law.58

c. UP CD v Hungary

In the UP and CD v Hungary case, the Tribunal requested the parties to comment on the effect, if any, of the Achmea decision on the ongoing arbitration.59 The Respondent argued that the decision had a binding effect and that as a consequence the arbitral tribunal no longer had jurisdiction.60 The Tribunal rejected the argument and rejected the applicability of the Achmea decision in this case.

Decisive for the Tribunal was the fact that in this case the jurisdiction of the Tribunal was based on the ICSID Convention “a multilateral public international law treaty.”61 According to the Tribunal, therefore, unlike the Achmea case, “this Tribunal is placed in a public international law context and not in a national or regional context.”62 The Tribunal carried on distinguishing this case from Achmea. In Achmea the place of arbitration was in Germany, the law applicable to the proceedings was German law, the judicial review of the award was within the competence of German Courts and it was within such proceedings that the ECJ was called to intervene.63 In this case instead: the only applicable law to the proceedings is the ICSID Convention and the ICSID Rules; the judicial review of the award is not in the hands of national courts, but subject exclusively to the annulment procedure according to Article 52 ICSID Convention and such review is final and not subject to any further review by national courts.64

Furthermore, the Tribunal argued that the Achmea decision made no references to the ICSID Convention.65 It argued that Hungary did not terminate its participation in ICSID when it joined the EU in 2004 and that the accession to the EU was not an implied withdrawal from the ICSID Convention.66 The Tribunal argued that in any event, the BIT provided a sunset clause that would imply that the BIT was still in force for this arbitration.67

56 Vattenfall and Others v Federal Republic of Germany (Vattenfall II), ICSID Case No ARB/12/12, Decision on the Achmea Issue, 31 August 2018, paras. 211-229.
57 Ibid., para. 230.
58 Ibid., para. 231.
60 Ibid., paras. 230-251.
61 Ibid., para. 253.
62 Ibid., para. 253.
63 Ibid., para. 254.
65 Ibid., para. 258.
66 Ibid., para. 260.
67 Ibid., para. 265.
d. Greentech and NovEnergia v Italy

In the Greentech and NovEnergia v Italy arbitration, the Tribunal granted the parties the opportunity to comment on the potential impact of the Achmea judgment on the proceedings. The Tribunal also requested comments from the parties on post-Achmea developments, namely the issuance of the Masdar Solar v Spain award, the Antin Services et al v Spain award, the Antaris Solar et al v Czech Republic award and the European Commission’s 19 July 2018 Communication on intra-EU investment protection. Having considered the parties’ arguments and the Achmea judgment, the Tribunal decided that the decision “has no preclusive effect such as to remove its jurisdiction over the present dispute.”

The Tribunal based its decision on three reasons. First, it considered that its jurisdiction derived exclusively from Article 26 of the ECT, which is not an intra-EU BIT. Second, it considered that the fact did not change in light of the choice of law clause in Article 26(6), according to which the arbitral tribunal “shall decide the issues in dispute in accordance with [the ECT] and applicable rules and principles of international law.” According to the tribunal, in fact, EU law may not be considered as international law as referenced to in the ECT. The Tribunal argued that Article 26(6) ECT should be interpreted according to Article 31(1) of the VCLT and consequently it refers only to principles of international law and not EU law. Third, and finally, according to the Tribunal the Achmea decision did not apply in this case because it referred exclusively and was confined to agreements “concluded between Member States” and the ECT was an agreement in which also the EU was a signatory and in which there were also 25 non-EU signatory States.

Finally, with respect to the EC communication of 19 July 2018, the Tribunal considered that it cannot be considered as a binding instrument and it does not provide an authoritative interpretation of the Achmea judgment and even if it did the Tribunal argued that it was not bound to take it into consideration because it “is not constituted pursuant to EU law nor does it interpret or apply EU law.”

In all four cases and for different reasons, the Tribunals decided that the CJEU’s decision in Achmea did not apply. In particular, the Masdar Tribunal and the Greentech and NovEnergia v. Italy Tribunal argued that Achmea did not apply to ECT cases; the UP and CD v Hungary Tribunal argued that the Achmea decision did not apply to the ICSID Convention; and the Vattenfall Tribunal stated that it did not have to take into consideration the Achmea Decision because EU Law was not applicable to the question of its jurisdiction. The applicable law to the question of jurisdiction was only Article 26 ECT to be interpreted according to the rules in the VCLT.

What emerges from the four decisions is that only the Vattenfall Tribunal addressed the issue of whether and why it should or must apply the CJEU’s preliminary ruling. The other tribunals, and especially the UP CD v Hungary Tribunal, try to distinguish their case from the Achmea case. However, by so doing they appear to be accepting the theoretical applicability of such judgment. These decisions appear to be emotional reactions to the
CJEU’s decision, which they seem to consider unavoidably applicable, had their case been an intra-EU BIT arbitration. These Tribunals consequently, instead of addressing the issue of why and how the CJEU decision should apply, they appear to anticipate arguments that will be useful during annulment or non-enforcement proceedings before national courts. The Masdar Tribunal, the Greentech Tribunal and the UP CD v Hungary Tribunal appear to have wanted immediately to shield both ECT and ICSID arbitrations from the effects of the Achmea decision. However, the first question that they should have addressed, as the parties did in their submissions and the Vattenfall Tribunal argued, was why should they apply the ECJ Decision in the first place, even if they had been constituted pursuant to a BIT that was the same as the one in Achmea.

IV. Much ado about nothing: all awards need national courts to be enforced or annulled and EU national courts apply EU law, including the Achmea decision

It appears that, even if arbitral tribunals are correct in considering that there is no duty to apply the Achmea decision, their resistance may be futile. Investors may well succeed in an arbitration. However, if this arbitration is not an ICSID one, the arbitral award will have to be enforced in a national court and the award is subject to annulment proceedings in national courts. In this case, if the enforcement or annulment court is in an EU Member State, that court will certainly be bound by the CJEU’s decision. If at that point the national court has doubts as to the applicability of the Achmea decision, the national court may or will have to refer the issue back to the CJEU.

As was predictable, the first case in which an award was annulled by applying the CJEU’s judgment was the Achmea case itself. The BGH, hearing the set aside proceedings in the Achmea case, has now rendered its decision annulling the award. The annulment was entirely dependent on the application of the CJEU’s decision.75

Meanwhile, Spain is seeking the annulment of its award in the NovEnergia v Kingdom of Spain, SCC Case No. 063/2015 before the Swedish courts. The arbitration had its seat in Stockholm and the award was delivered one month prior to the CJEU’s issuance of the Achmea judgment. Spain, therefore, is arguing that the award should be annulled because by applying the CJEU’s decision it appears that the tribunal lacked jurisdiction because the arbitration clause should be considered incompatible with EU law. The difference with the Achmea case, however, is that the NovEnergia case was an ECT case and the applicability of the CJEU’s decision to ECT cases is being contested. Spain has therefore requested the Swedish court to request a new preliminary ruling from the CJEU.76

Interestingly, while the annulment proceeding is pending in that case, the investor is trying to enforce the award in the US in DC courts. In such proceedings the Kingdom of Spain is arguing that enforcement should not be granted because the Achmea judgment clarified that the arbitral tribunal was without jurisdiction and in any event requested the stay of the proceedings while the annulment proceedings are pending, pursuant to the New York Convention.77

77 See Damien Charlotin, “Hungarian State-Owned Investor, MOL, Intervenes in Court in support of another Investor seeking to enforce an intra-EU ECT Award against Spain; MOL insists that ECT remains viable for intra-EU disputes-As it waits for award in its own case” 18 January 2019, Investment Arbitration Reporter (online) <https://www-iareporter-com.peacepalace.idm.oclc.org/articles/hungarian-state-owned-investor-mol-intervenes-in-court-in-support-of-another-
The decision in this case will be of particular interest, considering that a non-EU Court is being requested to apply EU law. The DC Court will have to conduct a conflict of laws analysis to determine the law applicable to the question of jurisdiction, after having decided whether the issue regards the validity of the arbitration agreement or an issue of arbitrability. If the DC Court decides that it is an issue of validity of the arbitration agreement Article V(1)(a) of the New York Convention would apply. The Court would thus apply the ECT exclusively or the law of “the country where the award was made.” In this second case the applicability of EU law would be easier. If the DC court interpreted the issue as one of arbitrability, it would have to apply Article V(2)(a) of the New York Convention which leads to the application of US law.

V. Are ICSID awards different? A potential paradox

ICSID arbitrations appear to be an exception. ICSID, in fact, includes an annulment system and prevents annulment and enforcement proceedings in national courts. ICSID arbitrations, therefore, appear to be the safest arbitrations from the CJEU’s grasp.

The paradox in this conclusion must be apparent. Part of the rationale of the CJEU’s decision was that arbitral awards are only subject to a limited review by national courts and thus to a limited control by the CJEU. ICSID arbitrations are subject to no control whatsoever by national courts. Yet, the inapplicability of the CJEU’s decision in ICSID arbitrations and the non-risk of national court enforcement or annulment proceedings allow ICSID proceedings to potentially avoid the Achmea effect.

However, also ICSID awards may end up in national courts and under national law review, even if at a later stage, the execution stage. Pursuant to Article 54(3) of the ICSID Convention: “Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.”

VI. Need for Member State Action

While arbitral tribunals in pending intra-EU arbitrations had to address the impact of the Achmea decision, the CJEU’s decision also sparked a reaction from the European Commission and the Member States.

The EC’s position is well summarised in its communication of 19 July 2018 to the European Parliament and to the Council. The communication had a double aim. On the one hand, to clarify the incompatibility with EU law of an intra-EU investment protection system based on intra-EU BITs and the ECT and, on the other hand, to provide guidance as to the existing EU rules and regulations on investment protection. The second part aimed at demonstrating that the elimination of the BIT system would not lead to a lessening of investment protection within the EU.

As regards the incompatibility of the two systems of investment protection, the EC welcomed the Achmea judgment as a confirmation of its interpretation of the relationship between the investment protection system based on investment treaties and the EU investment protection system based on the EU Treaties, the Charter and specific EU legislations. The EC also interpreted the CJEU’s judgment as a legal backing to its actions...
to convince Member States to terminate their intra-EU BITs. The EC, in particular, mentioned the action that it was consequently taking:

Following the Achmea judgment, the Commission has intensified its dialogue with all Member States, calling on them to take action to terminate the intra-EU BITs, given their incontestable incompatibility with EU law. The Commission will monitor the progress in this respect and, if necessary, may decide to further pursue the infringement procedures.80

This statement reveals the aim of the EC to eliminate the system of investment protection based on BITs and not to allow its coexistence and it also reveals that the EC considers the CJEU’s judgment as having clarified the obligation of Member States to terminate the existing BITs. In light of the obligation arising from the CJEU judgment, the EC may in fact actually start infringement proceedings against Member States that do not comply.

In its communication, the EC also gave its interpretation of the Achmea judgment and argued that two obligations arose from it in particular: first, that national courts of Member States had to annul arbitral awards rendered pursuant to BITs such as the one in Achmea and they had the obligation of refusing to enforce them; second, that “Member States that are parties to pending cases, in whatever capacity, must also draw the necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs.”81 The EC concluded by stating that the Achmea judgment should also be equally applied to the “intra-EU application” of the ECT arbitration clause.82

Most recently, and less than a year from the CJEU’s judgment, Member States have now issued three Declarations stating their interpretation of the judgment and setting out what resembles a plan of action for the near future. The Declarations appear to have been prompted by the invitation by the EC in its July 2018 communication to “draw all necessary consequences” from the Achmea judgment “pursuant to their obligations under Union law.”83 Member States issued three Declarations because of a difference of interpretation regarding the applicability of the Achmea judgment to the ECT. Thus, the majority Declaration was signed by 22 Member States. The second Declaration was signed by Finland, Luxembourg, Malta, Slovenia and Sweden. And the third Declaration was signed by Hungary.

As to the common part of the Declarations, the Member States agree on three points: (1) that all investor-State arbitration clauses in intra-EU BITs are contrary to EU law and thus are inapplicable; (2) that consequently also the so-called grandfathering or sunset clauses are inapplicable; and (3) that arbitral tribunals established on the basis of these arbitration clauses lack jurisdiction, “due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.”84

80 Ibid., pp. 2-3.
82 Ibid., p. 4.
83 Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 15 January 2019, p. 1 (22 Member States signed this declaration: Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Netherlands, Austria, Poland, Portugal, Romania, Slovakia and the United Kingdom).
84 Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 15 January 2019 (22 Member States signed this declaration: Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Netherlands, Austria, Poland, Portugal, Romania, Slovakia and the United Kingdom); Declaration of the Representatives of Finland, Luxembourg, Malta, Slovenia and
Having agreed on such legal consequences, the Member States “declare that they will undertake the following actions without undue delay.” Such actions include: informing arbitral tribunals of the legal consequences of Achmea as put forward in the communication; home States of investors cooperating with respondent states in informing the arbitral tribunals of the consequences of Achmea; respondent States requesting their courts not to enforce or to annul arbitral awards issued in violation with the interpretation of Achmea; respondent States requesting also national courts of States out of the EU not to enforce or to annul said awards; informing the investor community that no new intra-EU investment arbitration should be initiated; controlling that their undertakings acting as claimants in investment arbitrations withdraw their pending arbitrations; and especially terminating “all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally.”

The 22 Member States that signed the majority declaration also agreed that the Achmea judgment applied to the ECT. In particular, they agreed that as a consequence of the CJEU judgment the ECT arbitration clause should be considered inapplicable if interpreted as allowing arbitrations between an investor of a Member State against another Member State. Consequently the 22 Member States undertook to discuss with the EC additional steps “necessary to draw all the consequences from the Achmea judgment in relation to the intra-EU application of the Energy Charter Treaty.”

On the contrary, the Declaration by the 5 Member States stated that, in light of the fact that the issue of the applicability of the Achmea judgment to ECT arbitrations was currently being discussed before a Member State Court, “the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra-EU application of the Energy Charter Treaty.” Hungary added to the position of the 5 Member States that “the ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States.”


Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 15 January 2019, p. 4 (22 Member States signed this declaration: Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Netherlands, Austria, Poland, Portugal, Romania, Slovakia and the United Kingdom).


VII. Conclusion – Towards an orderly end of the transition

In conclusion, it appears that the CJEU decision is far from having obtained the most-wanted legal certainty that investors and States are looking for. Instead, the situation appears ever more partisan and open ended. On the one hand, the European institutions affirm, now with the backing of the CJEU, that intra-EU ISDS mechanisms in BITs are in contrast with EU law and thus should be considered inapplicable. On the other hand, arbitral tribunals constituted pursuant to the intra-EU BITs or in intra-EU ECT arbitrations decide upon their own jurisdiction, do not apply the CJEU Achmea decision, do not consider their arbitration clauses in contrast with EU law and continue to retain jurisdiction and to render awards on the merits.

Although the situation may still appear confused, a silver lining begins to appear and should be highlighted. The silver lining appears if all the stakeholders in the protection of intra-EU cross-border investments (investors, Member States, EU institutions, national courts, international arbitrators, practitioners and scholars) accept the fact that there has been a change of policy within the EU from which now the protection of cross border intra-EU investment is part of EU law. The fact that must be accepted is that, as part of the change of policy, the EU and its Member States are in the process of dismantling the prior-existing system of protection of foreign investment based on intra-EU investment treaties and building a new system of cross-border intra-EU investment protection. The silver lining is that the Achmea judgment seems to have triggered an orderly and final transition process.

The prior system of investment protection was built of a net of bilateral investment treaties between EU Member States which granted European investors substantive rights and the right of directly initiating international arbitration against their European host-State to enforce their newly acquired rights. The new system is different: the investment protections are multifaceted and derive from the EU Treaties, from the Charter of Fundamental Rights of the European Union, from the General Principles of EU law and from specific EU law on investments. In particular, the new system of investment protection, as all EU law, is based on mutual trust between Member States, which implies mutual trust in their legal systems and in their national court systems.

For years, the two systems of foreign investment protection have coexisted. Coexistence was due, in part, to the fact that: the two systems have different sources (the EU treaties, on the one hand, BITs and the ECT, on the other); the rights granted are different; and the dispute settlement avenues are different. Coexistence, however, also revealed a certain political unwillingness to complete the transition from one system to another by the only stakeholders common to both systems and with the power to actually complete the transition: the Member States. Member States have been reluctant to terminate their BITs probably because by so doing they would also be eliminating rights and an avenue of redress of their national investors investing in other Member States.

During the last few years, in fact, if, on the one hand, the Commission has urged EU Member States to terminate their intra-EU BITs, only a small number of States has complied with such request and for the rest intra-EU BITs have been only opposed to during arbitrations by the Respondent State arguing the lack of jurisdiction of the arbitral tribunal. In such arbitrations, the EU Commission has often if not always participated as amicus curiae, but the home-State of the investor, the other Party to the treaty, has rarely participated and has certainly not manifested its common agreement with the Respondent Party, the other Party to the treaty, to terminate the treaty, nor its common understanding.
with the other Party to the treaty that the BIT is now incompatible with EU law. In such a scenario, arbitral tribunals have acted as they should have: they have decided on the jurisdictional objections brought by the respondent and made their considerations and argumentations after having listened to the other party to the dispute, the claimant-investor, and without having considered binding the interpretation offered by the EU nor by the Respondent State. To act differently would have meant to disregard the nature of arbitration as a form of adjudication and the cardinal principle of *competence de la competence*. And today, alongside the end of intra-EU BITs, the end of arbitration as a trusted adjudicatory procedure would be nearer.

The *Achmea* decision is not being applied by arbitral tribunals. It is even being argued by arbitral tribunals that it may not be applied. The reasons for not applying the *Achmea* judgment in the ongoing arbitration proceedings may be right or wrong, however, they are based on the law, they appear reasonable, they apply a logical and legal method and they are the product of a process in which both parties to the proceeding were given an equal and reasonable opportunity of presenting their case on the issue.

Notwithstanding the non-application by the arbitral tribunals of the *Achmea* judgment, the judgment has a deep effect that has the potentiality of leading the way to the definite transition from one system of intra-EU investment protection to another. The judgment, in fact, will have to be applied by national courts. Thus, national courts will have to annul or not enforce arbitral awards that have disregarded the CJEU’s decision. If national courts have doubts on the interpretation of the judgment, they may not simply substitute the CJEU’s interpretation or the arbitral tribunal’s interpretation with their own. National courts, instead, will have to re-apply to the CJEU for another preliminary judgment and would then be bound by the new judgment. Moreover, and in particular, the *Achmea* judgment imposes also an obligation on Member States. While arbitral tribunals can and maybe even should, given their not being a part of the court system of the EU, “ignore” the CJEU’s judgment, Member States may not. Member States, therefore, have now the obligation and responsibility of dismantling their intra-EU BIT system. And Member States appear to have understood their duty in their recent New Year’s resolution and Declarations.

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89 See *Eureko BV v The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras 154-174 (https://www.italaw.com/cases/documents/418) in which The Netherlands did participate. However, The Netherlands did not “side” with the Slovak Republic nor with the EC. Instead, The Netherlands intervened simply to state that it had not formally terminated the BIT with the Slovak Republic and that the Slovak Republic had not sent any communication to it expressing its desire or intent to terminate the BIT.
SESSION VI

Evolving Dispute Settlement Mechanisms

Chair: Professor Takis Tridimas
King’s College London
The Distinction Between Arbitration and Judicial Settlement in International Law: Three Characteristics and Why They Matter for Reforms

Jonathan Brosseau*

I. Introduction

According to some commentators, a ‘second generation’ of judicial bodies in international law, best represented by international commercial and investment tribunals, World Trade Organization (“WTO”) panels, and claims-settlement mechanisms have supplanted international courts in recent decades.2 These judicial bodies, the argument goes, would prove to be more successful than courts, as they have been used more frequently by States and have rendered decisions more readily enforceable.3

Yet, the so-called ‘backlash against investment arbitration’4 may have turned the tide on the golden age of international arbitration.5 For one, the European Union launched in 2015 its ‘Trade for All’ strategy, which specified that the European Commission (“Commission”) would henceforth include in its modernized International Investment Agreements (“IIA”) a ‘public Investment Court System’ (“ICS”). This ICS would consist of a First Instance Tribunal and an Appeal Tribunal that would operate in a similar manner to a traditional court.6 In the same vein, the Commission has also begun discussions with its treaty partners to establish a permanent multilateral investment court.7 These proposals are intended to respond to the deficiencies—both real and apparent—in the investment arbitration ‘system’.8

These developments raise a fundamental question: what is the distinction between arbitration and judicial settlement in international law? This question is crucial to accurately evaluate the reform proposals introduced by the European Union, as well as any other reform proposals of dispute settlement mechanisms in international law generally, especially

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3 Ibid.
8 European Parliament (n. 6).
in light of the anti-globalization movements, the Western world’s populist surge, and the related backlash against experts.

To answer this question, this paper proceeds in three parts. (II) First, the formal sources and sociological portrait of arbitration and judicial settlement will be put forward. (III) Second, the three characteristics distinguishing these two peaceful means of dispute settlement will be examined. (IV) Third, how these three characteristics should guide policy-makers in shaping future reforms will be explained, using the European Union’s ‘Trade for All’ strategy as a case study.

II. Formal Sources and Sociological Portrait of Arbitration and Judicial Settlement

From a ‘substantialist’ conception of justice, arbitration and judicial settlement are almost identical. Arbitrators and judges indeed have the same function of adjudicating disputes based on rules of law. The literature notes several essential elements shared by arbitral tribunals and international courts:

i) a body composed of independent and impartial members, ii) is called to take a decision binding upon the parties to the dispute, iii) after an adversarial procedure during which the parties benefit from an equality of rights, and, iv) (…) the decision—usually an award in the case of arbitration, a judgement when given by a permanent body—will generally be based on exclusively legal consideration but might be founded on pure equity (ex aequo et bono) if the parties so agree.

In both cases, it is precisely the binding nature of decisions that imply—and require—the independence of decision-makers, due process between the parties, and respect for the rule of law. Certainly, the question of whether that decision will be enforced or respected is a separate issue. However, the decisions are, in both cases, binding on the parties involved.

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9 Muthucumaraswamy Somarajah, The International Law on Foreign Investment (4th ed., CUP 2017), pp. 286-7 (examining how the signing of the NAFTA and the [failed] negotiations of multilateral agreements that have created additional tensions).
15 There is a distinction in international law between a ‘binding’ decision and its enforceability: UN, Charter (24 October 1945), article 94. See also Alexandra Huneeus, ‘Compliance with Judgments and Decisions’ in Cesare Romano and others (eds.), The Oxford Handbook of International Adjudication (OUP 2014). Perhaps one of the reasons why it may be more straightforward to determine whether a State has complied with the decisions of arbitral tribunals rather than the ones of international courts pertains to the subject matters of disputes. By nature and by design, remedies in investment disputes are typically limited to monetary damages. This leads to a ‘yes’ or ‘no’ answer: was the awarded compensation paid? In contrast, compliance with remedies ordered in human rights disputes—which international and regional courts more commonly deal with—is not as black and white. It may be difficult to monitor such compliance because governments can find alternative means to pursue the policies whose foundation and rationale have been declared unlawful.
16 UN, Statute of the International Court of Justice (18 April 1946), article 59; International Bank for Reconstruction and Development, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (14 October 1966), articles 53-54; UN General Assembly, United Nations Convention on the Law of the Sea (10 December
Despite these essential elements, many treaties and constitutions of international organizations have entrenched the distinction between the arbitral and judicial settlement of international disputes.\(^{17}\) In particular, Article 33, paragraph 1 of the Charter of the United Nations (“Charter”) deals with pacific means of settling international disputes and distinguishes between the two.\(^{18}\) Article 36, paragraph 3 of the Charter even notes that judicial settlement is the preferred means of settling legal disputes between States, which reflects the general philosophy of the United Nations system.\(^{19}\) The Vienna Convention on the Law of Treaties (“Vienna Convention”) also confirms that, by its presence, this distinction must be interpreted in such a way as to give effect to those terms.\(^{20}\)

Beyond mere legal formalism, the practice of international adjudication demonstrates that States attach great importance to the distinction and inherent characteristics of these judicial bodies, including in international agreements such as the United Nations Convention on the Law of the Sea (“UNCLOS”).\(^{21}\) National courts similarly accord significance to this distinction, both in reviewing challenged arbitral awards and in evaluating the consequence of international court decisions pursuant to domestic law.\(^{22}\)

The ever-growing number of transnational disputes decided by arbitral tribunals and international courts since the Second World War suggests a rich literature on the distinction between these two peaceful means of dispute settlement. On close inspection, however, courts and commentators have offered differing interpretations of what this distinction represents and implicates. For instance, in discussing the Transatlantic Trade and Investment Partnership (“TTIP”) proposal, Johnny Veeder QC noted that consensual arbitration and judicial settlement are ‘two very different creatures.’\(^{23}\) He also questioned the possibility of successfully combining within the same judicial body characteristics of both means. On the other hand, the late Professor David Caron argued that, from the viewpoint

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\(^{17}\) Philippe Couvreur, \textit{The International Court of Justice and the Effectiveness of International Law} (Brill/Nijhoff 2016), p. 18.

\(^{18}\) Charter (n. 15), article 33, para. 1. The point here is not that article 33 in and of itself proposes discrete categories in international law. A case in point is the fluid relationship between ‘mediation,’ ‘conciliation,’ and ‘good offices’ (even through the latter is not mentioned in this article). Rather, it is noted that the Charter invokes age-old—and distinct—concepts when referring to ‘arbitration’ and ‘judicial settlement’, especially as it reshapes the Permanent Court of International Justice (“PCIJ”) into the ICJ.

\(^{19}\) Ibid., article 36, para. 3 (‘legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court’).

\(^{20}\) Vienna Convention on the Law of Treaties (23 May 1969), articles 31-32. See also UNIDROIT, \textit{Principles of International Commercial Contracts} (2016), article 4. Moreover, the \textit{Handbook on the Peaceful Settlement of Disputes Between States}, prepared by the Office of Legal Affairs (Codification Division) at the request of the UN General Assembly, follows the structure of the Charter, developing the distinction between arbitration and judicial settlement: (n. 14), pp. 55-80. As the \textit{Handbook} notes, “[a]rbitral tribunals […] are essentially of an \textit{ad hoc} nature, and are composed of judges selected on the basis of parity by the parties to a dispute who also determine the procedural rules and the law applicable to the case concerned. International courts and tribunals, by contrast, are pre-constituted inasmuch as they are permanent judicial organs whose composition, jurisdictional competence and procedural rules are predetermined by their constitutive treaties’ (Ibid., p. 66).

\(^{21}\) UNCLOS (n. 16), article 287 (allowing recourse to the International Tribunal for the Law of the Sea, the ICJ, an arbitral tribunal, or a special arbitral tribunal).

\(^{22}\) Among others, the Court of Justice of the European Communities (‘ECJ’) has, in several decisions, refused to attribute to an arbitral tribunal the character of ‘courts of one of the Member States’ in the sense of what is today article 267 of the Treaty on the Functioning of the European Union (‘TFEU’). In its judgement of 17 September 1997, the ECJ set out the main distinguishing features between a court and an arbitral tribunal: the legal origin of the organ, its permanence, the compulsory nature of its jurisdiction. See \textit{Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH}, No C-54/96, 17 September 1997, para. 23, http://curia.europa.eu/juris/showPdf.jsf?docId=100846&doclang=EN. This grid of analysis from European law has certain similarities—but also several differences—with that established in international law, as shown below: Infra, pt. III.

of consent, an international court and an *ad hoc* inter-State arbitration, ‘can be said to involve the same process’.24

Several reasons explain why it is difficult to draw a clear distinction between arbitral and jurisdictional tribunals. In analysing the many methods of resolving disputes in international law, Judge James Crawford explains that the main cause of this overlap is historical:

> the permanent institutions developed historically from arbitral experience. It is now common to see the development of integrated systems of dispute resolution which include international ‘courts’ of relatively formal jurisdiction and process, whilst reserving certain sui generis questions for arbitral tribunals convened under the procedures of the same system, for example, in the procedures of UN Convention on the Law of the Sea (UNCLOS) and the WTO.25

Since international courts have developed through the institutionalization of forms of arbitration, these two methods share certain characteristics, such as the ability of the parties involved in the proceedings to influence—at least in part—the composition of the bench and to control the establishment of procedures.26

Nevertheless, it seems exaggerated for some commentators to argue that in the post-1945 era the binary nomenclature has been out-dated by the emergence of a ‘mixed regime’,27 to claim that inter-State arbitration can be best defined as a ‘locus’ of activity rather than as a category of activity,28 or to contend that new dispute settlement mechanisms are simply ‘sui generis’.29 The key to understanding this distinction lies in examining how arbitration and judicial settlement fit on a fluid spectrum rather than in strict categories. Yet, the identification of opposite poles is necessary to accurately evaluate any reform proposals of dispute settlement mechanisms.30

### III. Three Characteristics Distinguishing Arbitration From Judicial Settlement

Based on the fluid spectrum set forth, new perspectives emerge on the three characteristics distinguishing arbitration from judicial settlement, namely, (a) the consent to jurisdiction, (b) the selection of decision-makers, and (c) the criterion of permanence. Conceptually, the solution adopted by a means of dispute settlement to the first characteristic—consent—is likely to influence the second, that is, the way adjudicators are chosen. The same goes for the second characteristic towards the third, meaning the mode of appointment of decision-makers is likely to affect the temporality of the judicial body.


26 Cesare Romano and others, ‘Mapping International Adjudicative Bodies, the Issues, and Players’ in Cesare Romano and others (n. 15), p. 5. See also Couvreur (n. 17), p. 18 (‘Notwithstanding the general considerations and objectives pursued by establishing a permanent judicial institution, the judicial settlement of international disputes involves several rules and procedures drawn from arbitral practice’).


30 See Samantha Besson, ‘Legal Philosophical Issues of International Adjudication’ in Cesare Romano and others (n. 15), p. 419 (‘The fact that international jurisdiction may not always be compulsory, general, and centralized merely affects the various functions of international adjudication that may be attributed in the international legal order as a whole, and not the adjudicative function itself’).
a. Consent to Jurisdiction

The first characteristic is the prior consent to the binding settlement of the dispute. Since the notion of consent is elusive and can be used in many contexts, it is defined here primarily on the basis of two aspects. First, consent can be differentiated according to the party or parties who can entitled to submit a claim against another party: the offer to adjudicate can thus be directed towards a few defined persons (bilateral/plurilateral consent) or to a large group of persons (multilateral consent). Second, the consensual nature also differs according to the judicial body’s scope of jurisdiction: this offer may include specific disputes (narrow consent) or several types of disputes (broad consent). As these aspects are relatively abstract, they will also be illustrated with several examples.

In domestic law, State justice is imposed on legal and natural persons (“persons”), and the administrative State, despite their will. In international courts, the Westphalian conception of the State in public international law always requires its consent, as the authority of international law is dependent upon the voluntary participation of States. However, these courts sit at one extreme of the spectrum in terms of ‘compulsory’ jurisdiction. Explicit ex ante consent to the jurisdiction of an international court is typical of judicial settlement in international law. In this case, consent is often multilateral and broad. Because of the prior conferral of jurisdiction, the control of the parties over the applicable law, the process, and rules of procedure are relatively minimal in international courts.

For instance, the judicial system governing the 164 WTO members, whereby disputes concerning any agreement contained in the Final Act of the Uruguay Round must be resolved through third-party adjudication, is a truly multilateral system. To take another example, seventy-three States have accepted the compulsory jurisdiction of the ICJ, which

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31 In public international law, ‘consent to be bound’ is a technical term ‘connoting the acceptance by a State that is bound by a treaty’: John P Grant and J Craig Barker (eds.), Encyclopaedic Dictionary of International Law (3rd ed., OUP 2009), s ‘consent to be bound’. This notion is entrenched and further defined in articles 11-15 and 17 of the Vienna Convention (n. 20). In international commercial law, consent is understood in its contractual sense, namely that ‘[t]he parties are free to enter into a contract and determine its content’: UNIDROIT (n. 20), article 1.1 (‘Freedom of Contract’).
32 This aspect relates to the relationship of the parties, that is, the ‘Who?’ See Andrea Marco Steingruber, Consent in International Arbitration (OUP 2012), para. 5.79. This spectrum is not only theoretical; it has concrete implications. For instance, in the case of a plurilateral agreement, where a limited number of States have a special interest in the object of the agreement, the possibility of a reservation is more limited than in a multilateral agreement. This principle of customary international law is codified in article 20, paragraph 2 of the Vienna Convention (n. 20): ‘When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties’.
33 This aspect relates to the subject matter of the dispute, that is, the ‘What?’. See Gary Born, International Commercial Arbitration (Wolters Kluwer Law & Business 2009), p. 222 (‘a further distinguishing characteristic of arbitration is that an arbitral tribunal is ordinarily selected, usually by the parties or their contractually-specified delegate, for a specific dispute or category of disputes’).
34 Romano and others, ‘Bodies, the Issues, and Players’ (n. 26), pp. 5-6. The principle of a democratic society based on the rule of law is also based, albeit more indirectly, on the concept of consent of individuals: see Jean-Jacques Rousseau, Du contrat social: ou, Principes du droit politique (first published 1762, Garnier Frères 1960).
35 Professor Caron noted, ‘if consent is the focus, an international court and an ad hoc interstate arbitration can be said to involve the same process’ (n. 24), p. 109.
36 For States, their consent is of course required in international law before they submit to the jurisdiction of any judicial body. Nevertheless, ‘international adjudication has evolved in some fields and regions to the point that adjudication is often compulsory’ (Romano and others, ‘Bodies, the Issues, and Players’ (n. 26), p. 7.
37 The compulsory jurisdiction represents ‘[t]he capacity of an international tribunal to order and thus compel states to litigate a dispute before it’ (Jonathan Law, A Dictionary of Law [9th ed., OUP 2018]).
38 Romano and others, ‘Bodies, the Issues, and Players’ (n. 26), pp. 5-6. UN General Assembly, Rome Statute of the International Criminal Court (1 July 2002), article 1 (‘A State which accepts this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5’). Contra August Reinisch, ‘Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards’ (2016) 19 JIEL, pp. 761, 766.
means that any international legal dispute involving those States may be submitted to the Court, provided that all States parties to the dispute have accepted its compulsory jurisdiction as well.41 As for the Inter-American Court of Human Rights ("IACHR"), twenty States have consented on a blanket basis to its contentious jurisdiction to decide on alleged violations of numerous and far-reaching human rights.42

By contrast, consent in international commercial arbitration is typically bilateral and narrow. When such persons and States decide to submit to this type of arbitration, they do so on their own initiative, also agreeing on the identity of the decision-makers and the rules of procedure applicable in the case at hand.43 In this sense, recourse to arbitration is ‘voluntary, consensual and not compulsory’.44 Consent, as noted by Gary Born, is an essential characteristic of international commercial arbitration.45

In traditional Investor-State Dispute Settlement ("ISDS"), (asymmetrical) consent is bilateral/plurilateral and narrow, but this proposition remains true only to the extent that both aspects are given a liberal interpretation. Apart from a few notable exceptions, the majority of Bilateral Investment Treaties ("BITs") and IIAs and are limited to protecting foreign investment from violations of international law.46 Host States have chosen to extend to foreign investors from another State a unilateral offer to arbitrate in BITs (and, in some IIAs, to foreign investors from several other States), which they accept through the well-known concept of ‘arbitration without privity’,47 thus contributing to making the notion of consent a specificity of arbitration. Moreover, the goal of emancipating investment arbitration from domestic law, and building it as a viable alternative to domestic courts, is unequivocal.48

In the end, the examples studied above, and compared to each other, show that the traditional distinction provides some insight. Surely consent is either there or not. But if arbitration and judicial settlement truly differ on the notion of consent in international adjudication, the fundamental divergence must lie in ‘who’ and ‘what’ are the objects of such consent.49

41 ICJ Statute (n. 16), article 36, para. 2. See also ICJ, ‘Declarations Recognizing the Jurisdiction of the Court as Compulsory’ <https://www.icj-cij.org/en/declarations> accessed on 30 January 2019.
43 UN, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (7 June 1959), 21 UST 2517, 330 UNTS 38, article II, para. 2 (‘Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration’). See also Franz Schwarz, ‘Limits of Party Autonomy in International Commercial Arbitration’ in Christina Knahr and others (eds.), Investment and Commercial Arbitration: Similarities and Divergences, vol. 3 (Eleven International 2010), p. 47 (explaining how greater autonomy of the parties in the development of the procedure is considered as a feature of arbitration in contrast to judicial settlement).
44 Kaufmann-Kohler, Potestà (n. 14), para. 93. On interstate arbitration, see Caron (n. 24), p. 111 (‘[I]nternational law leaves the structuring and conduct of the arbitration entirely in the control of the parties’).
45 Born, International Commercial Arbitration (n. 33), p. 219. Mr Born makes this comment regarding international commercial arbitration only; he does not reflect on the importance of consent in general public international law.
47 Jan Paulsson, ‘Arbitration Without Privity’ (1995) 10 ICSIDReview, p. 232. See also ICSID Convention (n. 16), article 25 (‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre’).
48 Steingruber (n. 32), para. 15.23 (‘in investment arbitration—like in commercial arbitration—the attempt to emancipate arbitration from a State justice system is clear and unavoidable’).
49 Besson (n. 30), p. 419.
b. Selection of Decision-Makers

While the previous characteristic distinguishing arbitral tribunals from international courts concerned the authority and jurisdiction of the judicial body, the second relates to the ‘legitimacy’ of decision-makers in the eyes of both the disputing parties and the public. It concerns, more specifically, the selection and remuneration of arbitrators and judges in international law. In order for neutral third-parties making binding decisions to be perceived as legitimate, they must be accountable—in a way that does not compromise their independence—to those who may be affected by their decisions. This goal is achieved differently in arbitration and judicial settlement.

In domestic law, the ‘public’ judge is paid by the State and imposed to the disputing parties without their prior agreement. In a democracy, the State (that is, the Sovereign) derives its legitimacy from the mandate of its population and transfers its prerogative to establish justice to its representatives, the magistrates. Albeit with some nuances, their authority thus stems in liberal democracies from the fact that the State has chosen them in the name of the people to render justice for them (and, importantly, because they mostly live up to these expectations in practice).

The situation is similar, but more nuanced, in general, public international law. In several international courts, the selection of judges is beyond the control of the parties to a specific dispute. At the International Criminal Court (“ICC”), for example, an assembly of States parties elects judges. States are, however, generally more reluctant to consent to an international court without having a say, at least in an oblique way, on the identity and selection of adjudicators when their own international responsibility can be directly examined. As an illustration, at the European Court of Human Rights (“ECtHR”), judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates proposed by the State Party whose judge must be elected. At the ICJ, the General Assembly and Security Council elect judges from the list of candidates nominated by national groups of States, although a State party to a case still has the opportunity to appoint an ad hoc judge. Thus, for States, the legitimacy of third party decision-makers

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50 By ‘authority,’ this statement alludes to the powers of a court or tribunal, and not to the sources of obligations in international law themselves. On the latter, see the classic piece of Gerald Fitzmaurice, ‘The Foundations of the Authority of International Law and the Problem of Enforcement’ (1956) 19 ModLRev, p. 1.

51 In this context, the concept of legitimacy is employed in its narrowest sense. Using Stephan Schill’s terminology, the term here refers not to national or global legitimacy, but rather to community legitimacy: that is, to the validity of the arbitration proceeding from the perspective of the disputing parties and service users: ‘Conceptions of Legitimacy of International Arbitration’ in David D Caron and others (eds.), Practising Virtue: Inside International Arbitration (OUP 2015), p. 119.

52 Guy Canivet and others (eds.), Independence, Accountability, and the Judiciary (BIICL 2006) (noting, in their comparative study in domestic law, that the relationship between selection powers and judicial accountability is widely recognized).

53 Cesare Romano and others, ‘Bodies, the Issues, and Players’ (n. 26), p. 5.


56 To be clear, the view set out on the selection of decision-makers in public international law is not premised on transposing the idea of the unitary State to the international level. Rather, the cornerstone of the analysis centres, as with the two other characteristics, on how each body prioritizes private or public interests: Infra, pt. IV.

57 ICC Statute (n. 38), article 36.

58 Jan Paulsson, The Idea of Arbitration (OUP), pp. 153-4 (‘States are wary of the international legal process, as an external check on their sovereignty, and have traditionally insisted on the unilateral right to appoint at least one arbitrator or judge to international tribunals. This is all the more understandable when one considers the generality and abstraction with which so much of public international law is formulated, the controversies as to their sources and interpretation, and the likely politicization of such disputes’).


60 ICJ Statute (n. 16), articles 4-10.
who settle international disputes always derives from their role in this selection, but States’
powers are generally limited and indirect in international courts.61

Moreover, hundreds of millions of dollars are invested every year in international courts
by States, whether or not they participate in disputes pending before them.62 This idea can
be folded down through the concept of potential litigants. Just as the wider tax base bears
the cost of the court system domestically, so the international community bears the cost of
international tribunals, whether they use them or not at a specific time.

In comparison, in international arbitration (either between persons in an international
commercial arbitration or between States in an inter-State arbitration), the legitimacy of the
arbitrator comes from his or her selection by these parties and is therefore part of a so-called
‘private justice’.63 The arbitrator is thus neither a member of the State judiciary,64 nor a
member of the government,65 nor even a member of any other emanation of the State.66
The disputing parties also pay the arbitrator.67 Hence, the method of selection represents a
real specificity of international arbitration. Sophie Nappert also points out, in the context of
the creation of the Permanent Court of International Justice (‘PCIJ’) in 1920, the Advisory
Committee of Jurists included the appointment of arbitrators as a distinctive feature of
arbitration as opposed to judicial settlement.68

In investment arbitration, the role of the parties in the selection of decision-makers is
also fundamental in practice, even if it is not a ‘right’ of persons in the international legal
order. For persons, the legitimacy of adjudicators in public international law depends on the
way in which it is approached and corresponds to a combination of the sources of legitimacy
in domestic and international law: it is ensured by the choice made by a person’s State of
origin, as its representative in international law,69 about whether or not to give it the power
to appoint one or more decision-makers. It thus seems exaggerated to assert, as some
commentators do, that persons have the right to choose their arbitrators in investment
arbitration.70 The Iran-United States Claims Tribunal (‘IUSCT’), in particular, which is

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(explaining how ‘[the] nominations of judges in international courts is not simple, apolitical processes’). On negotiations
regarding the allocation of votes in elections, see Ofer Eldar, ‘Vote-Trading in International Institutions’ (2008) 19 EJIL,
p. 3; Ruth Mackenzie and others, Selecting International Judges: Principle, Process, and Politics (OUP 2010), pp. 122-
62 Romano and others, ‘Bodies, the Issues, and Players’ (n. 26), p. 5 (‘The adjudicators are selected, elected, or nominated
through a mechanism that does not depend on the will of the litigating parties’). For instance, the budgets of the WTO
and ICC, borne by the Member States of these institutions, are quite large and constantly increasing: Zuleta Eduardo,
‘The Challenges of Creating a Standing International Investment Court’ (2014) 11 TDM.
63 Ibid. (‘Since the parties select the members of arbitral bodies, the mandate of arbitrators is circumscribed to administ-
ering “private justice”’).
64 Gabrielle Kaufmann-Kohler, Antonio Rigozzi, International Arbitration: Law and Practice in Switzerland (3rd ed., OUP
66 Charles Jarroson, La notion d’arbitrage (Librairie générale de droit et de jurisprudence 1987), p. 103. Yet, in practice,
arbitrators are often senior retired government officials: Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25
EJIL, p. 387. See eg Jonathan Brosseau, ‘From Canadian Minister to International Arbitrator: The Oral History of Marc
Lalonde’ (2016) 6 JArb&Med, p. 73.
67 Alec Stone Sweet, Florian Grisel, The Evolution of International Arbitration: Judicialization, Governance, Legitimacy
(OUP 2017), p. 27 (‘The arbitrator owes [her] obligations foremost to those who pay her: the parties’).
68 Sophie Nappert, ‘Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism’ (The 2015 EFILA Inaugural
69 Christine M. Chinkin, Third Parties in International Law (OUP 1993), pp. 120-3.
70 Charles Brower, Charles B. Rosenberg, among others, argue that this is fundamental to the legitimacy of international
arbitration: ‘The Death of the Two-Headed Nightingale: Why the Paulsson–van Den Berg Presumption that Party-
Appointed Arbitrators Are Untrustworthy is Wrongheaded’ (2013) 29 ArbIntl, p. 7. See also Alan Scott Rau, ‘On Integrity
In Private Judging’ (1998) 14 ArbIntl, p. 115 (noting that “widely shared conviction that the ability to participate in the
recognized as a form of international arbitration, decided claims that were (indirectly) submitted to it by citizens in the exercise of diplomatic protection,\(^{71}\) and exclusively the United States and Iran appointed its members.\(^{72}\)

In spite of a few counter-examples, the role of parties in the selection of decision-makers certainly is indeed a characteristic of arbitration. It can be observed, most notably, in traditional ISDS where foreign investors have commonly been granted the unilateral power to appoint arbitrators in more than 3,000 IIAs.\(^{73}\)

c. Criterion of Permanence

The third characteristic that distinguishes arbitration from judicial settlement in international law is the criterion of permanence. This characteristic is based on two related aspects. The first is institutional; it concerns the temporality of the judicial body and the security of tenure of its decision-makers. The second aspect is functional; it concerns the mandate of these adjudicators and their role in the development of the law.\(^{74}\)

International arbitration is typically ad hoc or institutional, while judicial settlement invariably takes place in permanent judicial bodies.\(^{75}\) In arbitration, the arbitrator is chosen by the parties on a case-by-case basis after the dispute arises in order to decide on a particular dispute; the arbitral tribunal is dismissed after rendering its final award. Conversely, judicial settlement pre-exists the question to be decided.\(^{76}\) A judge generally enjoys, in domestic law, security of tenure for life or until the mandatory retirement age and, in international law, fixed terms that vary in duration and with regard to the possibility of re-election.\(^{77}\)

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\(^{73}\) Michael E. Schneider, 'President's Message: Forbidding Unilateral Appointments of Arbitrators-A Case of Vicarious Hypochondria?' (2011) 29 ASABulletin, p. 273 ('The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not centuries'). See also Fabien Gélinas, 'The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?' (2011) 24 NYIntlLRev 1, p. 28 ('The party appointment system has emerged out of long-established and widely shared practices across the whole spectrum of adjudicative configurations').

\(^{74}\) In the literature, the criterion of permanence commonly treats the status of the judicial body as an end in itself. The argument here is rather that the temporality of an instance brings about an important consequence, that is, it determines its function (public vs private) in their respective regimes. Certainly, any rule of law necessarily belongs to a legal system (Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System [OUP 1980]). Without taking a stand in the debate on systems theory and the constitutionallisation of international law, the fact remains that regional and international courts fundamentally shape the legal system in which they operate by their functional role, even if they are not per se 'centralized': on the general system of public international law and specialized systems in international law, see International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (Report of the Study Group of the International Law Commission, A/CN.4/L.682, 2006).

\(^{75}\) Reinisch (n. 38), p. 766 ('Usually, the distinctive element is exactly the permanency [...] Judges are appointed for a certain period of time and for an undefined number of disputes, whereas arbitrators are appointed by the disputing parties for a specific dispute').

\(^{76}\) Romano and others (n. 52), p. 5.

\(^{77}\) In the United States, this is the case of federal courts: see Vicki C Jackson, 'Packages of Judicial Independence: The Selection and Tenure of Article III Judges' (2006-07) 95 GeoLJ, pp. 965, 986-96.

\(^{78}\) In Canada, this is the case for judges of the superior and federal courts and of the Supreme Court: see R v Lippé, [1991] 2 SCR 114; Reference re Remuneration of Judges of the Provincial Court (PEI) [1997] 3 SCR, p. 3.

\(^{79}\) Judges are appointed for nine years with the possibility of re-election to the ICJ: ICJ Statute (n. 16), article 13. After much deliberation, the consensus was that ICC judges should not be eligible for re-election due to the particularities of a criminal court: ICC Statute (n. 38), article 36, para. 9; Medard R Rwelamira, 'Composition and Administration of the Court' in Roy SK Lee (ed.), The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results (Kluwer Law International 1999).
Yet, the criterion of permanence is one of the aspects on which the analogy between domestic courts and international courts is the most tenuous, as shown by the examples of part-time appointments at the WTO Appellate Body and of ICJ Chambers and Committees. From the viewpoint of formal sources of international law, the temporality of a judicial body and security of tenure are also not necessarily decisive. The New York Convention recognizes, for instance, that both ad hoc and standing tribunals may render enforceable arbitral awards. The preparatory work of the Convention confirms that even a permanent dispute settlement body can be considered as arbitration.

However, the institutional aspect of the criterion of permanence significantly affects, on the ground, the mandate of adjudicators and their role in ‘law-making.’ In international arbitration, ad hoc tripartite panels most often hear cases. The arbitrators—private decision-makers—deliver justice for the parties. Although they refer materially to other decisions and have contributed indirectly to the development of international law, tribunals do not follow the rule of stare decisis nor do ‘precedents’ bind them. Their opinion is nothing more, in theory, than that of individuals appointed to resolve a specific legal dispute. Since tribunals are dissolved at the end of the proceedings, similar cases may also potentially find different, if not contradictory, conclusions from one tribunal to another. In addition, there is no opportunity of appeal to review decisions in fact or in law to ensure long-term consistency in the field. Dissents serve more to express the opinion of the arbitrator (often, that of the losing side party-appointed arbitrator) than to ensure the development of the law.

In contrast, the authority of the international judge comes from its public mandate and its decisions are, by nature, a public good. While they are tasked with resolving the cases

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80 The possibility of using ad hoc chambers established under article 26, para. 2 of the ICJ Statute has been challenged by some judges: see eg Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, I.C.J. Reports 1990, Dissenting opinion of Judge Shahabuddeen, p. 18.
81 New York Convention (n. 43), article I, para. 2.
82 Reinisch (n. 38), p. 767.
85 Stephan W. Schill, ‘International Arbitrators as System-Builders’ (2010) 106 ASILPROC, pp. 295, 296 (‘international arbitrators do not function simply as Montesqueuan bouches de la loi, who passively apply pre-existing legal rules to the facts of the cases. Rather, international arbitrators contribute significantly to making the rules and principles governing international economic transactions both private and public. This suggests that they operate in an increasingly public system of international arbitration that goes much beyond the settlement of individual disputes and that involves important elements of law-making in the transnational legal realm’).
87 Repeat appointments in international arbitration generate a form of consistency, as arbitrators generally adopt the same position on procedural and substantive issues in between decisions: see generally Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 ArbIntl, p. 357. However, they are in no way equivalent to sitting courts, which benefit from security of tenure, institutional knowledge, permanent secretariats, etc.
88 For consideration of appeals mechanism in ISDS, see Karl P. Sauvant (ed.), Appeals Mechanism in International Investment Disputes (OUP 2008).
90 Cesare Romano, ‘The Price of International Justice’ (2005) 4 LPICT, p. 281; Philippa Webb, International Judicial Integration and Fragmentation (OUP 2013), pp. 1-3. The traditional distinction is challenged by the WTO, even though this model confirms certain its key concepts in effect. In the Dispute Settlement Body (“DSB”), panels are ad hoc, their decisions only binding on adoption by the membership, and even then only bind the parties to the dispute. Nonetheless, the impact of their decisions is in fact significant. For instance, even the reasoning contained in an unadopted panel report may prove to be compelling in a future case regarding the same legal question: see Japan—Alcoholic Beverages II (Complaint by the European Communities) (1996) WTO DocWT/DS8/R, para. 6.10 (Panel Report); Japan—Alcoholic Beverages II (Complaint by the European Communities) (1996) WTO DocWT/DS8/AB/R, DSR 1996:I, pp. 97, 108 (Appellate Body Report), https://docs.wto.org/dol2fe/ENPages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32900&CurrentCatalogueIdIndex=0&FullTextSearch. The implications of
before them, judges contribute to the coherent development of rules in a specific area of
ternational law because ‘[t]hey sit on the body’s bench and decide a series of cases.’
Beyond their adjudicatory functions, courts strive to promote the rule of law through
educational and capacity-building initiatives. For all these reasons, the decisions of
international courts are often cited with authority by arbitral tribunals, while the reserve
scenario is uncommon, if not non-existent.

The ICJ further illustrates how the permanence of a judicial body impacts its role in the
application and clarification of public international law. Pursuant to Article 59 of the Statute,
‘[t]he decision of the Court has no binding force except between the parties and in respect
of that particular case.’ Nevertheless, the Court itself noted:

/[t]o the extent that the decisions contain findings of law, the Court will treat
them as it treats all previous decisions: that is to say that, while those
decisions are in no way binding on the Court, it will not depart from its settled
jurisprudence unless it finds very particular reasons to do so.

Moreover, during the preliminary negotiations to create this new international court in the
middle of the 20th century, the characteristics that this mechanism should have to enable
the advancement of the international legal order were explained as follows:

Only such a court should succeed in ‘forming a series of precedents’ and
possibly develop a body of international law: ‘The Court of International
Justice, being composed of judges, permanently associated with each other
in the same work, and (…) retaining their seats from one case to another,
can develop a continuous tradition, and assure the harmonious and logical
development of International Law.’

Notwithstanding some exceptions, ICJ judges hear all cases, which helps develop a
consistent case law. In the same vein, although international courts do not always provide
for an appeal mechanism, other means, such as revisions and dissents, help the
development of international law.
IV. Why the Distinction Matters for Reforms of Dispute Settlement Mechanisms

Going back to the European Union's 'Trade for All' strategy, this case study illustrates how the distinction between arbitration and judicial settlement matters in international law. The nomenclature is certainly of great value to the main actors involved, the European Union and its treaty partners, who themselves refer to the ICS as a 'court' and seek to exploit the legitimacy that accompanies this designation.\(^{100}\) While the attempt of the European Union to address some valid concerns about investment arbitration needs to be applauded, the issues addressed and those unresolved suggest less a global philosophy regarding investment arbitration and more a targeted response to the most sensitive points of the current process.\(^{101}\)

More importantly, the ICS example demonstrates how crucial it is for policy-makers to avoid putting the cart before the horse in forging ahead with reforms in ISDS and other fields of international law, including in the European Union's effort to modernize the WTO,\(^{102}\) the United Nations Commission on International Trade Law's work in reforming investment arbitration, and the United States' reassessment of treaties granting jurisdiction to the ICJ.\(^{103}\) In its proposal, perhaps the European Union did not ask the right initial question by emphasizing the dichotomy between arbitration and judicial settlement. Rather, the Commission could have identified first 'who' exactly is expected to benefit from the prospective dispute settlement mechanism.

As this paper has shown, the characteristics distinguishing arbitration and judicial settlement are interrelated and all address—on a fluid spectrum rather than in strict categories—the 'public vs. private' divide in the pacific settlement of international disputes. Only once policy-makers decided whether they want a dispute settlement mechanism to render justice primarily for the disputing parties or for the common good should they determine the 'judicialization' this mechanism requires.\(^{104}\) Indeed, arbitral tribunals and international courts are confronted with the same 'judicial trilemma'. They face an interlocking trade-off among pursuit of three core judicial values, namely independence, accountability, and transparency.\(^{105}\) However, there is no perfect level of judicialization (only an optimal one) and no perfect blend of fundamental values (only a harmonized one).

The European Union can introduce into investment tribunals characteristics traditionally associated with domestic courts and international courts. However, the real question, which the European Union may be purposefully fending off, is how far it is ready to go to establish international institutions not only for its own sake, but also for that of the international public.

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\(^{100}\) For political reasons, the Commission has sought to present the ICS as a 'court' to respond to public criticisms of traditional ISDS as a system supplanting the authority of national courts: Catherine Kessedjian, Lukas Vanhonnaeker, 'Les différends entre investisseurs et états hôtes par un tribunal arbitral permanent. L’exemple du CETA' (2017) 2017 RTDE, pp. 633, 636 ('La sémantique est importante et le vocabulaire choisi par les négociateurs nécessairement fluctuant compte tenu de la charge politique négative que revêt la référence à l’arbitrage').


\(^{104}\) In the scholarship, specialists have wondered whether the international trade regime has become 'overlegalized,' thus provoking a hostile reaction from certain states: see eg Judith Goldstein, Lisa L Martin, 'Legalization, Trade Liberalization, and Domestic Constituents: A Cautionary Note' (2000) 54 IntlOrg, p. 603; Joost Pauwelyn, 'The Transformation of World Trade' (2005-06) 104 MichLRev, p. 1. For the sake of clarity, it is clear that an arbitrator offering its dispute settlement services on the market economy benefits all. The point is that the performance of this service in a specific instance does not produce a public good, but rather a private good.

community more broadly. States are no doubt entitled to act in their national interests and to find that the sacrifice of their individual freedom sometimes comes at a too hefty price. Yet, they must not forget that they currently reap the benefits of the day-to-day investment into international courts since the dawn of the post-1945 era.
Preliminary thoughts on the conceptual compatibility between i) annulment grounds in ICSID and civil law systems featuring a Cour de Cassation, and ii) the role and function of ICSID ad hoc annulment committee members and the Judges of the International Court of Justice. A comparative analysis, in the context of ISDS reform

G. Matteo Vaccaro-Incisa*

I. Introduction

It may prove difficult for the proposal of establishing the EU-backed Multilateral Investment Court (“MIC”) to overcome the intricate political and legal hurdles that emerged in the context of the ongoing discussion at UNCITRAL on the reform of investor-State Dispute Settlement (“ISDS”). Gathering the necessary consent for an international legal instrument creating yet another specialized, permanent international court appears a daunting task that will require considerable time and political capital, in the face of the various positions (or lack of interest) that several key States maintain. Moreover, the idea of opening arbitral awards to a review in fact — as opposed to only law — could aggravate — as opposed to contribute solving — some of the problems affecting Investor-State Arbitration (“ISA”) as it currently stands.

The meritorious work of Professor Roberts and IAR makes it possible to posit States’ current positions expressed at UNCITRAL on the MIC.2 Thus, within the EU, France, Germany, Spain, Belgium and Romania have openly declared their support for it. In favor also are Singapore, Mauritius and Morocco. Outspoken opponents are, nevertheless, numerous and not “lightweights”: the United States, Japan, Chile, Russia, Israel, Vietnam, Bahrain, and El Salvador. Canada and China are not outright against the MIC, but their statements do not lend support for it either. Cautious is also the attitude of Australia, Argentina, Egypt, the Philippines, Turkey, and Thailand. Brazil and South Africa have confirmed their lack of interest for ISA altogether.

It is somewhat striking that Canada and Vietnam do not expressly support the MIC, despite having recently concluded bilateral treaties with the EU including the “intermediate” solution labelled Investment Court System (“ICS”).3 Even more striking is that none of the nine Latin American States participating in the UNCITRAL discussions (most notably, Argentina, long epicentre of investment arbitration), are not against ISA per se. Australia, too, despite its long voiced concerns against ISA, is for the time being not supportive of the EU proposal.

In the context of the ongoing discussions and the movement to replace the current horizontal ad hoc ICSID annulment committee system with a hierarchical system (whatever its form),4 the following sections aims at offering a preliminary brief review of the

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3 This notwithstanding the commitment of, e.g., Canada, at article 8.29 CETA, to “…pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism…”.

compatibility i) of the systems of annulment of decisions at ICSID and in civil law systems with a Cour de Cassation; and ii) of ICSID ad hoc annulment committee members and judges of the International Court of Justice (ICJ). If a key aspect of ISDS reform is to recompose otherwise palpingenetic (and costly) debates (e.g., definition of investment, extent of the Most Favourite Nation (“MFN”) clause), then the potentially needed “hierarchicalization” of the system could happen via the ICJ judges, on the basis of ICSID grounds of annulment already existing, yet reconceptualized.

II. ICSID and Cour de Cassation: comparative analysis of the grounds of annulment

One issue of reforming ISDS is whether the grounds for annulment (or review) of investment decisions (be they arbitral awards or court pronouncements) need to be different from those established in the ICSID Convention (Article 52.1). The Convention’s wide acceptance makes its annulment grounds a reasonable starting point. It is true, however, that some of them are long subject to interpretive debate — in particular, that of “manifest excess of powers”, and especially with regard to the extent of “failure to apply the law”. In the context of this brief preliminary study, the following looks at the genesis of ICSID grounds of annulment, the related key interpretive issues, and the compatibility of these grounds with those used in selected civil law systems with a Cour de Cassation.

Next to borrowings from other fields of international law, domestic legal systems played a non-secondary role in the determination of ICSID grounds of annulment at the time of the drafting of the Convention. In their subsequent interpretation and development, however, the role of some of these systems (and, in particular, civil law) has been marginal. In this respect, it is significant that in at least 28 civil law jurisdictions “annulment” of decisions is the typical function of the Cour de Cassation, i.e., the highest court dedicated to preserve the uniform interpretation of the law within a domestic legal system. Comparing Article 52.1 ICSID with the grounds for which decisions of lower courts can be brought before, e.g., the French or Italian Cour de Cassation, one may be surprised by the similarities between the systems. In the context of this brief preliminary review, the analysis will carry on focusing on these two domestic systems only (as opposed to all civil law systems featuring a Cour de Cassation), being possibly the most influential both in absolute terms and relatively to the contribution brought in during the drafting of the ICSID Convention.

Preliminarily, it is surprising that, notwithstanding the substantial scholarly contributions on ICSID annulment, next to nothing explores the relationship between the latter and the system of annulment and authoritative interpretation of the law the cours de cassation embodies. Most writings move from the Convention’s travaux preparatoires, their

5 Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
   (a) that the Tribunal was not properly constituted;
   (b) that the Tribunal has manifestly exceeded its powers;
   (c) that there was corruption on the part of a member of the Tribunal;
   (d) that there has been a serious departure from a fundamental rule of procedure; or
   (e) that the award has failed to state the reasons on which it is based.

6 States with cour de cassation proper: Albania, Armenia, Belgium, Bulgaria, Congo (Kinshasa), Egypt, France, Gabon, Greece, Haiti, Holy See, Italy, Ivory Coast, Jordan, Lebanon, Morocco, Qatar, Romania, Senegal, Serbia, Tunisia, Turkey. States whose constitutional, federal or anyway higher courts act with cour de cassation typical powers: Colombia, Hong Kong, Kenya, Monaco, Singapore, Spain, Switzerland.


8 E.g., Schreuer’s 206-strong pages commentary on Article 52 ICSID mentions the term “Cour de Cassation” once, at para. 491 (in a seemingly contradictory fashion; see sections below); Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, The ICSID Convention: A Commentary, Cambridge, 2009. More recently, a few passing mentions may be found in Nikolaos Tsolakidis, ICSID Annulment Standards: Who Has Finally Won the Reisman v. Broches Debate
interpretation - no doubt highly influential — of Mr. Broches, and Professor Caron’s 1992 prominent article on the difference between annulment and appeal. This scholarly restraint may be due to: i) the dominance of the English language in the international legal debate (and a much more limited participation of scholars from different languages and legal background until just a couple of decades ago); ii) the ensuing influence of common law-based thinking and approaches in commercial arbitration (and not only); iii) the fact that the Cour de Cassation is alien to common law systems; and iv) even when non-native-English speaking scholars dealt with ICISD annulment, it seems they did not come from countries (or received their legal education in countries) with a civil law system contemplating a Cour de Cassation.

The lack of academic analysis in this respect is unfortunate, as scholars have consequently focused their attention on comparisons between instruments more typical of investment or commercial arbitration (e.g., ICSID annulment v NY Convention set aside), or between investment arbitration and State-State arbitration. Especially in the case of ICSID arbitration, however, this approach equates different animals, and different tasks.

Firstly, in commercial arbitration the doctrine privileging finality of the award over its legal correctness is universally accepted, as it reflects the choice of two private parties to resort to an ad hoc means alternative to domestic courts to settle their disputes over a commercial transaction. If an award ends up being scrutinized by a domestic judge, it is because of alleged serious defects that make it incompatible with that domestic legal system. Echoing Professor Caron’s words, the domestic judge is unconcerned with the actual dispute between the parties or their interest, his/her only interest being that to preserve the integrity of the domestic legal system. That is also the reason why usually setting aside proceedings fall under the competence of higher courts. Indeed, in civil legal systems that contemplate a cour de cassation, these cases typically end up being dealt by it (in France and Italy, following a first answer by the court of appeal where enforcement is requested).

Secondly, in ad hoc State-State arbitration, the well-established opposition of States to conceive any appeals is after all a logical reflection of the customary Latin maxim rex superiorem non recognoscens, and the otherwise conceptual contradiction of admitting the review of a decision where two Sovereigns are in control of every step of the dispute and its settlement (arbitration agreement, choice of arbitrators, arbitration procedure).

By comparison, the task of an ICSID annulment committee is different. First, it operates within the framework of a system defined as autonomous, delocalized and “self-contained” (as opposed to ad hoc spot mechanisms of commercial or State-State arbitration). Second, the task of an ICSID annulment committee is dependent on the understanding of Article 52 its members have. This potentially troublesome dependency is reflected in Professor Schreuer's Commentary, where in two close sentences it is stated: “...the ad hoc committee’s function is purely that of a Court of Cassation,” and yet, “The ad hoc committee is not a higher authority that sets standards or makes policy. Its function is purely to clear the way for a fresh decision by a new tribunal”. The two sentences are at least partly at

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10 E.g., Doak Bishop (US citizen, US education), S.M. Marchili (Argentine citizen, Argentine & US education), Annulment under ICSID convention, Oxford, 2012; Christoph Schreuer (Austrian citizen and education), Loretta Malintoppi (Italian citizen but US education), August Reinisch (Austrian citizen and education), Anthony Sinclair (UK citizen & education), above.; David Caron (UK citizen and education), above.

11 Caron, supra, pp. 15-6.

12 Caron, supra, p. 24

13 Schreuer, supra, pp. 1041-2, paras. 491-2.
odds, as the essential function of a Cour de Cassation is that its pronouncement on the interpretation of the law is authoritative: not only, in case of annulment, for the lower court (which must then decide the issue anew in accordance with the interpretive instructions provided), but in any case for all courts that will subsequently deal with the same point of law. Professor Schreuer’s apparently contradictory words reflect the systemic schizophrenia of ICSID, which entrusts ad hoc committees with the role of a supreme court, but only with regard to the pars destruens of a specific case (i.e., the power to annul), depriving them of the pars construens (i.e., the power to make authoritative interpretations for the system as a whole). The lack of interpretive authoritativeness, however, is part and parcel with a horizontal system made of optional, ad hoc and entirely independent annulment committees.

One clear way to represent the similarity between the grounds to request an annulment at ICSID and at Cour de Cassation in Italy and France is with the following comparative table:

<table>
<thead>
<tr>
<th>Art. 604 c.p.c. FR /jurisp.</th>
<th>Art. 360 c.p.c. IT</th>
<th>Art. 52.1 ICSID</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. défaut de motivation</td>
<td>1. giurisdizione</td>
<td>1. improper constitution</td>
</tr>
<tr>
<td>2. vice de forme</td>
<td>2. competenza</td>
<td>2. manifest excess of powers</td>
</tr>
<tr>
<td>3. violation de la loi</td>
<td>3. violazione o falsa applicazione di norme</td>
<td>3. corruption</td>
</tr>
<tr>
<td>4. défaut de base légal</td>
<td>4. nullità sentenza o procedimento</td>
<td>4. serious departure from fundamental rule of procedure</td>
</tr>
<tr>
<td>5. incompétence</td>
<td>5. omesso esame circa un fatto decisivo</td>
<td>5. award failed to state reasons</td>
</tr>
</tbody>
</table>

The table shows that the grounds for annulment are very much compatible - to the point that most do not require, in the context of this brief preliminary review, further elaboration. However, while ICSID “manifest excess of power” certainly includes issues of jurisdiction (the distinction between “jurisdiction” and “competence” being, in practice, overlooked), its compatibility with the French-Italian “violation of the law” needs closer scrutiny.

First, all French grounds are jurisprudential creations of the last two centuries elaborated by the Cour de Cassation itself – whose function, at the time of its creation, in 1804, was that of most authoritative bouche de la loi in the judiciary. By the orthodox interpretation of the doctrine of division of powers, the judiciary was barred from voiding the work of the legislature, hence the Court could provide only for the proper interpretation of the law (as opposed to annul or modify it). Even today, the French Code of Civil Procedure does not make explicit the grounds for appeal to the Court. Hence, it shall be clarified that today’s violation de la loi (lit., violation of the law) includes, by established case-law, the cases of méconnaissance directe (ignorance), fausse interprétation (misinterpretation), fausse application (misapplication), and refus d’application (denial of application). These are the cases contemplated as well in the Italian system, where falsa interpretazione di norme

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14 In both the French and Italian systems, “improper constitution” is ipso facto a procedural issue potentially affecting the validity of the decision (hence falling in the ground “vice de forme” or “nullità sentenza o procedimento”). Corruption is a more complex case whose effects on the Court decision vary depending from the State: even if proved, corruption may not ipso facto result in the nullity of the decision, and the ground for such nullity may either be of a jurisdictional or substantive nature. In this respect, it may be concluded that this ground is part of the ICSID convention via the 1958 NY Convention on the Recognition and Enforcement of Foreign Arbitral Award.


16 Article 604 c.p.c. simply reads: “Le pourvoi en cassation tend à faire censurer par la Cour de cassation la non-conformité du jugement qu’il attaque aux règles de droit.”

(misapplication of the law) is made explicit in the code of civil procedure. Consequently, the French and the Italian system are, on the point, equivalent.

Secondly, and critically, it is necessary to analyse the relationship between ICSID’s “manifest excess of power” and the Cour de Cassation’s “violation of the law” – ground that pertains to the fond du droit (lit., the substance of the law) and is also known as erreur de droit (or errore di diritto, in Italian), best translated in English as “error in law.” This indeed represents the crux of the matter (even without considering that the qualifier “manifest” was added at a later stage in the drafting of the Convention). Mr. Broches’ position was that the locution includes defects in jurisdiction (in particular, ultra petita) and “failure to apply the proper law, but not error in law.” Hence, the wording was intended to comprise méconnaissance directe (ignorance), fausse application (misapplication), and refus d’application (denial of application), but not fausse interprétation (misinterpretation). However, that “excess of powers” could have been understood by some as including the full breadth of the locution “error in law” (hence, fausse interprétation as well) emerges, e.g., from ROC’s request, at the time of the drafting of the Convention, to expressly add “including failure to apply the proper law”. Also, Lebanon (whose French-based legal system features a Cour de Cassation) highlighted the possible confusion with the French-derived identically-worded hypothesis of nullity of administrative acts (excès de pouvoir), for the establishment of which a scrutiny over the proper interpretation of the law as applied by the administration is necessary. While the draft wording of the Convention ultimately stayed as such (with the sole addition of the qualifier “manifest”), the tension for extending, to various degrees, “failure to apply the proper law” as to include the full extent of “error in law” was evident then, as well as in a subsequent stream of ad hoc annulment cases such as Klockner I, Amco II, Soufraki, MCI, Sempra, and Enron.

Therefore, were the current horizontal ad hoc ICSID annulment committees to be ultimately replaced by a hierarchical centralized system, the annulment grounds featured in Article 52 ICSID, already widely accepted by the international community, may be kept as such, but their reading need not to be bound to the interpretation Mr. Broches offered of a phrasing that, in several jurisdictions, is understood in a broader sense. In light of the outlined similarity of the grounds for annulment between Cour de Cassation and ICSID, “failure to apply the proper law” may also be understood as including “interpretation of the law,” thus opening the way to one-off authoritative interpretations of certain unsettled issues in investment law. The benefit of this reading, on top of avoiding negotiations for the establishment or amendment of annulment grounds, would be that, in case ISA is ultimately maintained at least as a first-level dispute resolution mechanism, ICSID tribunals would be bound (and non-ICSID tribunals are likely to feel bound) to this hierarchically superior

18 Article 360 c.p.c. (see text in the table above).
21 History of the ICSID Convention, Vol. II, p. 850. [can use “Ibid. at X” instead of reciting the full citation]
26 Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7), https://www.italaw.com/cases/1041.
pronouncement without the need to elaborate ex novo on grounds of annulment for investment awards.30

III. The Judges of the ICJ as Cour de Cassation in investor-State arbitration: attributing formal authority to a de facto practice

In light of the illustrated compatibility between ICSID and Cour de Cassation grounds of annulment, and staying within the working hypothesis of the replacement of the current horizontal ad hoc ICSID annulment committees with a hierarchical centralized system, the focus then shifts on whom can be entrusted with such a Cour de Cassation function, i.e., to annul awards and authoritatively state the correct interpretation of investment law. One place where, naturally, an international lawyer is brought to look at is the ICJ. Can to any extent the World Court exercise functions equivalent to or compatible with a Cour de Cassation? And, more pertinently, are the functions of an ICJ judge compatible with those of a judge sitting on a Cassation bench?

As it is well known, the ICJ per se cannot, by Article 34 of its Statute,31 be involved in quarrels between private investors and States.32 The current hypothesis, however, does not move from the Court per se, but the respect that this institution commands through its members in providing authoritative interpretations on questions of law - much in the same way as for domestic supreme courts.33 In this respect, the ICJ draws from the high standards and variety of (legal) education and nationalities the Statute (and the practice of it) demands from its members.34 This results, in turn, in their largely undisputed international recognition, which most often pre-exists seating on the Bench.

A possibility — thus far seemingly unexplored — could be to institutionalize the involvement of the members of the ICJ in the interpretation of investment law. The use of the term “institutionalize” seems appropriate, as ICJ judges in their individual capacity have long engaged with ISDS, as arbitrators and members of ICSID annulment committees, before, after and, especially, during their term.35 This notwithstanding that Article 16 of the Statute plainly bars judges from “…engag[ing] in any other occupation of a professional nature”, and that an ordinary bona fide reading of this text implies not engaging in professional work outside of the Court.36 According to a recent study, at least seven current members of the Court are serving on ISDS tribunals, and so did 13 other members during their term previously.37 Overall, individual ICJ judges sit or have sat on at least 90 cases as either arbitrators or members of annulments committees, and they have participated in roughly 10% of the overall known treaty-based ISDS cases.38 These numbers do not take into account appointments subsequent (or prior) to their service at the ICJ.

Leaving aside any consideration on its correctness in law, by common ethical standard this long-running custom is no doubt inappropriate and, under a systemic point of view and

30 As it is instead the case, e.g., with the EU ICS proposal.  
32 Article 34.1, ICJ Statute: “Only States may be parties in cases before the Court”.  
34 Cf. article 2, ICJ Statute.  
36 Cf. article 2, ICJ Statute.  
37 Bernasconi-Osterwalder, above.  
38 Ibid.
in the form it happens today, quite unnecessary. The presence of a current (or former) member of the Court in an investment arbitration panel is not sufficient per se to finally settle interpretive disputes in investment law, nor guarantees from setting aside in domestic courts. In the meantime, his/her dual role tarnishes the appearance of impartiality of the Court as, e.g., while serving as arbitrator in an investment dispute the same judge may concurrently sit on a dispute at the Court involving that same State. All this without even considering questions such the judge “ancillary” (as implied from the reading of Article 16 of the Statute) remuneration as arbitrator.

Two elements, however, may not be ignored. The first is that ICJ judges respond to appointment requests coming from the parties to the investment dispute, and the trend of involving ICJ judges reflects—and attempts to answer—the crisis of legitimacy of investment arbitration. One may argue, however, that appointment of ICJ judges in investment tribunals precedes talks of any such crisis. The second aspect is that the judges are able to accept such appointments as they dispose of the time to serve as arbitrator—and this reflects the fact that the Court’s docket is still not particularly busy.

Hence, taking into account the ongoing practice (and the virtual impossibility to alter it—unless action from within the ICJ itself is taken), the idea to “institutionalize” the involvement of ICJ judges in investment arbitration, possibly making it part and parcel of their mandate, seems a reasonable proposition—one that is certainly less cumbersome (and costly) than the creation of a new specialized permanent international body. Such an additional task could be implemented without altering the Statute, as States may reach an understanding by which availability in this respect is condicio sine qua non for successful election of an ICJ candidate.

It may be argued that ICJ judges may not be fit to decide Cour de Cassation issues (such as those related to the grounds of ICSID annulment), as they have been selected to do a different job. Also, it may be argued that, as noted earlier, only about half of the bench currently engages in ISDS, leaving thus the other half unaffected, uninvolved, or uninterested. In this context, it may be additionally argued that certain judges may not be willing to lend their service to this additional function. The following aims at briefly surveying possible answers to these concerns.

Firstly, the Cour de Cassation has the primary function of ensuring the authoritative interpretation of the law within a domestic legal system. When a lower court offers an erroneous interpretation of the law, either material or procedural, the Cour de Cassation annuls the decision of the lower court and, by providing a dictum (i.e., stating how to properly interpret the law in question), mandates that the same lower court (usually, however, with a different composition of judges) examines the issue anew.

Looking at Article 36.2 of the ICJ Statute, the first two functions of the Court are “interpretation of a treaty” and “question of international law”. Moreover, the ICJ is

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39 This “side activity” from ICJ judges has come under criticism; see, e.g., Philippe Sands, Reflections on International Judicialization, EJIL, Vol. 27, Issue 4, 2016, pp. 885–900.
40 Rather, uncertainty is “institutionalized” when ICJ judges concurrently sitting on an investment case openly disagree: e.g., the majority and the dissent opinions among annulment committee members in Malaysian Historical Salvors, SDN, BHD v. Malaysia (ICSID Case No. ARB/05/10).
41 Bernasconi-Osterwalder, supra.
42 ICJ judges have been involved in ICSID cases since 1972, with the appointment as presiding arbitrator of Mr. Sture Petréén (Sweden), judge 1967–1976, in Holiday Inns S.A. and others v. Morocco (ICSID Case No. ARB/72/1).
43 The third ground also covers the existence of facts which if established would constitute a breach of international law. In this respect, the Court may work as a court of first instance. 36.2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
   a. the interpretation of a treaty;
entrusted, in virtually every international treaty, to resolve disputes relating to the “interpretation or application” of the text. Notably, this is true also with the ICSID Convention, as well as with many BITs, where the President of the ICJ is called to make arbitral appointments in case of a defaulting party. Also in the recent Canada-EU Investment Agreement, despite the ICS there put in place, the President of the ICJ is called upon to decide challenges against tribunal members. Therefore, that the ICJ judges are fit to issue “authoritative interpretations” of legal texts, including BITs and other investment agreement, and that they are already de jure involved in some aspect of ISA (in addition to their involvement as actual arbitrators), is established.

It may be still argued that the ICJ is, nonetheless, not explicitly granted functions of annulment – thus lacking the other essential role of a Cour de Cassation. In this respect, attention may be drawn to the 1958 International Law Commission’s Model Rules on Arbitration, designed for the settlement of disputes between States and adopted, e.g., by the United States in several of its BITs. In the Model Rules, over grounds equivalent (or outright identical) to those of ICSID, the Court “…shall be competent to declare the total or partial nullity of the award…”. Hence, it could be argued that the ICJ has long been viewed by key actors of the international community as an appropriate court for the annulment of arbitral awards.

With regard to the fact that some of the judges may not be experts in investment law, the preliminary answer is twofold. Firstly, current issues in investment law are general issues of interpretation of law, exactly as those that may arise from any other international agreement deferring questions of interpretation or application to the ICJ (e.g., CERD, ITLOS, Whaling Convention). Secondly, the fact that interpretive issues in investment law find an answer in a non-specialized context (such as an ad hoc Investment Court) should contribute to reduce the fragmentation of the international legal system as a whole.

In light of the above, all members of the ICJ (as opposed to only those that are already involved in ISDS at the time of their election) seem suitable to adjudge questions of investment law, make authoritative interpretations and, if needed, annul an ICSID award. The question then turns on how to appropriately institutionalize such additional function. Taking into account the principal doctrinal contributions in this respect, one possibility seemingly worthy of investigation is the transfer, via an opt-in protocol, of ICSID ad hoc annulment function to a PCA arbitration featuring all, or some, of the judges of the ICJ. This protocol could also expressly record the understanding earlier mentioned, by which States parties agree to join their effort to elect at the ICJ judges that are willing to undertake such task.

b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

See article 64. Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

Article 8.30 CETA.

Grenada, Senegal, Morocco, Panama, Haiti, Egypt, Congo, Cameroon.

Article 35: The validity of an award may be challenged by either party on one or more of the following grounds:
That the tribunal has exceeded its powers;
That there was corruption on the part of a member of the tribunal;
That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
That the undertaking to arbitrate or the compromis is a nullity.

Article 36. Article 37 then reads “If the award is declared invalid by the ICJ, the dispute shall be submitted to a new tribunal....”

See supra, fn. 3.
a. Advantages and possible variations

While side-stepping the need to create an international court dedicated to investment disputes, the hypothesized solution entails several positive consequences, from a material, theoretical and systemic point of view. Among the first, of paramount importance is that of creating no (or very limited) additional costs for the international community, given the increased resort to a body of experts that are already available to it and already enjoys its trust. On the second, resorting to ICJ judges renews the link between public international law and international investment law, hence the predictability of the interpretation of the law over certain questions of investment law, all the while promoting a “chilling effect” over certain arbitral interpretive trends (e.g., definition of investment, investor nationality, extent of the MFN clause, content of the FET clause and its relationship with MST, value of the locution “in accordance with the law”, relationship between BIT standards and their customary equivalent, relationship between contract claims and treaty claims). Lastly, on the systemic aspect, while arbitration would be maintained as the standard means to settle investment disputes, it is likely that interpretations coming from the ensemble of the ICJ judges are perceived as authoritative enough to be also employed, wherever possible, in arbitral disputes taking place outside the ICSID purview.

Of course, an assortment of variations is possible, but all require additional consent on aspects not agreed anywhere else by States. Of these, two could come prima facie to mind: the grounds for challenging the validity of ICSID awards, and the composition of the arbitral annulment committee (in terms of number and/or selection criteria of ICJ members sitting as arbitrators).

The first argument is based on the fairly common view in practice and scholarship for which ICSID grounds for award annulment are particularly high. This position is no doubt reasonable in the context of the outlined institutional “schizophrenia” of the ICSID system which, as seen, delegates some of the functions of a Cour de Cassation to a decentralized ad hoc arbitral system. In this perspective, the desire to expand or amend the grounds for annulment (up to allowing for a limited review of facts) is understandable. However, in the context of a centralized system of supervision like that here hypothesized, the argument loses most of its poignancy. In any case, and perhaps more in concreto, much like it is unfeasible these days to amend the ICSID Convention to review the grounds for annulment listed in Article 52, it seems hard to imagine a swift and fruitful conclusion of a debate as such in the context of the current UNCITRAL discussions. Consent has been already granted in the ICSID Convention on those grounds by 154 States. States know those grounds, and a significant jurisprudence has been built upon them over the last two decades. What is missing is a “final” word to recompose otherwise palingenic (and costly) debates. The authoritative interpretation of these grounds from ICJ members would help stabilizing the overall ICSID annulment legal framework – without even considering the “stabilizing spillover” on non-ICSID arbitration. Moreover, in light of the global trend to restrict access to domestic higher courts (due to overload of domestic judicial systems), it seems possibly counterintuitive (and certainly counterproductive) to open at the international level an issue which is not debated domestically.

Regarding the number of ICJ judges acting as arbitral annulment committee, it could be seen as preferable to have a less crowded bench to decide. However, this solution would not only open the way to an assortment of procedural issues with regard to the selection of the members of the resulting “investment law chamber”, but also cast additional (and unwelcome) colours on the election of those specific ICJ members. By keeping the

50 See supra, fn. 4.
composition of annulment committees within the general membership of the ICJ, the weight of investment law-related consideration at the time of election of a new batch of ICJ judges will be diluted among all other usual political and legal considerations. Investment law is no doubt important but is also not the only concern in international law – let alone, the election of a member of the ICJ.

IV. Conclusion

Given the hurdles to creating a multilateral investment court, and the intrinsic and extrinsic limits for the EU to back a project as such, the EU should perhaps simplify its approach (otherwise overly ambitious) on the matter of ISDS reform. Among the panoply of proposals being elaborated, the one here sketched out, while welcoming the centralization of the review of investment awards (ICSID directly, all others through “authoritativeness”), has the benefit of not throwing away the ISA baby with a two-decade-strong jurisprudential bathwater – most of which is indeed valuable. In the context of verticalization and centralization of the review of investment awards, the proposed limited reconceptualization of ICSID grounds of annulment would critically contribute to reinstating the requirement of predictability and interpretive stability a system of law ought to have. These goals can be effectively achieved via an opt-in protocol that transfers ICSID ad hoc annulment function to a PCA arbitration featuring all, or some, of the judges of the ICJ, and records an understanding between States parties to join their effort to elect at the ICJ judges that are willing to undertake such task. As such, the foregoing possibly offers an acceptable and non-cumbersome compromise that meets the needs of all parties.
Jean Monnet Network LAwTTIP

Based on a consortium among the International Research Centre on European Law of the University of Bologna, the Centre of European Law of King’s College London and the Institut de l’Ouest Droit et Europe of the University of Rennes 1, the Jean Monnet Network LAwTTIP – Legal Ambiguities withstanding TTIP intends to promote a large-scale legal reflection of both the existing EU Free Trade Agreements of new generation and the ongoing negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

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