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How Innovative Is the EU's Proposal for an Investment Court System: A Comparison between ICS and Traditional Investor-State Dispute Settlement

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General Note about the Content

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Abstract

Prompted by the growing criticism against traditional investor-state dispute settlement (ISDS), especially in the midst of the negotiations of the failed trade and commercial agreement with the United States, the European Commission of the European Union came up with a new system for the settlement of investment disputes, which promises to erase all the recurrent concerns about ISDS: the Investment Court System (ICS). For the most part, rather than absolutely innovative, the ICS merely embraces modern treaty trends developed throughout the years in the context of ISDS on subjects such as transparency, the prevention of forum shopping and frivolous claims, restrictions to the scope of the standards of treatment, among others. Yet, the ICS does introduce an innovative element, namely, the replacement of traditional *ad hoc* arbitral tribunals with a permanent tribunal coupled with an appeal mechanism. While these innovations certainly promise to fix some of the concerns, which ISDS has never been able to address in a satisfactory manner, such as the lack of legitimacy, predictability and consistency, it may also be the source of new challenges and issues that need to be assessed and weighed properly.

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1. Introduction

Traditional Investor-State Dispute Settlement (ISDS) is in a deep crisis that threats its existence, some claim. Whether that is true or not, what is at least clear is that ISDS is facing more challenges than ever before. Not only it is being subject to wide-spread, but certainly not new, criticism, but is also facing unexpected competition from a new system that claims to address all the failures of ISDS, and even more. This new system, the so-called "Investment Court System" (ICS), was envisioned by the European Commission of the European Union (EU) within the context of the negotiations of the free trade agreement with the United States and then was effectively incorporated by the EU in recent free trade agreements (notably, the one concluded with Canada). This paper aims to analyze the EU's proposal for the settlement of investments disputes and establish, by way of comparison, to what extent it differs from traditional ISDS. As the reader will note in the conclusions of this paper, while the ICS differs from traditional ISDS in some respects, notably regarding the existence of a permanent adjudicatory body and an appeal mechanism, both of which are absent in ISDS, in many other respects ICS merely accommodates to trends already developed under ISDS treaties and case law. As the reader will also note, the EU's proposal also raises some new issues and concerns that need to be weighed when establishing whether it offers a better alternative to ISDS. Particularly, there are serious concerns as to potential selection of members sympathetic to States and uncertainties with respect to the enforceability of the awards rendered under the new system.

The paper first describes some of the general features of traditional ISDS and the main critics against it (Section 2). Then it addresses the EU's proposal for the creation of an investment court

system (Section 3). This Section summarizes the background of the EU's proposal and its current status within the EU (Section 3.1), describes two decisions from the European Court of Justice with important consequences in the current and future development of investment law in the EU (Section 3.2), and then finally describes the general features of ICS as compared to traditional ISDS (Section 3.3). Finally, we present our conclusions (Section 4).

2. The beast to get rid of: Traditional ISDS and its perceived drawbacks

Since the EU's proposal aims to displace traditional ISDS as a mechanism of solving investment disputes, it is convenient to highlight, at least briefly, the major criticisms that have been raised against ISDS. As a preliminary observation, it is important to bear in mind that the criticisms against ISDS are not new, nor are they an exclusive product of the recent European developments on the subject. As a result, efforts to address the criticisms against ISDS, without eliminating it, have flourished throughout the years, as the reader will note in many sections of this work. For the purposes of this section, we will merely summarize some of the main criticisms against ISDS in order to gain a general understanding of the issues involved.[1] Later in this work, when analyzing the specific aspects of the EU's proposal, we will refer to some of those efforts that have been made under traditional ISDS to cope with the criticisms to which we refer in the present section.

ISDS refers to investors' direct right of action against host States (States recipient of investments) to claim for the violation of their rights. Such right of action usually has its source in an

[1] For deeper description of the criticisms, and the answers to them, European Federation for Investment Law and Arbitration (EFILA), *A response to the criticism against ISDS* (May 17, 2015), available at https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf

International Investment Agreement (IIA), which may consist in a Bilateral Investment Treaty (BIT), an Investment Chapter in a Free Trade Agreement (FTA) or a multilateral investment agreement, such as the Energy Charter Treaty. The disputes are decided by *ad hoc* arbitral tribunals whose members are habitually appointed by the parties in dispute (i.e. by the investor and the host State). Subject to the specific provisions of the respective IIA, the proceedings are usually conducted either under the rules of the Convention on The Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), under the UNCITRAL Arbitration Rules or under the rules of other arbitral institutions. With this brief background, we will refer to the major criticisms that have been raised against ISDS.

First, a recurrent criticism is that ISDS lacks *legitimacy*. This is due to the fact that the disputes, despite involving in many cases areas of public interest and the validity of States' policies, are decided by *ad hoc* tribunals composed by individuals appointed by the parties, rather than by "judges" appointed through public scrutiny.[2]

Second, it is said that ISDS lacks *transparency*. Having international commercial arbitration as a model, investment arbitration is confidential, the documents of the cases are kept secret, the hearings are closed to the public, and the participation of third parties, such as non-governmental organizations (NGOs), is not allowed. While these features may have justification under commercial arbitration, they are not suitable to disputes involving States' policies in which the public interest is concerned.

[2] United Nations Conference on Trade and Development UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013), at 172, available at https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf

Third, ISDS, it is said, lacks *consistency* and *predictability*. Since the disputes are solved by spread *ad hoc* tribunals and, consequently, there is not *stare decisis*, the system endorses the existence of inconsistent decisions and interpretations regarding similar or identical treaty provisions.[3] This circumstance leads "to uncertainty about the meaning of key treaty obligations and lack of predictability as to how they will be read in future cases."[4]

Fourth, and related to the previous criticism, ISDS allegedly fails to offer an effective review mechanism to assure consistency and assure *correctness* of the decisions. Indeed, awards under the ICSID Convention are subject to the annulment procedure set forth in Article 52, which contains only limited grounds for annulment mostly limited to procedural failures in the proceedings.[5] Thus, since annulment committees are banned from analyzing the merits of the awards, the annulment mechanism is not suitable to either assure the existence of consistent case law or correct deficient decisions.[6] A similar situation occurs with regard to non-ICSID awards.[7]

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[3] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1445 (2005) (pointing out to three different cases of inconsistency: "First, different tribunals can come to different conclusions about the same standard in the same treaty. (…) Second, different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights. (…) Finally, different tribunals organized under different investment treaties will consider disputes involving a similar commercial situation and similar investment rights, but will come to opposite conclusions."); David Gaukrodger; Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03 (OECD Publishing, 2013), at 60.

[4] United Nations Conference on Trade and Development UNCTAD, *supra* note 2, at 172.

[5] ICSID Convention, Article 52(1) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.")

[6] Susan D. Franck, *supra* note 3, at 1548.

[7] Non-ICSID awards have no internal annulment review and, as general rule, are subject to setting aside procedures in the place of arbitration or recognition and enforcement procedures under the New York Convention. However, the grounds for annulment or refusal or enforcement are narrow.

Fifth, and very important as we will see, critics claim that ISDS imposes limits on the States' right (and duty) to enact regulations on matters of public interest, such as human health, protection of the environment, human rights and so forth. ISDS, to some, creates a so-called "regulatory chill."[8]

Sixth, ISDS is perceived as a system that fails to assure *independent* and *impartial* adjudicators. Among other related criticisms, it is questioned the practice whereby individuals move from being arbitrators in some disputes to counsels in others (double-hat practice), something that is allowed under traditional ISDS rules.[9] It is also distrusted the fact that some arbitrators are reappointed by the same party to different disputes or, more generally, that some arbitrators are recurrently appointed by investors, while others are repeatedly appointed by States.[10]

Seventh, it is said that ISDS is *costly* in terms of time and money. As to the former, although accounts differ to some extent, it is said that an ICSID arbitration has an average duration of 3.6 years,[11] with some cases lasting more than five years.[12] As to the latter, some estimates show that each party in an ISDS dispute pays on average USD10 million,[13] with costs superior to USD30

[8] European Federation for Investment Law and Arbitration (EFILA), *supra* note 1, at 26 (referring to a definition of "regulatory chill" as the "situation in which 'a State actor will fail to enact or enforce *bona fide* regulatory measures because of a perceived or actual threat of investment arbitration' in which they distinguish between a) not drafting particular legislation in anticipation of arbitration, b) chilling legislation upon awareness of arbitration risks, and c) chilling legislation after the outcome of a specific dispute."); United Nations, General Assembly, *Report of the Independent Expert on the promotion of a democratic and equitable international order*, A/HRC/33/40 (July 12, 2016), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/151/19/PDF/G1615119.pdf?OpenElement (noting, at para. 11, that "[t]he regulatory chill caused by the mere existence of investor-State dispute settlements has effectively dissuaded many States from adopting much-needed health and environmental protection measures.")

[9] Malcolm Langford; Daniel Behn; Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20:2 Journal of International Economic Law, 301 (2017).

[10] David Gaukrodger; Kathryn Gordon, *supra* note 2, at 50.

[11] Anthony Sinclair, Louise Fisher; Sarah Macrory, *ICSID arbitration: how long does it take?*, 4:5 Global Arbitration Review (2009).

[12] For example, the longest ICSID arbitration case (*Pey Casado v Chile*) lasted 10.5 years. *Id*.

[13] Matthew Hodgson, *Costs in Investment Treaty Arbitration: the Case for Reform*, 11:1 Trade Dispute Management (2014).

million in some cases.[14] The high costs, it is argued, may prevent medium and small investors from using the system.[15] Moreover, the threat of high costs can exert pressure on States (especially on those of the developing world) to settle cases.[16] Critics have also stressed that, since the "pay your own way" rule is usually applied by ISDS tribunals, States have to bear the costs of the proceedings even in cases when they succeed.[17]

Lastly, one cannot avoid mentioning that, in a more general sense, there are some voices that, based on the aforementioned criticisms or merely on basis of public policy arguments, question the utility of having ISDS in the first place.[18] These voices, coming from different sectors of the society, became particularly visible within the context of the negotiations of the trade agreement between the EU and the United States (so-called Transatlantic Trade and Investment Partnership - TTIP).[19] One recurrent argument in this sense is that ISDS is not necessary in agreements between

[14] David Gaukrodger; Kathryn Gordon, *supra* note 2, at 19.
[15] Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 Wash. U. L. Rev. 769, 788 (2011).
[16] David Gaukrodger; Kathryn Gordon, *supra* note 2, at 23.
[17] United Nations Conference on Trade and Development UCTAD, *supra* note 2, at 172.
[18] See, extensively, United Nations, General Assembly, *Report of the Independent Expert on the promotion of a democratic and equitable international order*, *supra* note 8 (defending the use of diplomatic protection as an effective mean for the protection of investors' rights (para. 22), claiming that ISDS creates unequal competitive conditions, for it grants foreign investors with greater rights domestic investors (para. 23), and claiming for the total abolishment of ISDS and its replacement by either (i) an investment court, (ii) State-to-State dispute settlement before the ICJ or (iii) domestic courts (para. 55).)
[19] Just to have a taste, see German Magistrates Association, Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015 (February 2016), available at https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf; Alliance for Justice, Open letter Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, outlining the harm ISDS (June 24, 2015), available at https://www.afj.org/press-room/press-releases/afj-isds-closes-courtroom-doors-and-undermines-equal-access-to-justice; Open letter of civil society against investor privileges in TTIP (December 16, 2013), available at https://www.bilaterals.org/?open-letter-of-civil-society; 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts (October 25, 2017), available at https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf; Elizabeth Warren, The Trans-Pacific Partnership clause everyone should oppose, The Washington Post (February 25, 2015), available at https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?noredirect=on&utm_term=.e27a9db93b08

developed countries with strong legal systems in which foreign investors can rely on for the protection of their rights.[20] In fact, it is not irrelevant to reckon that some recent investment agreements do not include ISDS provisions.[21]

3. The EU's proposal for the creation of an Investment Court System (ICS)

3.1. Background of the proposal and its current status within the EU

Member States of the EU have for long entered into IIAs with non-European countries, with other European Countries non-members of the Union and with other Member States (intra-EU IIAs).[22] Member States of the EU have concluded 1384 BITs with third countries.[23] For long, then, the conclusion of IIAs by Member States was considered no more than an expression of their remaining external competence, with minor interactions with the EU system.[24] In 2009, though, the Treaty of Lisbon afforded the EU with exclusive competence over "foreign direct investment."[25] Even though it was not absolutely clear then the extent of such competence,[26] as will be shown, after the Treaty of Lisbon the EU actively undertook the negotiation of FTA with

[20] About (and against) this argument, European Federation for Investment Law and Arbitration (EFILA), *supra* note 1, at 33.
[21] United Nations Conference on Trade and Development UCTAD, *supra* note 2, at 115.
[22] There have been concluded roughly 190 "intra-EU" BITs between Member States of the EU. Nikos Lavranos, *2019: the Year of the Big Harvest*!, Kluwer Arbitration Blog (December 30, 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/12/30/2019-the-year-of-the-big-harvest/
[23] Stefanie Schacherer, *Can EU Member States Still Negotiate Bits With Third Countries?*, Investment Treaty News (August 10, 2016), available at https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/
[24] Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 Common Market L. Rev. 383, 387 (2009).
[25] Treaty on the Functioning of the European Union (TFEU), Arts 3 and 207.
[26] Particularly, back in 2009 was disputed whether the exclusive competence of the Union covered portfolio or indirect investments, dispute settlement between the investor and the host State and substantive standards of protection, particularly the defense against expropriation.

third countries, triggering important developments on the subject of international investment law and ISDS.

At first, the European Commission expressly embraced ISDS as "such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others," stating as a result that "future EU agreements including investment protection should include investor-state dispute settlement."[27] Shortly thereafter, though, the European Parliament raised some concerns as to both the substantial and procedural content of future EU agreements.[28] Particularly relevant for our purposes, the European Parliament stressed the need to safeguard States' right to regulate and demanded a revision of the investor-state dispute settlement mechanism on matters such as transparency, appeal mechanism, exhaustion of local remedies,[29] the use of *amicus curiae* in the proceedings and the definitiveness of the forum selection.[30]

As public concerns regarding ISDS continued growing, remarkably in countries like Germany and Austria,[31] in 2014 the European Commission decided to consult the European Public on investment

[27] European Commission, *"Towards a Comprehensive European International Investment Policy"*, Communication, COM (2010)343 Final, 10, available at http://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-343-EN-F1-1.Pdf

[28] European Parliament, Resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0141+0+DOC+PDF+V0//EN

[29] Id. at 23-26.

[30] Id. at 31.

[31] August Reinisch, *The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court*, CIGI Investor-State Arbitration Series, Paper No. 2 (2016), 8 (noting that this opposition seemed surprising given the fact that both Germany and Austria for long have entered into BITs).

provisions in the TTIP with the United States.[32] In general, the responses,[33] coming from a wide variety of sources,[34] reflected fierce opposition against ISDS or the TTIP itself.[35] Reacting to the opinions it gathered, the European Commission decided to focus on finding improvements in four particular areas of concern: (i) the protection of the right to regulate, (ii) the establishing and functioning of arbitral tribunals, (iii) the relationship between domestic judicial systems and ISDS and (iv) the review of ISDS decisions through an appellate mechanism.[36]

In May 2015, the European Commission released the Concept Paper "Investment in TTIP and beyond — the path for reform,"[37] in which it proposed new improvements in the four particular areas of concern previously identified. In addition to some drafting proposals aiming to reduce ambiguities on States' right to regulate and exclude parallel claims by investors, the main proposal consisted in the removal of *ad hoc* arbitration and the creation of an investment court[38] comprised of adjudicators previously appointed by the Contracting Parties, along with the establishment of

[32] European Commission, Press Release, "*Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement*" (21 January 2014), available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1015.
[33] European Commission, Report, *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, SWD(2015)3 final (January 13, 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf
[34] Including citizens, academics, companies, NGOs and so forth. Id. at 11.
[35] Id. at 14.
[36] Id. at 28.
[37] European Commission, Concept Paper, *Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF. To have a taste of the political dimension of this process, see the speech delivered at the European Parliament by the Trade Commissioner, Cecilia Malmström, with respect to the referred concept paper (6 May, 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153430.pdf.
[38] At the EU level, the creation of a permanent investment court had been proposed some months earlier by the Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, although the core proposition of the Group was that no ISDS was required in the future EU agreements. Socialists and Democrats Group, "S&D Position Paper on Investor-State dispute settlement mechanisms in ongoing trade negotiations" (4 March 2015), available at https://www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdfhttps://www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf

an appeal mechanism mirroring, with some adjustments, the WTO Appellate Body.[39] As we will see, the public reaction to this proposal and its merits was mixed; but, notwithstanding such positive and negative reactions, what remains clear is that such proposal, after being backed by other EU institutions,[40] ended up defining the trend of the EU trade negotiations for the ensuing years.

Indeed, furthering the ideas of the Concept Paper, in September 2015 the European Commission released its proposal on an investment court system in the TTIP to be discussed with the Council and the European Parliament.[41] Shortly thereafter, in November 2012, the European Commission finalized its proposal and formally submitted it to the United States for further negotiations.[42] Moreover, the European Commission stated its desire to incorporate the ICS in other EU trade agreements. While the TTIP negotiations turned murky, to the extent that they were suspended in late 2016 and have not been resumed, or at least not officially, other EU trade agreements incorporated the ICS. This is the case of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore Trade Investment Protection Agreement and the EU-Vietnam Trade and Investment Protection Agreement. Although both CETA and EU-Singapore

[39] European Commission, Concept Paper, supra note 18, at 9.

[40] See European Parliament, Committee on International Trade, *Report containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, (2014/2228(INI)) (June 6, 2015), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0175+0+DOC+PDF+V0//EN (noting that a "public International Investment Court could be the most appropriate means to address investment disputes").

[41] European Commission, Press Release, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (September 16, 2015), available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm; The text of the proposal is available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

[42] European Commission, Press Release, *EU finalises proposal for investment protection and Court System for TTIP* (November 12, 2015); The text of the proposal is available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf; The European Commission accompanied the proposal with a factsheet on "*Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors*," available at http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm

were signed, none of the investment chapters therein has entered into force because there are still pending some internal procedures,[43] one of which is the ratification by each Member State of the EU as result of the ECJ Opinion 2/15 (to which we refer below). The negotiations of the EU-Vietnam agreement already concluded, but it has not been signed yet.[44]

While still negotiating individual agreements with third countries, the EU undertook a plan for the creation a Multilateral Investment Court to be discussed, initially, with trade and investment partners within the framework of the United Nations Commission on International Trade Law (UNCITRAL).[45] So far, the EU has submitted two papers to the UNCITRAL working group, one restating its concerns with respect to the traditional ISDS and explaining its proposal for establishing a multilateral investment court,[46] while the other suggesting a work plan to be followed by the working group.[47] It remains to be seen whether this proposal will succeed, especially considering the numerous IIAs currently in force worldwide providing for traditional ISDS.

[43] CETA entered into force on 21 September 2017, with the exclusion of the provisions dealing with portfolio investments and investment dispute settlement, which are subject to the approval of each of the Member States. See Council of the European Union, Decision 2017/38 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017D0038. The definitive text of CETA is available at http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf

[44] See Press Report, Commission presents EU-Vietnam trade and investment agreements for signature and conclusion (October 17, 2018), available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1921

[45] Council of the European Union, Press Release, *Multilateral investment court: Council gives mandate to the Commission to open negotiations* (March 20, 2018), available at https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/. Additional documents on the proposal for a multilateral investment court can be found online at http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf

[46] Submission of the European Union and its Member States to UNCITRAL Working Group III, *Establishing a standing mechanism for the settlement of international investment disputes* (January 18, 2019), available at https://uncitral.un.org/sites/uncitral.un.org/files/wp159_add1.pdf

[47] Submission of the European Union and its Member States to UNCITRAL Working Group III, *Possible workplan for Working Group III* (January 18, 2019), available at https://undocs.org/en/A/CN.9/WG.III/WP.159

With this brief recount, the main features of the ICS proposal will be analyzed. We will consider both the TTIP proposal released in November 2015 and the final CETA text. Given that the EU-Singapore agreement and the EU-Vietnam contain similar provisions, for simplicity these agreements will not be assessed in detail, unless we find a significant departure from the CETA. However, before moving to this assessment, it is necessary to refer, at least briefly, to two important decisions emanated by the European Court of Justice (ECJ) during the process that has just been summarized. Although these decisions have no minor consequences whose analysis exceed the scope of this paper, it is necessary to bear them on the radar to fully comprehend the current developments of investment law within the EU.

3.2. The ECJ Opinion 2-15 and the *Achmea* decision

As mentioned, the Treaty of Lisbon entrusted the EU with competence on the subject of "foreign direct investment." Upon such conferral, the EU undertook the negotiation of investment agreements with third countries. However, it was by no means clear whether the EU had competence over all matters related to foreign investments or whether such competence was restricted by the wording of Article 207 of the Treaty of Lisbon.[48] After being consulted on the subject by the Commission within the context of the EU-Singapore FTA,[49] the ECJ concluded that EU's exclusive competence is not unlimited and does not include portfolio investments or

[48] Siegfried Fina; Gabriel M. Lentner, *The Scope of the EU's Investment Competence after Lisbon*, 14 Santa Clara J. Int'l L. 419 (2016) (arguing in favour of a broad interpretation of the competence of the EU in the field of investment, such as to include provisions regarding standards of protection, portfolio investments and dispute-settlement).
[49] European Commission, "*Commission Decision of 30.10.2014 requesting an opinion of the Court of Justice pursuant to article 218(11) TFEU on the competence of the Union to sign and conclude a Free Trade Agreement with Singapore*", C(2014) 8218 final (May 30, 2014), available at http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-8218-EN-F1-1.PDF

investment dispute settlements.[50] According to the Court, the competence over such matters is shared between the EU and the Member States and, consequently, each of the Member States must approve the corresponding provisions in the IIAs negotiated by the EU.[51]

As some commentators have pointed out, Opinion 2-15 threatens to make treaty negotiations more cumbersome and time-consuming, for Member States will likely take part actively in the negotiation of the agreements.[52] In addition, the need for ratification from each Member State inevitably delays the moment in which the treaties enter into force,[53] something that has already occurred with CETA as mentioned above. It has been suggested that Opinion 2-15 could lead the EU to conclude separate agreements regarding Investor-State dispute settlement.[54] Other commentators go beyond, suggesting that Opinion 2-15 could lead to the definitive exclusion of such provisions in EU's IIAs.[55] It still remains to be seen how far-reaching will be the consequences of Opinion 2-15 in future IIA negotiations and agreements by the EU.

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[50] European Court of Justice, Opinion 2/15 of 16 May 2017 pursuant to Article 218 (11) TFEU (EU-Singapore Free Trade Agreement), at ¶ 285-293, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=415687; The ECJ thus rejected the idea that procedural enforcement mechanisms are implicitly covered by the Union's competence to provide substantive protection standards in FTAs. August Reinisch, *supra* note 31, at 4; See Marise Cremona, *Shaping EU trade policy post-Lisbon: opinion 2/15 of 16 may 2017 : ECJ, 16 may 2017, opinion 2/15 free trade agreement with Singapore*, 14(1) European Constitutional Law Review (2018) 231.

[51] Member States were given, as a result, a *de facto* power on the subject. Ana M. Lopez-Rodriguez, *Investor-State Dispute Settlement in the EU: Certainties and Uncertainties*, 40 Hous. J. Int'l L. 139, 163 (2017). Laurens Ankersmit, Opinion 2/15 and the Future of Mixity and ISDS, EUR. L. BLOG J. (May 18, 2017), http://europeanlawblog.eul2017/05/18/opinion-215-and-the- future-of-mixity-and-isds/ (noting that an element of political discretion of the Member States is involved as a result of the decision of the ECJ).

[52] Ana M. Lopez-Rodriguez, *supra* at 163.

[53] Id. at 164.

[54] Yotova Rumiana, *Opinion 2/15 of the CJEU: Delineating the Scope of the New EU Competence in Foreign Direct Investment*, 77(1) The Cambridge Law Journal (2018), 29, 32. (noting that the need to conclude separate agreements on dispute resolution and portfolio investments creates the risk of making EU treaties less attractive to third States).

[55] Anthea Roberts, *A Turning of the Tide against ISDS,* 9, EJIL: TALK! (May 19, 2017), www.ejiltalk.org/a-turning-of-the-tide-against-isds/.

Another important development on the subject of investment protection came with the decision of the ECJ in the famous *Achmea* case. As a way of background, encouraged by the accession of new States to the Union in 2004 and the resulting increase in the number of intra-EU BITs,[56] commentators began to cast some doubts about the compatibility of intra-EU BITs with the EU law.[57] Early in 2006, in the context of an investment dispute involving a recently accessed Member State, the Commission embraced the position that intra-EU BITs are incompatible with EU law and therefore the Member States are under the obligation to terminate such treaties.[58] This position subsequently was reiterated by the Commission in other numerous investment disputes involving intra-EU BITs, but arbitral tribunals consistently rejected the Commission's argument and asserted jurisdiction to hear the disputes. [59] However, the Commission did not stop there. When an award ordered Romania to pay damages to an investor as a result of the breach of the Sweden-Romania BIT,[60] the Commission instructed Romania not to execute the award, for doing so would constitute

[56] Hanno Wehland, *Intra-Eu Investment Agreements and Arbitration: Is European Community Law An Obstacle?*, 58 International & Comparative Law Quarterly 297, 298 (2009) (noting that as a result of the accession of 12 new Member States, most of them from Eastern Europe, the number of intra-EU BITs rose to 191).
[57] *Id*.; Christer Soderlund, Intra-EU BIT Investment Protection and the EC Treaty, 24 J. Int'l Arb. 455 (2007); Dominik Moskvan, *The Clash of Intra-EU Bilateral Investment Treaties with EU Law: A Bitter Pill to Swallow*, 22 Colum. J. Eur. L. 101 (2015); Agnieszka Rozalska-Kucal, *Intra-EU Bits - Are They Really Still Necessary: The Best Award of the Year 2012 and Prof. Emmanuel Gaillard Say Yes*, 1 Polish Rev. Int'l & Eur. L. 27 (2012); Ursula Kriebaum, *The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective*, ELTE Law Journal, 27 (2015).
[58] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (March 27, 2007), at paras. 116, 126.
[59] *Achmea B.V. (previously Eureko B.V.) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (October 26, 2010), at paras. 176-196; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award (January 21, 2016), at para. 223; *Isolux Netherlands, BV v. Spain*, SCC Case V2013/153, Award (July 18, 2016), at paras. 623-627; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy*, ICSID Case No. ARB/14/3 (December 17, 2016), at paras. 175-196.
[60] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award (December 11, 2013).

incompatible financial aid from the State.[61] The same instruction was further given to Spain in the context of another dispute brought under the Energy Charter Treaty.[62]

Under this context, the *Achmea* decision, delivered in March 2018, came into scene.[63] After being condemned to pay damages to a foreign investor in one of the cases in which the Commission unsuccessfully claimed that the tribunal lacked jurisdiction because the intra-EU BIT was incompatible with EU law,[64] Slovakia sought to set aside the award before the German Courts. When the case reached the German Federal Court of Justice (Bundesgerichtshof), the high court requested a preliminary ruling from the ECJ under Article 267 TFEU on the question of whether EU Law precludes ISDS in intra-EU BITs. According to the ECJ, since arbitral tribunals must consider the law of the host State and EU law, by its nature, is to be deemed part of such law,[65] the BIT effectively calls arbitral tribunals to interpret and apply EU law.[66] However, there is no available mechanism to assure that arbitral tribunals correctly apply EU law, for they do not constitute courts or tribunals of a Member State within the meaning of Article 267 TFEU[67] and

[61] European Commission, State aid SA.38517 (2014/C) (ex 2014/NN) — Implementation of Arbitral award *Micula v Romania* of 11 December 2013 (November 7, 2014), at 17, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:393:FULL&from=EN. The Commission adopted a final decision on the subject on March 2015, confirming the instruction given to Romania on November 2014. European Commission, Decision 2015/1470 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013 (March 30, 2015), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1470&from=EN; Recently, the Commission brought suit against Romania before the ECJ for its failure to recover the part of the award that was paid to the investor. European Commission, Press Release, State aid: Commission refers Romania to Court for failure to recover illegal aid worth up to €92 million, December 7, 2018, available at http://europa.eu/rapid/press-release_IP-18-6723_en.htm

[62] European Commission, State aid SA.40348 (2015/NN) — Spain Support for electricity generation from renewable energy sources, cogeneration and waste (October 11, 2017), at para. 165, available at http://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf

[63] European Court of Justice, Case C-284/16 *Slowakische Republik v. Achmea BV* (March 6, 2018), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057

[64] *Achmea B.V. (previously Eureko B.V.) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award (December 7, 2012).

[65] European Court of Justice, supra note 63, at paras. 40 and 41.

[66] Id. at para. 42.

[67] Id. at paras. 45 and 46.

thereby have no authority to make references to the ECJ for preliminary rulings,[68] and their decisions are subject to limited judicial revision under national law.[69] Given that BITs "prevent th[e] disputes from being resolved in a manner that ensures the full effectiveness of EU law,"[70] the ECJ concluded that EU law precludes intra-EU agreements providing for ISDS before arbitral tribunals.[71]

The *Achmea* judgement thus seems to put an end to the discussion as to whether ISDS provisions contained in intra-EU BITs are compatible with EU law. Nevertheless, the breadth of the judgement is not undisputed. Particularly, it is not clear whether the decision affects intra-EU disputes arising under the Energy Charter Treaty, which is not, strictly speaking, a treaty "concluded between Member States" in terms of the *Achmea* judgement,[72] but a multilateral treaty in which most Member States and the EU itself are parties.[73] In the aftermath of the judgement, the European Commission expressed its view that the *Achmea* decision prevents intra-EU disputes

[68] Id. at para. 49.
[69] Id. at para. 50-55.
[70] Id. at para. 56.
[71] Id at para. 60 ("… 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.)
[72] See supra note 71.
[73] Deyan Dragiev, *2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration*, Kluwer Arbitration Blog (January 16, 2019), available at http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/; Calling for a narrow reading of the Acmea decision, see Csongor István Nagy, *Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back"*, 19(4) German Law Journal, 981 (2018); Neil Newing, Lucy Alexander, Leo Meredith, *What Next for Intra-EU Investment Arbitration? Thoughts on the Achmea Decision*, Kluwer Arbitration Blog (April 21, 2018) (noting that had Achmea decision is extended to the ECT, a situation could be created "where EU investors are unable to bring claims in arbitration against EU Member States, but non-EU investors are, effectively creating two classes of investor within the ECT, contrary to the wording of the treaty. Indeed, a key tenet of the ECT's investment protections is non-discrimination.")

under the ECT.[74] However, when respondent Member States in pending disputes under the ECT resorted to *Achmea* to resist arbitral tribunals' jurisdiction, the tribunals rejected the Commission's position, stressing the fact that the decision of the ECJ is silent as to the compatibility of the ECT with EU law.[75] The discussion has not ended there, since Member States, on basis of *Achmea*, are resisting enforcement of ECT awards before national courts.[76]

Neither is it clear whether the *Achmea* decision affects intra-EU ICSID disputes, because in *Achmea* the BIT provided for *ad hoc* arbitration under UNCITRAL Rules.[77] One ICSID tribunal recently addressed the issue, concluding that *Achmea* would have not prevented the arbitral tribunal from asserting jurisdiction.[78] This conclusion was based on the differences between the particular circumstances in *Achmea* and the circumstances in the case before the annulment committee,[79] and also the fact that "[t]he *Achmea* Decision contains no reference to the ICSID

[74] European Commission, Communication from the Commission to the European Parliament and the Council, *Protection of intra-EU investment* (July 17, 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8

[75] *Masdar Solar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018), at paras. 678-683; *Vattenfall AB; 2. Vattenfall GMBH; 3. Vattenfall Europe Nuclear Energy GMBH; 4. Kernkraftwerk Krümmel GMBH & Co. OHG; 5. Kernkraftwerk Brunsbüttel Gmbh & Co. OHG v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue (August 31, 2018); *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Award (November 14, 2018), at para. 220.

[76] Spain, for example, is resisting before the District Court of the District of Columbia the enforcement of the award rendered on February 2018 in *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain*, SCC Case No. 2015/063. Information on the case available at https://www.italaw.com/sites/default/files/case-documents/italaw10065.pdf

[77] Clément Fouchard; Marc Krestin, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, Kluwer Arbitration Blog (March 7, 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/; Neil Newing, Lucy Alexander, Leo Meredith, supra note 73 (noting that *Achmea* "does not apply to ICSID arbitration (which is governed by the ICSID Convention").

[78] *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (October 9, 2018), at paras. 252-267.

[79] In *Achmea*, the place of the arbitration was Germany and so German law applied to the proceedings, and the award was subject to judicial review before German Courts, being that the reason with the ECJ ended up intervening. Conversely, in the case before the annulment committee only ICSID Convention and ICSID Arbitration Rules were the rules applicable to the proceedings and the revision of the award was restricted to the annulment proceeding under Article 52 of the ICSID Convention. Id. at paras. 253-257.

Convention or to ICSID Arbitration."[80] In any case, although *Achmea* certainly does not expressly refer to ICSID arbitration, one cannot avoid noting that its reasoning is perfectly suitable to intra-EU ICSID disputes as well. Indeed, as noted, the ECJ's concern is that while arbitral tribunals may be called to interpret or apply EU law, there is no mean to assure the effectiveness of EU law, for such tribunals have not authority to make a reference to the ECJ for a preliminary ruling and their decisions are excluded from a comprehensive review before domestic courts. The situation does not seem to be different under ICSID arbitration.[81]

Adding a new element to the discussion, in January, 2019, representatives of the Governments of the Member States released a declaration "on the legal consequences of the judgement of the Court of Justice in *Achmea* and on investment protection in the European Union."[82] In the Declaration, the Member States interpret *Achmea* as entailing that "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable."[83] The Declaration avoids mentioning ICSID arbitration, but this language, in my opinion, seems broad enough to include intra-EU BITs providing for ICSID arbitration. Moreover, the Declaration deems intra-EU arbitration under the ECT as incompatible with EU law.[84] As a result, among other things, the Member States committed to terminate all

[80] Id. at para. 258.
[81] Kit Chong Ng; Mubarak Waseem, *Moving on Up? Intra-EU investor-State dispute settlement following the decision in UP v Hungary*, Regulation for Globalization (November 9, 2018), available at http://regulatingforglobalization.com/2018/11/09/moving-on-up-intra-eu-investor-state-dispute-settlement-following-the-decision-in-up-v-hungary/#_ftnref13
[82] *Declaration of the Representatives of the Governments of the Member States, of January 15 2019 on the legal consequences of the judgement of the Court of Justice in Achmea and on investment protection in the European Union* (January 15, 2019), available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf
[83] Id. at 1.
[84] Id. at 2.

intra-EU BITs[85] and undertake some measures regarding pending investment disputes[86] and awards that have not been enforced or voluntarily complied with.[87] The Declaration additionally informs the investor community that no new intra-EU investment arbitration proceeding should be initiated.[88] Two separate pronouncements were made, on one part, by Hungary[89], and, on the other part, by Finland, Luxembourg, Malta, Slovenia and Sweden.[90] These two declarations reproduce the general Declaration in most respects, but exclude intra-EU arbitration under the ECT from the breadth of the *Achmea* decision.

It remains to be seen the final reach of the *Achmea* decision. Undeniably, the judgment is consistent not only with the Commission's position regarding the compatibility of intra-EU BITs with EU law, but also, in general, with its opposition against traditional ISDS.[91] From the investors' perspective, the decision is a source of major uncertainty.[92] Some commentators foresee that investors from Member States may consider to shift their investments to non-EU countries.[93] Although the decision refers only to intra-EU BITs, it paves the way for the definitive abandonment of ISDS within the EU and the future adoption of ICS. The path is not completely

[85] Id. at 4, para. 5.
[86] Id. at 3, paras. 1 and 2.
[87] Id. at 4, para. 7.
[88] Id. at 3, para. 3.
[89] *Declaration of the Representatives of the Governments of the Member States, of January 16 2019 on the legal consequences of the judgement of the Court of Justice in Achmea and on investment protection in the European Union* (January 16, 2019), available at http://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf
[90] *Declaration of the Representatives of the Governments of Hungary, of January 16 2019 on the legal consequences of the judgement of the Court of Justice in Achmea and on investment protection in the European Union* (January 16, 2019), available at http://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf
[91] Clément Fouchard, Marc Krestin, *supra* note 77.
[92] Kit Chong Ng; Mubarak Waseem, supra note 81,
[93] Andrea Erbenová; Barbora Ivanová, *Arbitration proceedings between member state and investor from other member states in the context of the CJEU decision*, The Slovak Spectator (December 17, 2018), available at https://spectator.sme.sk/c/22007801/arbitration-proceedings-between-member-state-and-investor-from-other-member-states-in-the-context-of-the-cjeu-decision.html

clear yet, because the ECJ, on Belgium's request pursuant to Article 218(11) TFEU,[94] is still expected to decide whether the investment court system proposed by the Commission is compatible with EU law. Advocate General Bot recently delivered his opinion on the subject, defending ICS's compatibility with EU law.[95] His opinion is supported, to some extent, by some provisions in CETA that seek to prevent the investment court from applying EU law.[96] These provisions will be addressed below, as they constitute, to some extent, one of the "innovative" features of ICS compared to traditional ISDS. It remains to be seen whether the ECJ will deem such provisions as sufficient to assure EU effectiveness, especially in light of its conclusions in *Achmea*[97] and other objections that have been raised against ICS's compatibility with EU law.[98]

Against this backdrop, now we can turn to the assessment of the innovative features of the investment court system proposed by the European Commission and included in CETA and other EU FTAs.

3.3. General features of the ICS

[94] Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17) (September 30, 2017), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CU0001&from=EN

[95] Opinion of Advocate General Bot, Opinion 1/17 (January 29, 2019), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10811785

[96] Id. at paras. 134-140.

[97] Guillaume Croisant, *CJEU Opinion 1/17 – AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law*, Kluwer Arbitration Blog (January 29, 2019), available at http://arbitrationblog.kluwerarbitration.com/2019/01/29/cjeu-opinion-117-ag-bot-concludes-that-cetas-investment-court-system-is-compatible-with-eu-law/

[98] Ana M. Lopez-Rodriguez, *supra* note 51 at 166 (in addition to the issue of autonomy and primacy of EU law, the author points out to the competence to hear damages and the principles of direct effect and non-discrimination as elements to consider when establishing ICS's compatibility with EU law);

As mentioned, the ICS will be analyzed primarily within the context of CETA, since its provisions are very similar to those included in other EU FTAs that have adopted the new system. CETA introduces some provisions that, as we also noted, are meant to cope with the major focus of criticism against the traditional ISDS, to which we referred in Section 2 of this paper. The aim of this section is to assess how these provisions differ from the *status quo* under traditional ISDS and, consequently, establish whether they indeed solve the particular flaws of ISDS. Those provisions will be evaluated in two categories: procedural innovations and substantive innovations.[99]

A. Procedural innovations of the ICS

The main focus of CETA's innovations refer to the investor-state dispute settlement mechanism, its composition, functioning and decision making-process. Among the more relevant innovations,[100] we can stress the ensuing provisions:

i. Permanent investment court/tribunal

As its own name indicates, the Investment Court System introduces a two-tier investment "court" mechanism, which is inspired by the WTO dispute settlement mechanism.[101] Thus, instead of *ad hoc* tribunals appointed to adjudicate particular disputes, all the disputes concerning the violation

[99] This same presentation is also adopted in August Reinisch, *supra* note 31 at 14—24.
[100] For an exhaustive revision of the ICS's features, see European Federation for Investment Law and Arbitration EFILA, *Task Force Paper regarding the proposed International Court System (ICS)* (2016), available at https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf
[101] European Commission, *supra* note 37, at 9. Regarding the challenges posed by the use of the WTO Dispute settlement system as a model to reform ISDS, see Stephen S. Kho1; Alan Yanovich; Brendan R. Casey; Johann Strauss, *The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?*, 32 (2) ICSID Review 326 (2017).

of CETA's foreign investment provisions must be solved by a single "Tribunal."[102] Although CETA does not employ the expression Tribunal of "First" instance,[103] this "Tribunal" does in fact constitute a tribunal of first instance, because the agreement provides for an "Appellate Tribunal" entrusted with the revision of the award rendered by the "Tribunal."[104]

The Tribunal shall be constituted by fifteen[105] "Members,"[106] all of them appointed by the CETA Joint Committee, i.e., by the EU and Canada. Five members shall be nationals of Canada, five shall be nationals of a Member State and the other five shall be nationals of third countries.[107] The members of the tribunal serve for a fixed term of 5 years, which can be renewed once.[108] The Tribunal so constituted shall have a President and a Vice-president, both of whom shall be selected from within the Members that are nationals from third countries.[109] The members of the Tribunal must assure their availability when required,[110] in assurance of which they will receive a monthly retainer fee to be paid by the Contracting Parties.[111] This retainer fee, according to the TTIP proposal, will be around € 2,000 per month,[112] and will be paid unless the CETA Joint Committee decides to transform the retainer fee into a permanent salary.[113] It is not clear what are the

[102] CETA, *supra* note 43, Articles 8.23 and 8.27. Although the Commission uses the label of investment "court" system, CETA actually omits the word "court" when referring to the adjudication body. In fact, CETA does not even employs the title "Investment Court System." The same occurs with the EU-Singapore FTA. Curiously, the TTIP proposal submitted to the United States does use the expression "Investment Court System" in several occasions. See TTIP proposal, *supra* note 42.
[103] Conversely, the TTIP proposal does use the expression "Tribunal of First Instance." *Id.* at Article 9. The EU-Singapore also uses the same expression (Article 3.9).
[104] CETA, *supra* note 43, Article 8.27.
[105] This number varies in the EU FTAs. For instance, under the EU-Singapore FTA the "Tribunal of First Instance" is composed by 6 members (Article 3.9 (2)).
[106] While the TTIP proposal refers to the members of the tribunal as "Judges," CETA prefers to call them "Members" of the tribunal.
[107] CETA, supra note 43, Article 8.27 (2).
[108] *Id.* at Article 8.27 (5).
[109] *Id.* at Article 8.27 (8).
[110] *Id.* at Article 8.27 (11).
[111] *Id.* at Article 8.27 (12).
[112] TTIP Proposal, *supra* note 42, Article 9 (12).
[113] CETA, *supra* note 43, Article 8.27 (15)

consequences if this decision is made. While the TTIP Proposal states that in that case the "Judges" "shall serve on a full-time basis and (…) shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal,"[114] CETA is silent on the subject and merely states that the CETA Joint Committee shall "decide applicable modalities and conditions."[115]

Each dispute is to be decided by divisions of three Members.[116] The appointment of the members of the division for a particular case is made by the President of the Tribunal on a "rotation basis" in a "random and unpredictable" manner.[117] Each division must be composed by a member from a Member State of the EU, a member from Canada, and a member from a third country.[118] The final award must be rendered within 24 months of the date the claim is submitted by the investor, unless the division requires additional time.[119] While the members receive the retainer fee, that is., while the Committee decides to pay them a permanent salary, they are entitled to additional fees and expenses for each case they hear in an amount determined in accordance with the Rules of the ICSID Convention.[120] These additional fees and costs must be borne by the losing party, but, "[i]n exceptional circumstances" -that CETA does not clarify-, the Tribunal may apportion such costs between the parties.[121] The same losing-party pays rule applies with regard to other "reasonable" costs, including legal fees, unless the tribunal decides otherwise.[122] Thus, the ICS embraces the

[114] TTIP Proposal, *supra* note 42, Article 9 (15).
[115] CETA, *supra* note 43, Article 8.27 (15)
[116] *Id.* at Article 8.27 (6).
[117] *Id.* at Article 8.27 (7).
[118] This member from a third country is in charge of chairing the respective division. *Id.* at Article 8.27 (6).
[119] *Id.* at Article 8.39 (7).
[120] *Id.* at Article 8.27 (14).
[121] *Id.* at Article 8.27 (14) and Article 8.39(5).
[122] *Id.* at Article 8.39(5).

"English Rule" with regard to legal fees, rather than the "American Rule" that has prevailed under the ICSID Convention.[123]

As can be seen, CETA's "Tribunal" differs from traditional ISDS in several respects. As mentioned, the disputes will no longer be heard by *ad hoc* arbitral tribunals, but by a permanent adjudicatory body. Relevantly, unlike traditional ISDS, the investor does not participate in the appointment of the members of the Tribunal.[124] They are appointed in advance by CETA's Contracting Parties (EU and Canada). Some have pointed out that this feature of the ICS may lead the States, envisioning themselves as potential respondents, to select members sympathetic to respondent's states, which could undermine the system's authority and legitimacy.[125] It has been argued, however, that the Contracting Parties will not necessarily appoint "pro-State" members, since they also have interest in protecting their own national investors by providing them with an

[123] Freya Baetens, *The EU's proposed Investment Court System (ICS): addressing criticisms of investor-State arbitration while raising new challenges*, 43:4 Legal Issues of Economic Integration, 367, 378, 379 (2016).

[124] Criticizing the elimination of the investor's right to appoint arbitrators, S.M. Schwebel; *The EU-Canada Free Trade Agreement (CETA): Keynote Remarks (TDM CETA Special)* 1 TDM (2016), https://www.transnational-dispute-management.com/article.asp?key=2311#citatio (claiming that "stripping investors of the right to appoint arbitrators" reveals a smack of appeasement of uninformed criticism of ISDS rather than sound judgment.")

[125] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 15; Louise Woods, Fit for Purpose? The EU's Investment Court (March 23, 2016), available at http://arbitrationblog.kluwerarbitration.com/2016/03/23/to-be-decided/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29; Emma Rose Bienvenu, *The EC's proposal for a permanent-investment court system: politics, pitfalls and perils*, Journal of International Law, available at http://pennjil.com/the-ecs-proposal-for-a-permanent-investment-court-system-politics-pitfalls-and-perils/ (noting that … with each panel guaranteed to include one EU national, one US national and only one third-country national, State Respondents are guaranteed that every panel will include at least one of their five appointees. State parties will in fact have the power to select one of the judges hearing their disputes, albeit in advance of any particular claim. The contemplated appointment process may disfavour candidates with a history of pro-investor treaty interpretation."); Hans Von Der Burchard, *Business Slams Malmström's TTIP Pitch*, Politico, Oct. 10, 2015, available at http://www.politico.eu/article/ttip-business-lobby-slams-malmstroms-arbitration-proposal-isds-businesseurope/ (noting that "the provision on countries appointing the judges would discriminate against the business community."); Stephen S. Kho1 et al., *supra* note 101, at 343.

unbiased adjudicatory body.[126] In our opinion, the validity of this last counter-argument must be reviewed, at least to some extent. The argument may hold within the context of investment treaties involving developed countries who are both recipients and exporters of investments. However, when the investment treaty involves one developing country, one can foresee that the incentives for the State to appoint "pro-State" members will be higher, for the prospect of its own nationals using the system does not appear to be evident.

Be it as it may, it is undeniable that the fact that potentially respondent States have the power to select in advance "pro-State" adjudicators constitutes, by itself, a threat to ICS's authority.[127] It is hard to disagree, then, with those voices claiming steps to be taken in order to make the appointment process transparent and thereby less subject to political influence.[128] CETA, however, contains no provisions allowing stakeholders to monitor the way in which the Contracting States will appoint the members of the Tribunal.

Other ICS's features have given place to concerns as to the existence of potential bias on adjudicators. It has been argued that the members of the Tribunal, willing to be reappointed for a second period, may be prone to favor respondent States.[129] This problem, apparently, has arisen

[126] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 15; Celine Levesque, *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New*?, CIGI Investor-State Arbitration Series, Paper No. 10 (2016), 8 (noting that "Canada, the United States and many European countries have by now realized that the system protects both their 'defensive' and 'offensive' interests. Therefore, competence and neutrality should be of paramount importance.")

[127] Emma Rose Bienvenu, *supra* note 125; Piero Bernardini, *Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests*, 32:1 ICSID Review 38, 48 (2016) (noting that "[f]rom the investor's perspective, judges appointed by States and paid a retainer fee by States that are the disputing parties would have an inherent pro-State bias that, although per se not a sufficient reason for challenge, would undermine the confidence in the full neutrality of the adjudicating body, therefore of the system as a whole.")

[128] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 15 (suggesting, for example, that the Contracting States might undertake consultations with the different stakeholders when choosing the members of the Tribunal).

[129] Emma Rose Bienvenu, *supra* note 125.

within the context of the WTO dispute settlement mechanism,[130] which served as a model to ICS. Furthermore, it has been alleged that the members of the Tribunal may be inclined to favor their home state (when acting as a respondent) and investors from their home state (when acting as claimants).[131] Remember, in this regard, that under ICS the cases are solved by "divisions" composed by one national of each Contracting Party and a national of a third country, while under traditional ISDS, as a general rule, nationals of the parties in a dispute are barred from acting as arbitrators in such dispute.[132]

ii. Appeal mechanism

The second prong of the system, to some the most "interesting" aspect of the ICS,[133] is the "Appellate Tribunal." The Appellate Tribunal is in charge of reviewing the Tribunal's decision, of course, only if at least one the parties appeal within 90 days after the awards is rendered.[134] The members of the Appellate Tribunal must be appointed by the CETA Joint Committee[135] and they shall hear the appeals on divisions of three randomly appointed Members.[136] Other operative aspects of the Appellate Tribunal, such as the actual number of Members, their remuneration and costs, are to be defined "promptly" by the Committee.[137] This undefinition of the CETA regarding

[130] Celine Levesque, *supra* note 126, at 9 (footnote 85) (highlighting a controversy regarding US government blocking of WTO appellate body members' renewal).
[131] Emma Rose Bienvenu, *supra* note 125 (referring to some empirical studies within the context of the International Court of Justice revealing that judges use to vote in favor of their home countries in roughly 90% of the cases.)
[132] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), arts. 38 and 39.
[133] August Reinisch, *supra* note 31, at 26.
[134] CETA, supra note 43, Article 8.28 (1) and (9).
[135] Id. at Article 8.28 (3).
[136] Id. at Article 8.28 (5).
[137] Id. at Article 8.28 (7).

the Appellate Tribunal contrasts sharply with the TTIP proposal, which contains a more detailed regulation of these aspects.[138]

As to the scope of the review, the Appellate Tribunal may "uphold, modify or reverse" the award rendered by the division of the Tribunal. Thus, the scope of the review is not restricted to the annulment of the award, as occurs under the ICSID annulment mechanism.[139] Moreover, the grounds for review are broader, including: (a) errors in the application or interpretation of applicable law; (b) *manifest* errors in the appreciation of facts, including the appreciation of relevant domestic law and; (c) the grounds for annulment set forth in Article 52 of the ICSID Convention, as far as they are not covered by the first two grounds.

The appeal mechanism, absent in current ISDS, is supposed to assure correctness in the decision-making and bring consistency and predictability,[140] the lack of which, as mentioned, is highlighted as one of the main drawbacks of traditional ISDS.[141] It is also meant to "respond to the legitimacy concerns as regards the current ISDS system."[142] It is to be noted, however, that the actual design of ICS does not *absolutely* assure consistency of the decisions. The partial awards are not reviewed by a single "Appellate Tribunal" hearing all the appeals, but by "divisions" composed by members

[138] For example, the TTIP proposal does define the number of members of the Appellate Tribunal and their nationality (Art. 10 (2)), the procedure for the appointment of such Members (Art. 10 (3)), their tenure (Art. 10 (5)), the procedure for the appointment of a President and Vice-President and their tenure (Art. 10 (6)), the retainer fee to be paid to the Members of the Appellate Tribunal (Art. 10 (12)), among other aspects.
[139] ICSID Convention, Article 52. If the award is annulled, the dispute may be submitted to a new tribunal. August Reinisch, *supra* note 31, at 26 (noting that the Appellate Tribunal functions as a "court of last instance," rather than a "court of cassation.")
[140] European Commission, *supra* note 37, at 8.
[141] About discussions regarding the need of implementing an appeal mechanism in traditional, see Christian Tams, *An Appealing Option? The Debate about an ICSID Appellate Mechanism*, 57 Essays in Transnational Economic Law (2006); Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30:5 J Intl Arb 531 (2013).
[142] *Id.* at 8; Freya Baetens, *supra* note 123, at 381.

randomly selected from the pool of members of the "Appellate Tribunal." This means that there is a chance that while one "division" reaches a conclusion regarding a particular issue, other "division," perhaps composed by other members, reaches an opposite conclusion as to the very same issue.[143] The system does not provide for a mechanism to assure consistency in this potential situation.

In any case, it is clear that the appeal mechanism brings consistency only within the context of the investment treaty providing for ICS (in our case, for example, the CETA).[144] It does not assure consistency of investment law in general, but only of the investment law as set forth in a singular investment treaty. To some, this feature of ICS threatens to become an obstacle to the achievement of consistency in investment law as a whole.[145] It is by no surprise, then, that the EU itself is promoting the creation of a multilateral investment court, which would be capable of solving disputes under many existing and future investment treaties.[146] Nevertheless, some argue that the ICS's appeal mechanism, instead of promoting a multilateral investment court, may end up becoming an obstacle to it.[147]

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[143] Celine Levesque, *supra* note 126, at 12.

[144] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 48 (noting that the system would increase the "internal" consistency of the applicable law).

[145] Celine Levesque, *supra* note 126, at 12; ICSID, *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper (October 22, 2004), at 13 (noting back in 2004 that "[i]t would in this context seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned."); Baetens, *supra* note 123, at 384 (noting that "[a] situation in which each FTA with an investment chapter and each International Investment Agreement (IIA) have their own ICS could lead to even greater fragmentation and unpredictability than the current *ad hoc* arbitration system.")

[146] Submission of the European Union and its Member States to UNCITRAL Working Group III, *supra* note 46, at 8; UNCTAD, *World Investment Report: Reforming International Investment Governance (2015)*, at 150, available at https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (noting that "[a]lthough an appeals body may be easier to set up in a bilateral context, its expected function of fostering legal consistency and predictability would be more pronounced in a pluri or multilateral context.")

[147] Stephan Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, 20 (9) ASIL INSIGHTS, 20 (9) (April 22, 2016), available at https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping#_ednref14 (noting that the "presently proposed the establishment of a TTIP Tribunal may create an additional obstacle on the way to a multilateral court, rather than aiding the process of multilateralization. In

Another aspect to consider regarding the appeal mechanism is the length of the proceedings. Adding a new stage will likely increase the time of the proceedings,[148] which is, already, a source of criticism under traditional ISDS as mentioned. Trying to assure that proceedings remain efficient and expeditious, the TTIP proposal set forth that "the appeal proceedings shall not exceed 180 days."[149] Some authors cast doubt as to whether such term is realistic, especially considering the fact that the complexity of the Appellate Tribunal's task has grown with the expansion of the grounds for review.[150] CETA, perhaps aware of these concerns, does not include a time limit for the conclusion of the appeals (it does provide, as mentioned, a 18-months term for the issuance of the award by the Tribunal). While this may be in line with the doubts raised by the TTIP Proposal's ambitious term, it leaves with no answer the concerns regarding the potential increase in the length of the proceedings as a result of the implementation of the appeal mechanism.

iii. Applicable law

Another innovative aspect of the ICS is related to the treatment of the applicable law. As mentioned, the ECJ, following the Commission's long-standing position on the subject, ruled in the *Achmea* decision that "intra-EU" BITs providing for ISDS are incompatible with EU law,

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fact, a tribunal composed of judges who are one-third European and one-third from the U.S. could further cement the bilateral structure of international investment law. The more effectively the TTIP Tribunal functions, the more difficult it will become to replace the status quo later with a multilateral mechanism."); Freya

[148] Piero Bernardini, *supra* note 127, at 147;

Stephen S. Kho1 et al., *supra* note 101, at 344 (noting that "[n]ot only is this [possibility of review of the facts] likely to lead to more litigation, but it is unclear how the Appeal Court could feasibly re-open factual findings by the Tribunal. The resulting cost and delay in pursuing an appeal could itself pose a barrier for foreign investors with limited resources to prosecute their claims against the host State in arbitration, causing them to think twice before investing in the first place.")

[149] TTIP Proposal, supra note 42, Article 29 (3); European Commission, Concept Paper, supra note 37, at 8

[150] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 57.

because they have the effect of allowing *ad hoc* arbitral tribunals to apply EU law, without being such decisions subject to any review by the courts of the Member States or the ECJ itself. The European Commission, in order to prevent the ICS from falling in the same "trap", envisioned some innovative provisions regarding the applicable law to the dispute. Hence, CETA specifies that the Tribunal shall apply CETA's provisions and "other rules and principles of international law applicable between the Parties."[151] In addition, CETA provides that the Tribunal, in determining whether a measure breaches the agreement, has no jurisdiction to determine the legality of the measure under domestic law and must consider such domestic law only "as a matter of fact," following the "prevailing interpretation given to the domestic law by the courts or authorities of that Party." Finally, "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."[152]

These rules evidently differ from the rules of traditional ISDS. According to the ICSID Convention, absent an agreement by the parties regarding the applicable law, the tribunal is directed to apply "the law of the Contracting State party to the dispute … and such rules of international law as may be applicable." CETA provisions seek to exclude the application of EU law from the jurisdiction of the Tribunal. Yet, it is not clear whether such rules will be enough to prevent the ECJ from concluding that the ICS, as "intra-EU BITs," is incompatible with EU law.[153] Neither is clear the precise scope of the rules[154] and how they will actually work in practice, especially considering that "the resolution of investment disputes often requires the determination

[151] CETA, supra note 43, Article 8.31 (1).
[152] Id. at Article 8.31 (2).
[153] August Reinisch, *supra* note 31, at 28.
[154] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 18.

of rights under domestic law, such as whether a property right exists in order to decide on an expropriation claim."[155]

iv. Other procedural provisions

CETA contains other procedural provisions that may also be considered, at least to some extent, innovative. CETA defines statutory limits for the submission of claims to the Tribunal (3 years after the investor knew or should have known about the breach of the agreement and the resulting damage or 2 years after the investor ceased to pursue claims before domestic courts of the host State).[156] CETA also includes a provision on transparency of the proceedings, providing for the application of the UNCITRAL Transparency Rules with some modifications[157] and the existence of hearings open to the public.[158] Of course, efforts to foster transparency within the context of traditional ISDS are not new, as it is revealed, for example, by the refinements introduced to NAFTA,[159] the 2006 amendments to the ICSID Arbitration Rules,[160] the enactment of the referred UNCITRAL Rules on Transparency Rules in Treaty-based Investor-State Arbitration,[161] which was followed by the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (also known as the "Mauritius Convention on Transparency"),[162] recent investment

[155] Celine Levesque, *supra* note 126, at 18.
[156] CETA, supra note 43, at Article 8.19 (3).
[157] Id. at Article 8.36 (1).
[158] Id. at Article 8.36 (2) – (4).
[159] See, for example, NAFTA Free Trade Commission (FTC) 2001 Note of Interpretation (allowing the documents of the proceeding to be public) and the 2003 statements of the NAFTA Parties (regarding the admissibility of amicus curiae briefs.
[160] ICSID Arbitration Rules, Rule 37 (2) (allowing the submission of *amicus curiae's* briefs).
[161] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, UN GA Res 68/109 (December 16, 2013, available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf
[162] Also known as the "Mauritius Convention," the Convention seeks to bring the States into the application of the UNCITRAL Rules on Transparency to any investor-State arbitration, whether or not initiated under such Rules. Its

treaties and BIT models,[163] and procedural orders issued by tribunals in specific cases.[164] Thus, as a commentator indicates, "the European Commission responded to the transparency concern, but not in any manner above or beyond reforms already adopted and being gradually incorporated in the existing investor-State arbitration system – as this seems, indeed, sufficient."[165]

CETA contains provisions on ethics and independence of the members of the Tribunal, which aim to deal with the perception that ISDS constitutes a secret justice operated by adjudicators continuously jumping from judges to counsels. In this regard, CETA states that the members of the Tribunal shall not be affiliated with any government,[166] although introduces, as a qualification, a footnote stating that the "fact that a person receives remuneration from a government does not in itself make that person ineligible." This last qualification, according to some commentators, threats the independence of the members of the Tribunal.[167] Additionally, the members of the Tribunal must observe the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.[168] Innovatively, the Members of the Tribunal, upon appointment, are barred from acting "as counsel or as party-appointed expert or witness in any pending or new

text is available at http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf

[163] For example, the recent Draft Dutch Model BIT, released on May, 2018, incorporates the UNCITRAL Rules on Transparency. See Bart-Jaap Verbeek; Roeline Knottneru, *The 2018 Draft Dutch Model BIT: A critical assessment* (July 30, 2018), available at https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/

[164] Piero Bernardini, *supra* note 127, at 54.

[165] Freya Baetens, *supra* note 123, at 374.

[166] CETA, supra note 43, at Article 8.30 (1).

[167] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 16 ("The premise of this footnote may be practically unworkable. To allow government paid officials, employees or consultants to become TFI or AT judges could undermine the requirements of non- affiliation with any government and independence, in particular because their existing loyalty towards the government which pays them cannot be ignored. In fact, this footnote opens up the door for appointments of "pro-State" judges or at least judges who may not be in an unfettered position to render decisions against their employer."); Freya Baetens, *supra* note 123, at 370 (noting that this provision, "one of the most problematical of the entire proposal," would give place to the situation in which a "counsel defending the same respondent State in a non-investment dispute as well as any domestic court judge, might be seen as able to cumulate their position with the position of Judge or Member in an ICS.")

[168] Unlike the EU-Singapore FTA, CETA does not adopt a code of ethics.

investment dispute under this or any other international agreement"[169] (prohibition of "double-hat" practice).[170] They are not discouraged, though, to act as arbitrators in other investor-state dispute outside the ICS or engage in any other occupation. Finally, as with other arbitration rules under which traditional ISDS is conducted, CETA contains a procedure for challenging the independence of a member of the Tribunal. While the TTIP proposal required the President of the Tribunal to decide the challenges,[171] CETA, perhaps aware of the strong criticism raised against the TTIP proposal,[172] entrusted the President of the International Court of Justice with that task.[173] CETA's final solution on the subject, unlike the TTIP proposal, does depart from the rule under traditional ISDS.[174]

CETA also contains some provisions limiting the access to ICS under certain circumstances. Rather than innovative, these provisions accommodate to best practices already developed by modern investment agreements. Thus, CETA excludes parallel proceedings,[175] which is in line

[169] CETA, supra note 43, at Articles 8.30 (1).
[170] Celine Levesque, *supra* note 126, at 8; Casting some policy doubts regarding this provision, Freya Baetens, *supra* note 167, at 370 (noting that "excluding anyone acting as counsel or expert in investment disputes that are unrelated to the disputes at hand, will likely result in severe difficulties in finding candidates with the level of required expertise. Eminent experts might not resign from their positions for the mere possibility that they may be selected to serve as Judge or Member in a potential future dispute.")
[171] TTIP Proposal, supra note 42, Article 11 (2) and (3).
[172] European Federation for Investment Law and Arbitration EFILA, *supra* note 100, at 16 (noting that [i]t is undoubtedly questionable whether there is sufficient distance and neutrality ensured if the respective President alone decides such delicate issues. The reasons for challenge on the grounds of want of impartiality or independence are wholly subject."); Sophie Nappert, *Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism*, The 2015 EFILA Inaugural Lecture (November 26, 2015), available at https://efila.org/wp-content/uploads/2015/11/Annual_lecture_Sophie_Nappert_full_text.pdf (noting that [i]t is striking, for a document that claims to bend over backwards to get away from ISDS as we know it, that it imports probably one of ISDS' most problematic practices in the ICSID context, and that is to have a Judge or Member, the President of the TFI or the Appeal Tribunal, decide on ethical challenges to fellow Judges or Members (Article 11 (2)-(4)) in instances where the challenged individual refuses to resign.")
[173] CETA, supra note 43, at Articles 8.30 (2) and (3).
[174] ICSID Arbitration Rules, Article 58.
[175] CETA, supra note 43, at Articles 8.22 (f) and (g), and 8.24.

with recent investment treaties providing for traditional ISDS.[176] Following ISDS case law, CETA also bars investors from filing claims when the investment was procured through "fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process."[177] Likewise, CETA provides for the rejection of fraudulent or frivolous claims,[178] something that has been authorized in the context of ISDS since the 2006 amendments to the ICSID Arbitration Rules.[179]

Moreover, in accordance with the fact that the Tribunal has no jurisdiction to determine the legality of a challenged measure, CETA does not allow the Tribunal to repeal or vacate the challenged measure, but only to order the payment of a compensation to the injured investor.[180] This rule is not new, though, for some tribunals under traditional ISDS have relied on Article 35 of the ILC Articles[181] to deny the repeal of regulatory measures taken by the host State.[182]

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[176] Diane Desierto, *Host State Controls over the Offer to Arbitrate: Waivers Against Parallel Actions in Investor-State Arbitration*, Kluwer Arbitration Blog (August 10, 2018), available at http://arbitrationblog.kluwerarbitration.com/2016/08/10/host-state-controls-over-the-offer-to-arbitrate-waivers-against-parallel-actions-in-investor-state-arbitration/ (noting that "[m]ore recent generations of investment treaties tend to include explicit provisions requiring claimants in investor-State arbitrations to submit waivers that – depending on the actual terminology used in these waiver provisions – generally seek to bar them from submitting their claims to other forums, such as through litigation before domestic courts or parallel international proceedings."

[177] CETA, supra note 43, at Articles 8.22 (f) and (g), and 8.18(3). Some tribunals had reached the same solution based on the generic wording of BITs requiring the investments to be made "in accordance" with the law of the host State. See, for instance, Metal-Tech Ltd v The Republic of Uzbekistan, ICSID Case No ARB/10/3, Award (October 4, 2013); Regarding abuse of process, see *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (December 17, 2015).

[178] CETA, supra at Article 8.32.

[179] ICSID Arbitration Rules, Rule 41 (6).

[180] CETA, supra note 43, at Article 8.39 (1).

[181] ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 35: "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

[182] See, for example, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018), at paras. 636, 637. ("In the circumstances of this case, the Tribunal deems the order sought by the Claimants disproportional to its interference with the sovereignty of the State compared to monetary compensation.")

B. Substantive innovations

In addition to the dispute-settlement innovations, mainly related to the creation of a permanent investment tribunal along with an appeal mechanism, CETA includes some provisions dealing with the substantive protection afforded to investors. As you will note, some of these provisions have been developed within the context of traditional ISDS and aim chiefly to reduce the scope of protection granted to investors. Thus, rather than innovate, CETA again accommodates to modern trends developed under traditional ISDS.

i. Right to regulate

As noted above, one of the main criticisms, if not the biggest, against traditional ISDS was that it promoted the so-called "regulatory chill," that is, restricted States' right to regulate in the public interest in matters like human health and environment.[183] Such criticism was mainly fed by some relatively famous claims filed by some investors regarding regulatory measures taken by host States. Particularly, critics referred to the cases brought by Philip Morris against Uruguay[184] and Australia[185] concerning regulatory restrictions imposed on the selling of cigarettes, and to the *Vattenfall*[186] case, which was brought against Germany as a result of its decision to shut down

[183] European Commission, Report, *supra* note 33, at 14, 38, 73, 75, 76, 132.
[184] *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay*, ICSID Case No. ARB/10/7, available at https://www.italaw.com/cases/460
[185] *Philip Morris Asia Limited v. The Commonwealth of Australia, supra* note 177.
[186] *Vattenfall AB and other*s v. *Federal Republic of Germany*, ICSID Case No. ARB/12/12, available at https://www.italaw.com/cases/1654

nuclear energy plants after Japan's Fukushima nuclear disaster.[187] It is important to bear in mind, though, that none of these cases had been decided on the merits by the time the EU released its ICS proposal,[188] so, in a way, one can argue that the criticism as to the alleged "regulatory chill" could have been premature. We will come back to this later.

In any case, aiming to address the States' right to regulate, CETA begins by stating in its Preamble "that the provisions of this Agreement preserve the *right of the Parties to regulate* within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity" and that the protection afforded to investors is not meant to "undermin[e] *the right of the Parties to regulate* in the public interest within their territories."[189] Then CETA devotes one article to "Investment and regulatory measures" (Article 8.9), in which, among other things, "reaffirm[s] [States'] 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,"[190] and declares, "[f]or greater certainty," that the

[187] Schill explains in these terms why the Vattenfall claim has particularly contributed to a more general debate in Germany regarding international investment arbitration: "The Vattenfall II case, however, is special because it involves more than the challenge of a politically sensitive legislative measure; much more: the nuclear power phase-out touches on an issue that has marked Germany's social and political culture over the past three and a half decades like no other issue apart from German reunification. The Green movement would have been unthinkable in its present form without opposition to nuclear power and the peace movement during the Cold War is likely to have been significantly different. The entire political and social landscape in Germany, in other words, has been so deeply influenced by the struggle against nuclear power that Vattenfall II, and with it investor-State arbitration generally, is seen as a challenge to a fundamental social and political settlement and hence to democracy more generally. Add to that an at best half-way informed press that understands little even of the basics of international investment law and investor-State arbitration, and you have the perfect storm of public skepticism vis-A-vis investor- State arbitration." Stephan Schill, *The German Debate on International Investment Law*, 16 J. World Investment & Trade 1, 2 (2015).
[188] Stressing this circumstance, August Reinisch, *supra* note 31, at 10.
[189] As to the relevance of these terms in the preamble of CETA, Catharine Titi, *The Right to Regulate***,** in FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 159, 169 (Makane Moïse Mbengue; Stefanie Schacherer eds., Springer, 2019) (noting that "[a]lthough preambles do not create concrete rights and obligations, the references to the right to regulate in CETA's preamble are in categorical language and could entertain powerful arguments in favour of the right to regulate."
[190] CETA, supra note 43, at Article 8.9 (1).

"*mere* fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section."[191]

While the previous provisions do not say too much, since it seems undisputed, even under ISDS case law, that the States have a right to regulate and that the mere fact that it regulates does not amount to a breach of an investment treaty, CETA's provisions on expropriation yield a more concrete effect. Indeed, in addition to defining some criteria to determine whether an indirect expropriation exists,[192] CETA states, again for [g]reater certainty," that "*except in the rare circumstance* when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."[193] As it appears on its face, these provisions seek to safeguard States' right to regulate by limiting to only "rare circumstance[s]" the cases in which investors can allege that certain regulatory measure provoked an expropriation.

However, as some have correctly pointed out, some notorious developments have been made under traditional ISDS to cope with the "regulatory chill" potentially created by vague provisions in IIAs.[194] The last quoted provision of the CETA, for example, simply reproduces, with only minor

[191] Id. at Article 8.9 (2).
[192] Id. at Annex 8-A (1) and (2). For a critic of the analogous provision set forth in the TTIP Proposal, see Federico Ortino, *Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership and the (Elusive) Search for 'Greater Certainty',* 43:4 Legal Issues of Economic Integration, 351 (2016).
[193] Id. at Annex 8-A (3).
[194] Vera Korzun, *The Right to Regulate in Investor- State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, S.J.D. Dissertations, 355, 387 (2016) (asserting that the "trend in today's treaty making is the inclusion into IIAs of provisions that reserve for the State the right to regulate—the safeguard provisions.")

refinements, the rule incorporated to the US 2012 Model BIT,[195] which, in turn, can be traced back in the US 2004 Model BIT.[196] The same provision, again, with only slight differences, forms part of the Canada Model BIT since 2004.[197] Many other countries have also reviewed their BIT models in order to define the right to regulate.[198] The Trans-pacific Partnership (TTP) agreement between the United States and 11 Pacific Rim countries also includes a provision resembling the provision of the US 2012 Model BIT.[199]

In the same direction, some ISDS tribunals, under older and vaguer IIAs, have nonetheless rejected claims that challenged regulatory measures taken by host States. Commentators refer to the *Methanex* case, decided more than 10 years ago under NAFTA, in which the tribunal upheld California's ban on the selling of methanol in the state of California.[200] Within the context of NAFTA, this decision has been recurrently used to defend ISDS from the "regulatory chill" criticism.[201] More recently, some of the claims that were used to champion the critics against ISDS

[195] 2012 U.S. Model Bilateral Investment Treaty, Annex B (4)(b) ("Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

[196] 2004 U.S. Model Bilateral Investment Treaty, Annex B (4)(b), available at https://www.state.gov/documents/organization/117601.pdf

[197] 2004 Canada Model Bilateral Investment Treaty, Annex B.13(1)(c), available at https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf

[198] United Nations Conference on Trade and Development, *UNCTAD World Investment Report 2016. Investor Nationality: Policy Challenges* (2016) 109, 110, available at https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf; Kyla Tienhaara; Todd Tucker, *Regulating foreign investment: Methanex revisited,* in Alternative Visions In The International Law On Foreign Investment: Essays In Honour Of Muthucumaraswamy Sornarajah, ed. Chin Leng Lim (Cambridge: Cambridge University Press, 2016), at 23, available at SSRN: https://ssrn.com/abstract=3012771

[199] Trans-pacific Partnership (TTP), Chapter 9, Annex 9-B (3)(b) ("Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.")

[200] *Methanex Corporation v. United States of America*, UNCITRAL, Award on Jurisdiction and Merits (August 3, 2005), available at https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf; Regarding this decision and its relevance in future case law and treaty drafting, see Kyla Tienhaara; Todd Tucker, supra note 198.

[201] Jessica C. Lawrence, *Chicken Little Revisited: NAFTA Regulatory Expropriations after Methanex*, 41 Ga. L. Rev. 261, 263 (2006) (noting that "[m]any NAFTA supporters have reacted jubilantly to Methanex, claiming that it proves-contrary to the "doomsday predictions" of detracting "Chicken Littles" -that NAFTA's chapter 11 does not interfere

within the context of the TTIP negotiations, have been decided in favor of the host State in the dispute. For instance, the Philip Morris' claim against Australia, which was used by the European Commission to justify the exclusion of "forum shopping" in the TTIP Proposal,[202] was rejected by the tribunal in the jurisdictional stage under the argument that Philip Morris, by changing its corporate structure to gain treaty protection, committed an abuse of right or abuse of process.[203]

Dealing particularly with the right to regulate, the tribunal in Philip Morris against Uruguay concluded that the investor's investment was not indirectly expropriated because the challenged measures did not substantially deprive it of its value.[204] Although its analysis might have ended there, the tribunal went further and asserted that "the adoption of the Challenged Measures by Uruguay was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation under Article 5(1) of the BIT."[205] According to the tribunal, the State's policy powers doctrine forms part of the rules of customary international law applicable to investment disputes under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, in support of which it relied, among other things, on some ISDS cases and the above-mentioned US Model BIT of 2004 and 2012.[206] Therefore, as a general rule, "State's action in exercise of regulatory powers not to constitute indirect expropriation," provided that the action is taken *bona fide* for the purpose of protecting the public welfare, is non-discriminatory and is proportionate.[207]

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with a State's ability to enact regulations that protect labor, health, the environment, and human rights by forcing it to pay off affected investors.")

[202] European Commission, Concept Paper, *supra* note 37, at 2.

[203] *Philip Morris Asia Limited v. The Commonwealth of Australia, supra* note 177, at para. 585.

[204] *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay*, *supra* note 184, at paras 284-287.

[205] *Id.* at para 287.

[206] *Id.* at paras. 290-301.

[207] *Id.* at para. 305. Criticizing the legal reasoning of the decision, Ranjan Prabhash, *Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay*, 9:1 Asian Journal of International Law, 98 (2019).

Some commentators rely on these decisions to claim that the alleged "regulatory chill," which fed so much criticism against ISDS, was no more than a myth.[208] In a more general way, Schwebel claims that "[s]ince the State's right to regulate has not been successfully challenged and, on the contrary, sustained, as by the arbitral award in *Methanex v United States of America*, this so-called 'new precise standard' [CETA's provisions regarding State's right to regulate] appears designed not to reform the law but to mollify uninformed criticism of ISDS."[209] Other commentators argue that, despite the final outcome in *Philip Morris v. Uruguay*, the "regulatory chill" created by investment arbitration still remains strong. [210] They point out to the fact that had not been for Michael Bloomberg's financial support, Uruguay had had to settle the case due to the immense legal fees and expenses to continue with it, which in their view "reinforces the notion that the high cost of ISDS can be sufficient to dissuade a government from defending a policy that would ultimately be determined to be compliant with international investment law."[211] Moreover, the final outcome does not eliminate the fact that the mere filing of a claim against a State may deter other States from adopting regulations similar to the one challenged before the investment tribunal (something that has been labelled as "cross-border chill").[212]

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[208] Nikos Lavranos, *After Philip Morris II: The "regulatory chill" argument failed – yet again*, Kluwer Arbitration Blog (August 18, 2016), available at http://arbitrationblog.kluwerarbitration.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/; Yannick Radi, *Philip Morris v Uruguay Regulatory Measures in International Investment Law: To Be or Not To Be Compensated?*, 33:1 ICSID Review, Vol. 33, No. 1 (2018) (noting that the decision "provides a salutary answer to those critics who decry international investment law as preventing States from regulating.")

[209] S.M. Schwebel, *The EU-Canada Free Trade Agreement (CETA): Keynote Remarks (TDM CETA Special)*, 1 TDM (2016), available at https://www.transnational-dispute-management.com/article.asp?key=2311#citation

[210] Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7:2 Transnational Environmental Law, 229, 237 (2018).

[211] *Id.*

[212] Id. at 238 (noting that New Zealand's decision to delay plain packaging until the dispute against Australia had been resolved is a clear-cut case of regulatory chill.")

ii. Definition of the standards of treatment

The European Commission also claims to have devised precise and specific standards of treatment for investors and investments, in order to "prevent abuse" and eliminate "unwelcome discretion"[213] from the members of the Tribunal. For instance, CETA provides a narrow definition of the standard of fair and equitable treatment (FET) by providing a limited list of cases in which a measure or a series of measures amount to a breach of such standard, namely, denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief, and abusive treatment of investors, such as coercion, duress and harassment.[214] In addition, CETA, taking position in a unsettled discussion under ISDS, States that specific representations by the State, vis-à-vis the particular investor, are required in order to create a "legitimate expectation" relevant to the standard of fair and equitable treatment.[215]

Once again, though, although the European Commission claims otherwise, CETA is not the first investment agreement whose wording limits the scope of the standard of fair and equitable treatment.[216] In fact, there are some investment agreements that provide for an even more restricted definition of the standard of fair and equitable treatment, as it is the case of the above-referred

[213] European Commission, Concept Paper, *supra* note 37, at 2.
[214] CETA, supra note 43, at Article 8.10 (2).
[215] *Id.* at Article 8.10 (4).
[216] UNCTAD, *Fair and Equitable Treatment - A Sequel: UNCTAD Series on Issues in International Investment Agreements II*, United Nations Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements II, UN, New York (2013), at 29.

TTP[217] and the ASEAN Comprehensive Investment Agreement of 2009.[218] It is also fair to mention that throughout the years ISDS tribunals have been delimiting the scope of the standard of fair and equitable treatment as vaguely defined in traditional IIAs,[219] which, at least to some extent, has also served the purpose of limiting adjudicators' discretion, despite the absence of *stare decisis* in investment arbitration.

With regard to the standard of the most favored nation (MFN), CETA excludes its application to provisions regarding dispute settlement,[220] that is, excludes the situation in which an investor, relying on the MFN clause, purports to benefit from more favorable dispute settlement provisions in other investment agreements concluded by the host State (the famous *Maffezzini* case).[221] This, whether consciously or not, arguably has also the effect of preventing investors from using traditional ISDS clauses contained in other investment treaties in order to escape from the ICS system envisioned in CETA. In any case, it is to be noted that, after the *Maffezzini* case, many investment treaties providing for traditional ISDS opted to exclude the application of the MFN

[217] Trans-pacific Partnership (TTP), supra note 199, at Article 9.6 (2) (providing that FET does not require treatment beyond that which is required under the customary international law minimum standard of treatment of aliens, restricting the FET scope to "the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world," and expressly stating that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.")

[218] ASEAN Comprehensive Investment Agreement of 2009, Article 11 (2), available at https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf;

[219] UNCTAD*, supra* note 216, at 61; Is Consistency a Myth? *Gabrielle Kaufmann-Kohler*, at 140.

[220] CETA, supra note 43, at Article 8.7 (4).

[221] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (January 25, 2000), available at https://www.italaw.com/cases/641; Criticizing the total exclusion of dispute settlement of the scope of the MFN clause, see Claire Crépet Daigremont, *Most Favoured Nation Treatment*, in FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 71,86 (Makane Moïse Mbengue; Stefanie Schacherer eds., Springer, 2019).

clause to dispute settlement provisions,[222] so CETA's provision, rather than innovative, embraces modern drafting trends and certain policy preferences.

However, CETA does include an innovative provision regarding MFN. Indeed, it states that "[s]ubstantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."[223] Thus, it is not relevant, for MFN purposes, whether a third treaty contains more favorable substantive provisions. Only when such provisions have been effectively implemented by the State with regard to foreign investors, the MFN clause in CETA comes into place. As some have mentioned, "[i]n this way, MFN treatment forbids *de facto* discrimination, not *de jure* discrimination arising from differences in clauses or in formulations in investment agreements,"[224] which is a way to "avoid treaty shopping: a sort of pick and choose among all provisions of treaties concluded with third States, importing preferred clauses into the basic treaty."[225]

Finally, CETA takes position in a long-standing discussion regarding whether the standard of full protection and security merely refers to the "physical" protection of investors and investments, or also encompasses some ways of "non-physical" protection (e.g. legal protection).[226] CETA

[222] UNCTAD, *IIA Issues Note. Tacking Stock of IAA Reform*, No. 1 (March 2016), at 9, available at https://unctad.org/en/PublicationsLibrary/webdiaepcb2016d3_en.pdf (noting that while between 1962 and 2012 only 3% of BITs excluded dispute settlement from the breadth of the MFN clause, nearly a third part of the BITs concluded between 2012 and 2014 (40) included such exclusion.).
[223] CETA, *supra* note 43, at Article 8.7 (4) last paragraph.
[224] Claire Crépet Daigremont, *supra* note 221, at 88.
[225] *Id.*
[226] August Reinisch, *supra* note 31, at 16.

embraces the former interpretation by expressly stating that "'full protection and security' refers to the Party's obligations relating to the *physical security* of investors and covered investments."[227]

C. Enforcement

Although enforcement provisions belong to the category of "procedural provisions," CETA raises some particular enforcement issues that deserve to be analyzed in a separate section, without intending to provide an exhaustive answer to them.[228] Some provisions of CETA are relevant in this regard. Firstly, CETA states that a claim may be brought under the ICSID Convention Rules or the UNCITRAL Arbitration Rules.[229] Secondly, and pointing towards enforcement, CETA states that an award under ICS rules is "an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention,"[230] and that "if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention."[231] In short, CETA seeks to create enforceable awards by relying on procedural rules traditionally used within the context of ISDS (ICSID Convention, NY Convention).

[227] CETA, *supra* note 43, at Article 8.10 (5).
[228] A deep discussion on the subject is found in August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 Journal of International Economic Law 761 (2016).
[229] CETA, *supra* note 43, at Article 8.23 (2). Accordingly, Article 8.25 (2) indicates that the consent the respondent's consent shall satisfy the requirements of Article 25 of the ICSID Convention and Chapter II of the ICSID Additional Facility Rules regarding written consent of the disputing parties, and Article II of the New York Convention for an agreement in writing.
[230] *Id*. at Article 8.41(5).
[231] *Id.* at. Article 8.41(6).

However, some commentators cast some doubt as to whether these provisions assure that the awards rendered under ICS will be enforceable. Regarding enforcement under the ICSID Convention, if faces an obvious *ratione personae* obstacle.[232] According to CETA, once an investor has given notice of its intent of bringing a claim, the EU must decide whether the Union itself or a Member State will act as respondent in the case.[233] If the EU decides to act as respondent, then the issue is that the EU is not a member to the ICSID Convention and, thereby, the tribunal would lack jurisdiction to adjudicate the dispute under Article 25 of the ICSID Convention.[234] The solution might consist in the EU becoming a member to the ICSID Convention. However, since the ICSID Convention currently restricts membership to "States"[235] -and the EU is not one of them-, it would be necessary to amend the ICSID Convention as to allow membership to entities other than States;[236] nevertheless, since it would require the unanimous vote from the current members to the ICSID Convention,[237] such amendment seems to be illusory.[238]

Another issue is related to the incompatibility of some of the procedural provisions of CETA with the rules of the ICSID Convention. For instance, as mentioned, while the ICSID Convention is based on the premise that adjudicators must be nationals from third countries, CETA requires the "divisions" to be composed with a national of a Member State of the EU, a national of Canada, and a national of a third country.[239] Moreover, as was also noted, while the ICSID Convention

[232] *Id.* at 768.
[233] CETA, *supra* note 43, at Article 8.21 (3).
[234] Piero Bernardini, *supra* note 127, at 56; August Reinisch, *supra* note 228, at 769.
[235] ICSID Convention, Article 67.
[236] Celine Levesque, *supra* note 126, at 13.
[237] ICSID Convention, Article 66.
[238] August Reinisch, *supra* note 228, at 769.
[239] *Id.* at 776; Celine Levesque, *supra* note 126, at 14 (noting that "[b]efore concluding that the EU-proposed system is clearly incompatible with the convention, however, one may ask whether the fact that an investor has voluntarily accepted to submit its claim under a treaty providing for a different method of appointment of the Tribunal does not

provides for the application of the domestic law of the host State, CETA states that the Tribunal must apply solely the investment treaty and the applicable rules of international law, and that the domestic law of the host State must be considered merely as a "matter of fact."[240] More relevantly, while the ICSID Convention includes the possibility of annulment of the award under certain restricted grounds, at the same time that indicates that such award "shall not be subject to any appeal or to any other remedy except those provided for in this Convention,"[241] CETA not only excludes such annulment mechanism, but replaces it with an entirely new one, namely, the appeal mechanism to which we referred above.[242] Given these differences, one may ask whether the courts of the members to the ICSID Convention will deem that an ICS award does indeed constitute an "award rendered pursuant to this Convention" and thereby enforceable under the ICSID Convention.[243]

As some have pointed out, to fix such incompatibilities it would be required to amend the ICSID Convention (e.g. to allow membership to non-State entities like the EU, displace the annulment mechanism in favor of the appeal mechanism and so forth). Leaving aside the option of an amendment of the Convention under Article 66, for it requires a hardly achievable unanimity, the remaining option would be an *inter se* modification of the ICSID Convention under Article 41 of the 1969 Vienna Convention on the Law of Treaties.[244] In any case, even assuming that such *inter*

fall under the beginning of the provision [Article 37(2)(b) of the ICSID Convention]— that is, "Where the parties do not agree upon [...] the method of their appointment."

[240] August Reinisch, *supra* note 228, at 778.

[241] ICSID Convention, Article 53 (1).

[242] Celine Levesque, *supra* note 126, at 14.

[243] ICSID Convention, Article 54 (1).

[244] August Reinisch, *supra* note 228, at 785 (concluding, after assessing each of the requirements for an *inter se* modification under Article 41 of the Vienna Convention, that an *inter se* modification of the ICSID Convention, so to make it compatible with the ICS mechanism, would be permissible.") In the same vein, Celine Levesque, *supra* note 126, at 15.

se modification is feasible, it would be binding only to the parties on it, which means that "parties to the ICSID Convention, which do not participate in the inter se agreement would not be affected by such modification with the consequence that they would not be under an obligation to enforce the ensuing (modified) awards under the ICSID Convention rules."[245]

Regarding the New York Convention, some commentators find that the enforcement of ICS awards seems to be less problematic, while others remain skeptical. One first question is whether the decisions rendered by the permanent "Tribunal" can be effectively considered as "arbitral awards" subject to recognition and enforcement under the New York Convention, especially in light of the fact that the "Tribunal" works in permanent -rather than temporal- basis[246] and that investors have no say in the appointment of the members of the tribunal.[247] Additionally, it may be contested whether there is an agreement in "writing"[248] between the investor and the host State to submit the disputes to arbitration[249] and whether the disputes to be solved under the ICS do constitute "commercial disputes."[250]

4. Conclusions

[245] August Reinisch, *supra* note 228, at 782.
[246] Piero Bernardini, *supra* note 127, at 48 (noting that, in his opinion, the decisions rendered under the proposed ICS are not "arbitral" awards "since neither the Tribunal nor the Appellate Tribunal are permanent arbitral bodies" under the meaning of the New York Convention).
[247] August Reinisch, *supra* note 228, at 767 (concluding, contrary to Bernardini, that "even a semi-permanent dispute settlement institution with panel members that have been appointed by States and not by the parties to a specific dispute can qualify as arbitration.")
[248] New York Convention, Article II(1).
[249] August Reinisch, *supra* note 228, at 784 (defending the opinion that this requirement should not pose major risks to the enforcement of ICS awards under the New York Convention).
[250] *Id.* at 785.

We have analyzed the EU's proposal for the creation of an investment court system for the settlement of disputes between foreign investors and the EU/Member States. It is not clear yet whether the ICS envisioned by the European Commission is compatible with the EU law, especially in light of the *Achmea* decision, whereby the ECJ found that intra-EU BITs providing for ISDS are not compatible with EU law. Even though the proposal includes some provisions aiming to assure its compatibility with EU law, it remains to be seen whether such provisions will be enough for the ECJ.

The proposal, as noted, claims to address all the demons of traditional ISDS. In many respects, though, the proposal merely collects many of the improvements that had been already introduced, or were in the process of being introduced, to traditional ISDS. Provisions requiring more transparency in the proceedings, requiring the observance of ethical rules, narrowing the scope of the standards of protection, safeguarding States' right to regulate, preventing "forum shopping" and many others, rather than depart from ISDS, incorporate solutions that States and tribunals have been refining throughout the years to deal with criticism against ISDS. Thus, the EU's proposal can be seen pretty much as a modern investment treaty.

That being said, the proposal does contain two innovative elements that overtly depart from ISDS, namely, the existence of a permanent tribunal and a broad appeal mechanism. If successfully implemented, these new elements will likely bring more legitimacy to the system of dispute settlement, assure correctness of the decisions and provide more consistency in the decision-making. These benefits, though, will be limited to the agreement containing the ICS.

Nevertheless, although these innovative elements promise to offer more consistency, correctness and legitimacy, they come with a price. Indeed, the new system creates new challenges and issues that need to be solved. For instance, there is a legitimate concern that the system, as designed, creates some conditions under which the members of the tribunal may be sympathetic to respondent States. The new appeal review, broad as it is, raises concerns as to the length and costs of the decisions under ICS. Although the proposal seeks to assure the enforcement of the awards as though they were rendered under the rules of traditional ISDS, it is still uncertain whether the awards will be enforceable. It seems that, even in the best of the cases, the ICS awards will not be as widely enforceable as awards under traditional ISDS, which is not a minor detail.

In conclusion, ICS does solve many of the critics against traditional ISDS, but it does so, to great extent, using the same tools that ISDS had created to correct itself. The real "innovations," although can provide solution to issues that ISDS has not been able to solve, are yet untested and may become the source of new concerns, critics and challenges. It remains to be seen whether ICS, in its purpose of fixing ISDS, will end up creating real solutions or even bigger problems.