A Paradigm Change: The CETA Investment Chapter

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Abstract

The Investment Chapter of the Comprehensive Economic and Trade Agreement (CETA) can be seen as an unofficial blueprint of future EU Investment Agreements and Chapters. It was developed under immense public pressure and had to fulfil multiple conditions resulting from the EU constitutional framework. This contribution highlights the political and juridical background of EU investment policy, and then analyses the most significant new approaches in international investment law – both with regard to substantive standards and investor-State dispute settlement – as exemplified in the CETA. With regard to the substance, it can be witnessed that states are more proactive in defining investment protection standards, leaving less discretion for adjudicators. With regard to dispute settlement, the EU managed to introduce a completely new Investment Court System (ICS) with preselected adjudicators and an appellate mechanism. In light of all these developments, this article argues that we are currently facing a complete change of paradigms in EU investment law, heading towards the EU's long-term goal of establishing a Multilateral Investment Court (MIC).

Keywords: Investment Court System (ICS), EU Investment Law, Right to Regulate, Multilateral Investment Court (MIC), Standards of Protection, Investor-State-Dispute-Settlement (ISDS), CETA

A. Introduction

With the entry into force of the Treaty of Lisbon,[1] the European Union (EU) has gained new competences in the area of international investment law and politics. Article 207 Treaty on the Functioning of the European Union (TFEU) provides for an external treaty-making power in the field of foreign direct investment.[2] Overall, the inclusion of investment protection in the common commercial policy is seen as a 'step forward' from an EU law perspective.[3]

After the entry into force of the Treaty of Lisbon on 1 December 2009, investment protection chapters have become part of the negotiation of new economic agreements

1 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01.

2 Article 207(1) Consolidated version of The Treaty on the Functioning of the European Union [2008] OJ C 115/47 reads: 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

3 Specifically in the field of direct investment, see *Herrmann/Müller-Ibold*, EuZW 2016/17, pp. 646 ff.; *Bungenberg*, in: von Arnauld (ed.), p. 743; *Reinisch*, Santa Clara Journal of International Law 2014/1, pp. 115 ff.; *Dimopoulos*, p. 66 ff.; *Bungenberg*, in: Herrmann/Terhechte (eds.), pp. 143 ff.

with third countries. A negotiating mandate was promptly issued on investment protection for the agreements with Canada, India, and Singapore.[4] Until the Court of Justice of the European Union's (CJEU) *Singapore* Opinion it was a matter of debate whether the EU had the exclusive competence to negotiate and conclude 'stand-alone investment agreements' – comparable to international investment agreements (IIAs) concluded by the EU Member States *before* the entry into force of the Treaty of Lisbon on 1 December 2009 – as well as Free Trade Agreements (FTAs) comprising chapters on investment law.[5] In its *Singapore* Opinion, the CJEU found a fairly clear answer to this question,[6] insisting on the limitation of the EU's power in foreign *direct* investment (FDI) and holding that agreements comprising portfolio investment and dispute settlement fall under the shared powers of the EU and its Member States.[7] The EU-Canda Comprehensive Economic and Trade Agreement (CETA) is an exception to this, as this agreement was already signed before the *Singapore* Opinion was rendered.[8]

The EU is currently negotiating investment agreements with China and Myanmar, as well as investment chapters as part of larger FTAs with India, Libya, Egypt, Jordan, Morocco and Tunisia, Malaysia and Thailand.[9] Besides the negotiation with Canada

4 See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs – EC negotiating mandate on investment (2011)' for an overview of FTA and other trade negotiations, available at: http://www.bilaterals.org/spip.php?article20272&lang=en (30/6/2021); Also the negotiation directives for CETA are partially published. See for instance, *Council of the EU*, Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada, 15 December 2015.

5 See *Hoffmeister/Ünüvar*, in: Bungenberg et al. (eds.), pp. 65 ff.; *Tietje*, Beiträge zum Transnationalen Wirtschaftsrecht 2009, p. 16; *Reinisch*, in: Bungenberg et al. (eds), p. 107; *Mayer*, Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar?, Expert Opinion for the German Federal Ministry for Economic Affairs and Energy, 22/9/2014, available at: https://www.bmwi.de/Redaktion/DE/Downloads/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen.html (30/6/2021), pp. 10 ff.

6 CJEU, Opinion 2/15, *Singapore FTA*, ECLI:EU:C:2017:376.

7 See further on this, *Bungenberg*, ZEuS 2017/4, p. 383; *Hindelang/Baur*, Stocktaking of investment protection provisions in EU agreements and Member States' bilateral investment treaties and their impact on the coherence of EU policy, Europäisches Parlament Study, 2019, available at: https://www.steffenhindelang.de/publikationen/stocktaking-of-investment-protection-provisions-in-eu-agreements-and-member-states-bilateral-investment-treaties-and-their-impact-on-the-coherence-of-eu-policy/ (30/6/2021); *Usynin/Szilárd*, in: Amtenbrink et al. (eds.), p. 267.

8 Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11 of 14/1/2017, p. 25; CJEU, Opinion 2/15, *Singapore FTA,* ECLI:EU:C:2017:376.

9 The Overview of FTA and other Trade Negotiations of the Commission shows the state of negotiations of international agreements currently negotiated by the EU, available at: https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (30/6/2021).

leading to the CETA, the agreements with Singapore,[10] Vietnam[11] and Mexico[12] have already been concluded.

The outcome of the negotiations between the EU and Canada is likely to set the stage for the conclusion of subsequent treaties with other partners. Together with Canada, the EU shaped a new template of international investment treaties likely to influence a new generation of IIAs in regard to ISDS as well as substantive standards of investment protection, promoting the rule of law via international agreements. Irrespective of the multiple ongoing negotiations and already concluded agreements, the CETA Investment Chapter is seen as the blueprint on both sides of the Atlantic for future trade and investment agreements.[13] The EU has not adopted a model investment agreement, but the CETA standard will likely provide a template for future negotiations.[14]

In relation to dispute settlement, the question of the past decade has been how to achieve a balance between investor and State interests whilst ensuring that tribunals do not extend their jurisdiction beyond the scope of the ISDS clause explicitly agreed to by Treaty Parties. In answer to that, CETA Chapter 8 features certain elements intended to limit the powers of ISDS tribunals. The more precise determination of the applicable standards as well as a potential, proactive and/or corrective interpretative function of the Contracting Parties, and the creation of an appellate mechanism all are intended to enable such balance. The CETA text integrates all of these aspects. CETA's investment dispute settlement mechanism will most probably set the standard for future agreements to which the EU is party. This is already evident in the EU-Singapore and EU-Vietnam Investment Protection Agreements.

This overview will highlight the CETA Investment Chapter background with regard to treaty-making powers as well as conditions stemming from the EU's 'constitutional framework', outlining the paradigm change of EU investment law.

B. The Economic Background: Benefits of a CETA Investment Chapter

The EU is Canada's second most important trading partner after the US. In 2018, the EU's outward FDI in Canada amounted to EUR 392.2 billion, on the flip side, Cana-

10 EU-Singapore Investment Protection Agreement (IPA), signed 15 October 2018 (not in force).

11 EU-Vietnam Investment Protection Agreement (IPA), signed 30 June 2019 (not in force).

12 New EU-Mexico Agreement, 23 April 2018: The Agreement in Principle (Investment), available at: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf (30/6/2021).

13 *Banks*, Justin Trudeau: CETA could be bluebrint for all future deals, The Parliament Magazine, 16/2/2017, available at: https://www.theparliamentmagazine.eu/news/article/justin-trudeau-ceta-could-be-blueprint-for-all-future-trade-deals (30/6/2021); *Laugier*, CETA's Investment Chapter: Blueprint for a Global Investment Reform?, Le Petit Juriste, 2/1/2018, available at: https://www.lepetitjuriste.fr/cetas-investment-chapter-blueprint-for-a-global-investment-reform/ (30/6/2021); *German Federal Ministry for Economic Affairs*, CETA – The European Canadian Economic and Trade Agreement, available at: https://www.bmwi.de/Redaktion/EN/Dossier/ceta.html (30/6/2021).

14 See *Reinisch*, JWIT 2014/3–4, p. 679.

dian FDI in the EU was valued at EUR 397.3 billion.[15] Because of this investment relation, Chapter 8 CETA (on investment) was included in the agreement. While bilateral investment flows did already represent a notable share of Canada's, the EU's and the EU Member States' total foreign direct investment, the CETA Parties recognised opportunities in increasing bilateral investment flows through the introduction of an investment chapter in the CETA.[16] In assessing the costs and benefits of a closer EU-Canada Economic Partnership, a joint study between the EU and Canada, released in 2008, indicated a desire to remove existing barriers to trade and investment.[17]

Another study on the impact of the CETA Investment Chapter pointed out that economic benefits including trade-stimulating effects and fostering intangible business linkages in Canada could be encouraged, although the significance of these would likely be minor. It found that impact in the EU would likely follow these trends, but on an even lower level of significance. Positive environmental impacts would result from increased investment in green technologies, yet negative impacts would result from increased FDI in the oil, sand and mining sectors in Canada.[18]

C. The EU Investment Policy

By reason of their constitutional framework, economic policymaking in both the EU and Canada is quite complex. At the heart of this complexity is the issue of competences. Constitutionally, legislative competence in the EU – and Canada – is granted either as an exclusive or shared competence between different levels of government. In the EU, legislative competence can be exclusive or shared between the EU and its Members States.

I. The Question of Competences

With the entry into force of the Treaty of Lisbon, the EU has gained new treaty-making powers in the area of international investment law and politics. It was initially unclear which competences in the field of external trade actually belong to the European Union, i.e. which areas of competence are so-called exclusive competences, and

15 *European Parliament*, Transatlantic Relations: The USA and Canada, Fact Sheets on the European Union, 2021, available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_5.6.1.pdf (30/6/2021), p. 6.

16 Joint Report on the EU-Canada Scoping Exercise, 5 March 2009, p. 5.

17 *Global Affairs Canada*, Assessing the costs and benefits of a closer EU-Canada economic partnership: A Joint Study by the European Commission and the Government of Canada, available at: https://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/study-etude.aspx?lang=eng (30/6/2021).

18 Chapter 7.3 in EU-Canada SIA Final Report, A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada, June 2011, published as part of the Directorate General of Trade of the European Commission's Trade Sustainability Impact Assessment Series. Full report available at: http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf (30/6/2021).

which are shared competences of the European Union and its Member States.[19] It was widely discussed which investment aspects are covered by the EU's now enlarged, external 'trade competences' and thus are exclusive competences of the European Union.[20] In its partly ambiguous *Singapore* Opinion published on 16 May 2017, the CJEU decided that the EU's exclusive competence in the field of investment is limited to the area of FDI.

In the area of so-called portfolio investments, in which foreign investors do not have controlling interests, but merely want to participate in the form of returns on economic success, the CJEU rejected an exclusive competence of the EU.[21] Thus, whenever an agreement also includes investment protection relating to portfolio investment, it contains parts that fall within the area of 'shared competences'. The CJEU also found a shared competence in the case of investor-State dispute settlement.[22] The CJEU thus found that the agreement with Singapore could not be concluded by the EU alone, particularly because of the chapter on investment protection.[23]

As a result of the *Singapore* Opinion of the CJEU, the EU's investment policy is now separated from its trade policy. Hence, investment protection is removed from 'comprehensive' treaty texts and transposed into separate investment protection agreements. The aim is to prevent trade aspects that are indisputably the exclusive competence of the European Union from becoming infected by the 'confused' distribution of competences in the area of investment protection, which requires the participation of the Member States of the European Union in the ratification process. This is certainly the case with the agreements with Vietnam[24] and Singapore.[25] Only in the CETA Agreement with Canada and the FTA with Mexico has the investment protection chapter been preserved as part of the overall agreement. This is explained by the fact that the agreement with Canada was already in the ratification process at the time the CJEU rendered its *Singapore* Opinion, and that the EU-Mexico Agreement[26] modernised a 2000 Global Agreement.

Nevertheless, it should be noted that, although there is a shared competence in some areas, this does not necessarily lead to a mixed agreement.[27] Whether an 'EU-only' or a mixed agreement will be concluded is a political decision to be taken jointly by the Commission and the Council.[28] In fact, this process also decides whether national parliaments should participate in the ratification process or not. The approach of 'fac-

19 See for instance *Herrmann/Müller-Ibold*, EuZW 2016/17, pp. 646 ff.; *Herrmann*, EuZW 2010/6, pp. 207 ff.; *Hoffmeister*, ZEuS 2013/4, pp. 385 ff.; *Dimopoulos,* pp. 94 ff.

20 Cf. *Herrmann/Müller-Ibold*, EuZW 2016/17, pp. 646 ff.; *Herrmann*, EuZW 2010/6, pp. 207 ff.; *Hoffmeister*, ZEuS 2013/4, pp. 385 ff.; *Dimopoulos,* pp. 94 ff.

21 CJEU, Opinion 2/15, *Singapore FTA,* ECLI:EU:C:2017:376, para. 238.

22 Ibid., para. 304.

23 Ibid., para. 305.

24 EU-Vietnam Investment Protection Agreement (IPA), signed 30 June 2019 (not in force).

25 EU-Singapore Investment Protection Agreement (IPA), signed 15 October 2018 (not in force).

26 EU-Mexico Agreement, available at: http://trade.ec.europa.eu/doclib/press/ (30/6/2021).

27 See for instance Opinion of AG *Kokott*, joined cases C-626/15 and C-659/16, *Commission v. Council*, ECLI:EU:C:2018:362, para. 105.

28 *Bungenberg/Reinisch*, in: Chaisse et al. (eds.), p. 7.

ultative mixity' thus also remains after the *Singapore* Opinion of the CJEU. The CJEU did not clarify in what way the Member States should participate as a consequence of shared competences. Subsequent rulings from the CJEU were needed to clarify that the EU can conclude EU-only agreements in fields of shared competences.[29] It should be noted that in the future the EU may conclude trade and investment protection agreements without the consent of the Member States if the investment protection only covers foreign direct investment and no provisions on dispute settlement.

But so far, no EU IIA or investment chapter as part of a broader FTA has entered into force; the 1200 Member States' bilateral investment treaties (BITs)[30] therefore still form the basis for international investment protection of EU investors abroad.[31]

II. (New) EU Investment Policy Approaches

After the transfer of competences from the EU Member States to the EU, the EU Commission's first statements seemed to suggest to 'reproduce' the European 'gold standard' in Member States' BITs.[32] Shortly after, it was made clear by different actors involved in EU policy-making that they considered that the time was ripe for new approaches. The European Parliament is very often seen as the advocate of innovative and more policy-oriented approaches. The Commission initiates all negotiations and is generally responsible for them, and the Council adopts the agreements at the final stage. Because the European Parliament ratifies international agreements, it stressed that it wanted new approaches to be introduced in economic agreements, and thus also into the one under negotiation with Canada. Therefore, all three institutions were involved in the treaty negotiations and ratifications. From the onset, the EU outlined its policy approaches in various papers, communications, resolutions, background papers, such as:

29 CJEU, case C-600/14, *Germany v. Council*, ECLI:EU:C:2017:935, para. 68; CJEU, joined cases C-626/15 and C-659/16, *Commission v. Council*, ECLI:EU:C:2018:925, para. 126.

30 *European Commission*, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, November 2013, available at: https://www.italaw.com/sites/default/files/archive/Investment%20Protection%20and%20Investor-to-State%20Dispute%20Settlement%20in%20EU%20agreements_0.pdf (30/6/2021), p. 4; See also the UNCTAD database with a list of all known IIAs worldwide, available at: https://investmentpolicy.unctad.org/international-investment-agreements (30/6/2021); For detailed numbers see also *UNCTAD*, Investor-State Dispute Settlement: An Information Note on The United States and the European Union, IIA Issues Note 2/2014, available at: http://unctad.org/en/PublicationsLibrary (30/6/2021), p. 3.

31 See in this regard Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351 of 20/12/2012, p. 40; on the EU Member States' approach to international investment law, see e.g. *Gaffney/Akçay*, in: Bungenberg et al. (eds.), pp. 186 ff.; *Trakman/Ranieri*.

32 See on this *Titi*, EJIL 2015/3, p. 640.

- Commission, Towards a European international investment policy, 7 July 2010,[33]
- Council (Foreign Affairs), Conclusions on a comprehensive European international investment policy, 25 October 2010,[34]
- European Parliament, Resolution on the future European international investment policy, 6 April 2011,[35]
- Council, Negotiating Directives of 12 September 2011 concerning the negotiations with Canada, India and Singapore,[36]
- Council, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013,[37]

33 *European Commission*, Towards a comprehensive European international investment policy, 7 July 2010, COM(2010) 343 final. In order to ensure effective enforcement, investment agreements also feature investor-to-state dispute settlement, which permits an investor to take a claim against a government directly to binding international arbitration [footnote: The Energy Charter Treaty, to which the EU is a party, equally contains investor-state dispute settlement.]. Investor-state dispute settlement, which forms a key part of the inheritance that the Union receives from Member States BITs, is important as an investment involves the establishment of a long-term relationship with the host state which cannot be easily diverted to another market in the event of a problem with the investment. ISDS is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others. For these reasons, future EU agreements including investment protection should include ISDS. This raises challenges relating, in part, to the uniqueness of ISDS in international economic law and in part to the fact that the Union has not historically been a significant actor in this field. Current structures are to some extent ill-adapted to the advent of the Union. To take one example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) is open to signature and ratification by states members of the World Bank or parties to the Statute of the International Court of Justice. The European Union qualifies under neither. In approaching ISDS mechanisms, the Union should build on Member States practices to arrive at state-of-the art ISDS mechanisms.

34 *Council of the EU*, Conclusions on a comprehensive European international investment policy, 25 October 2010 ('[…] stresses, in particular, the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements […]').

35 *European Parliament*, European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), para. 32 ('Takes the view that, in addition to state-to-state dispute settlement procedures, investor-state procedures must also be applicable in order to secure comprehensive investment protection').

36 See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs – EC negotiating mandate on investment (2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en (30/6/2021): 'Enforcement: the agreement shall aim to provide for an effective investor-to state- dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's)'.

37 *Council of the EU,* Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 9 October 2014, available at: http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf (30/6/2021): '[…] Enforcement: the Agreement should aim to provide for an effective

- Common blueprint by the EU and the US for future open and stable investment climates, 10 April 2012,[38]
- Resolutions adopted by the European Parliament in regard to specific negotiations ask for the implementation of an effective investor-state-dispute settlement mechanism,[39]
- Resolution by The European Parliament calling for the establishment of a permanent Investment Court System (ICS) with a built-in appellate structure,[40]
- 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', May 2015,[41]
- Council of the European Union mandate to the EU Commission to negotiate a Multilateral Investment Court (MIC),[42]
- European Union and its Member States – 'Establishing a standing mechanism for the settlement of international investment disputes', submission to UNCITRAL, 18 January 2019,[43]

and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, including through the possibility of binding interpretation of the Agreement by the Parties. State-to-state dispute settlement should be included, but should not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanisms. It should provide for investors as wide a range of arbitration fora as is currently available under the Member States' bilateral investment agreements. The investor-to-state dispute settlement mechanism should contain safeguards against manifestly unjustified or frivolous claims. Consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement, and to the appropriate relationship between ISDS and domestic remedies. […]'.

38 Statement of the European Union and the United States on Shared Principles for International Investment, 10 April 2012, available at: https://2009-2017.state.gov/p/eur/rls/or/2012/187618.htm ('Fair and Binding Dispute Settlement: Governments should provide access to effective dispute settlement procedures, including investor-to-State arbitration, and ensure that such procedures are open and transparent, with opportunities for public participation.').

39 See for example *European Parliament*, European Parliament Resolution of 9 October 2013 on the EU–China negotiations for a bilateral investment agreement (2013/2674(RSP)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-411 (30/6/2021), '42. Considers that the agreement should include, as a key priority, effective state-to-state and investor-to-state dispute settlement mechanisms in order, on the one hand, to prevent frivolous claims from leading to unjustified arbitration, and, on the other, to ensure that all investors have access to a fair trial, followed by enforcement of all arbitration awards without delay'.

40 *European Parliament*, A new forward-looking and innovative future strategy for trade and investment, Resolution of 5/7/2016, P8_TA-PROV 2016/0299, para. 68.

41 *European Commission*, 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, May 2015, p. 11.

42 *Council of the EU*, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 20 March 2018.

43 https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1 (30/6/2021).

- EU Proposal for WTO disciplines and commitments relating to investment facilitation for development, 25 February 2020,[44]
- New Investment Protection Agreements, 31 July 2020,[45]
- European Union text proposal for the modernisation of the Energy Charter Treaty, 27 May 2020,[46]
- European Union text proposal for the modernisation of the Energy Charter Treaty, 15 February 2021.[47]

These EU documents and negotiation mandates indicate a move from the traditional investment law policy inspired by the so-called European 'gold standard' to a new investment policy approach which reformulated the old standards with new substantive and procedural standards, intending to offer more clarity and certainty with respect to the regime governing the promotion and protection of foreign investment between the EU and third states. The compatibility of the new EU investment policy approach with the EU legal order was subsequently confirmed by the CJEU when seised to clarify the compatibility of the CETA Investment Chapter with the EU constitutional framework.

III. Clarifications on the Compatibility of the CETA Investment Chapter with the EU's Constitutional Framework

Before the CJEU rendered its *CETA* Opinion, it was unclear whether the CETA Investment Chapter, as well as other negotiated dispute settlement mechanisms, would fulfil the conditions defined by the CJEU in the *EEA*-, *ECHR*- and *Patent-Court*-Opinions as well as in the *Achmea* judgment. The decisive element was the principle of autonomy of EU Law – with the CJEU being the only competent institution to give a final and binding interpretation to EU Law. The autonomy of EU law is used to deny an international court jurisdiction for a binding interpretation of EU law. Thus, it precludes the EU or its Member States from concluding agreements that allow the final interpretation of EU law by a forum other than the CJEU.[48] Member States and the EU itself are therefore prevented from negotiating agreements that confer jurisdiction to a court or tribunal which have the effect of depriving national courts of their task to apply and interpret EU law or abrogate their power to seek preliminary rulings under Article 267 TFEU.[49]

In the case of the planned accession of the EU to the European Convention on Human Rights (ECHR), this principle of the autonomy of EU law also presented itself as an insurmountable obstacle. In particular, the planned accession agreement was

44 WTO INF/IFD/RD/46, February 2020, available at: https://trade.ec.europa.eu/doclib/docs (30/6/2021).
45 https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158908.pdf (30/6/2021).
46 https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf (30/6/2021).
47 https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf (30/6/2021).
48 CJEU, Opinion 2/13, ECLI:EU:C:2014:2454, paras. 201 ff.; CJEU, case C-459/03, *Commission v. Ireland*, ECLI :EU :C :2006 :345, para. 177.
49 CJEU, Opinion 1/09, ECLI:EU:2011:123.

incompatible with Article 344 TFEU because it did not exclude the European Court of Human Rights's (EctHR) jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU.[50]

In the context of *ad hoc* investment arbitration tribunals, the CJEU's *Achmea* judgment[51] also provides guidance. Therein, the Court ruled in March 2018 that so-called intra-EU investment agreements were fundamentally not in line with EU law. Arbitration would call into question the autonomy of EU law. The CJEU noted that investment arbitration tribunals adjudicating intra-EU disputes might be required to rule on the basis of domestic law as well as international agreements applicable between the Contracting Parties, which included EU law, but that they could not make a referral to the CJEU under Article 267 TFEU and were subjected to only limited judicial review before competent national courts. The limited review of arbitral awards provided, for example, by German Arbitration Law, was considered to be insufficient to guarantee the autonomy of EU law.[52] Thus, the CJEU found that intra-EU investment arbitration bypassed the preliminary ruling mechanism foreseen in Article 267 TFEU, which was necessary for the autonomy, proper application, and full effectiveness of EU law.

In 2019, the CJEU confirmed the application of these principles to the Investment Court System (ICS) introduced under CETA. In its Opinion dated 30 April 2019, the CJEU stresses that the Union or its Member States might only submit disputes to a mechanism that respected the autonomy of the EU legal order and met the conditions that emanated from this autonomy.[53] The CJEU pointed out that the final objective of the other EU institutions was to seek a multilateral dispute settlement solution after the interim stage of the bilateral investment court system.[54]

According to the CJEU, 'the competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions.'[55] However, the CJEU made it clear that such submission to an international jurisdiction was possible only under certain conditions. From an EU law perspective, the *CETA* Opinion is remarkable in at least two respects: its discussion of the constitutional principles and framework that guide the EU in its external action, such as when the Union concludes international agreements, and of the Charter of Fundamental Rights, and notably Article 47 of the Charter. What the *Kadi* Judgment[56] meant for outside acts 'entering' the internal EU legal order, the *CETA* Opinion outlines for the EU's participation in international dispute settlement. It is possible *as long as* a set of conditions are met.

50 CJEU, Opinion 2/13, ECLI :EU:C:2014:2454, paras. 201 ff.
51 CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.
52 Ibid., para. 53.
53 CJEU, Opinion 1/17, ECLI:EU:C:2019:341.
54 Ibid., paras. 108, 118.
55 Ibid., para. 106.
56 CJEU, joined cases C-402/05 P and C-415/05 P, *Kadi & Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461.

In the *CETA* Opinion, the CJEU specifically stated that investment courts under no circumstances were entitled to interpret EU law,[57] meaning that such an international judicial body must respect the CJEU's monopoly in interpreting EU law.[58] This principle of autonomy exists both towards the law of the Member States as well as towards international law.[59] Therefore, neither the CETA ISDS mechanism nor the future Multilateral Investment Court (MIC) should prevent the Union from operating according to its own constitutional framework. The CJEU considered that all these points were fulfilled with regard to the ICS.

A further condition resulted from the fact that the Union has its own constitutional framework, including the values set out in Article 2 TEU, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, the general principles of EU law, the provisions in the Charter of Fundamental Rights and the rules of the Treaties,[60] in particular, that the envisaged ISDS mechanism must ensure the right of access to an independent court.[61]

The *CETA* Opinion also took up the debate about the 'level of protection of the public interest', or in other words the right to regulate. The starting point for the discussion is Article 2 of the TEU. Systems of institutionalised dispute settlement to which the EU wants to adhere must be in conformity with the EU's 'constitutional framework' and 'principles'. Concerning the discussion about the legitimacy of investment law and ISDS in particular, the CJEU underlined that the CETA standards of protection respect state sovereignty and the right to regulate.[62] It is important to highlight that regulatory space is part of all negotiated EU IIAs.[63] In addition, investment tribunals are increasingly mindful of the States' right to regulate.[64] It is also significant that under the CETA, tribunals may impose compensation, but they are not empowered to enjoin States to 'amend or withdraw legislation'.[65] Thus, they do not undermine States' capacity to 'operate autonomously' (as per the CJEU's *dicta*). Article 28.3.2 CETA provides that nothing in the Agreement can be interpreted in a manner to prevent a Party from adopting and applying measures necessary to protect public interests.

The *CETA* Opinion further made it clear that the applicable law in IIAs must be only international law.[66] If domestic law were to come into play, it could present a direct threat to the autonomy of EU law. Tribunals set up under international agreements with binding effect on the EU cannot be entrusted to interpret EU law – only

57 CJEU, Opinion 1/17, ECLI:EU:C:2019:341, para. 120 ff.
58 Ibid., paras. 107 ff.
59 Ibid., para. 109.
60 Ibid., para. 110.
61 Ibid., paras. 189 ff.
62 Ibid., para. 17.
63 *Bungenberg/Titi*, CETA Opinion – Setting Conditions for the Future of ISDS, EJIL:Talk!, available at: https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/ (30/6/2021).
64 Ibid.
65 Ibid.
66 CJEU, Opinion 1/17, ECLI:EU:C:2019:341, para. 121 ff.

the agreement itself. But they can apply EU law as a fact.[67] Moreover, the ICS cannot have the competence to decide on the legality of an EU measure.

Another issue of a more general and systemic interest concerns the lessons to be drawn from the CJEU's *CETA* Opinion in relation to the Charter of Fundamental Rights. The CJEU underlines that the Charter is also binding on the EU in regards to its external relations. Therefore, any agreement that the EU wishes to ratify needs to comply with it. The analysis in the *CETA* Opinion concerns only the compatibility of the treaty's ISDS provisions with Article 47 of the Charter. These conditions mirror the fundamental rights guarantees developed by the CJEU in the past 45 years as an internal component of the rule of law within the EU,[68] now also laid down – for clarification – in the Charter of Fundamental Rights. Article 47 relates to the *Right to an effective remedy and to a fair trial*, including access to an independent and impartial tribunal and legal aid for those without sufficient resources to access justice. For the time being, the CJEU has made important points in relation to (a) access to justice and (b) the neutrality and independence of adjudicators. Therefore, the issue of cost apportionment and funding possibilities, especially for natural persons and small and medium-sized enterprises, has to be kept in mind when considering going beyond CETA's ICS, e.g. by designing a future MIC. In addition, it will be useful to review the Charter carefully in order to determine whether other fundamental rights, beyond those in Article 47 of the Charter, may become relevant.

To summarise, the CJEU held that the following conditions have to be fulfilled to allow the EU to participate in an international dispute settlement mechanism:

- The principles of autonomy and primacy of EU law do not permit the creation of dispute settlement mechanisms that may issue decisions preventing the EU institutions (including the CJEU) from operating or realising their functions in accordance with the EU constitutional framework.
- It is the autonomous right of the EU to define the level of public interests it seeks to secure under the EU legal order; this right cannot be undermined by any international legal obligation.[69]
- The substantive investment protection standards of IIAs must leave enough room for the Contracting Parties to regulate within their territories to achieve legitimate policy objectives. Its investment protection standards cannot call into question the level of protection of public interest determined by the Union following a democratic process.[70]
- Whenever the EU enters into an international agreement encompassing the establishment of judicial bodies, the EU is subject to Article 47 of the EU Charter on Fundamental Rights.[71] This refers especially to respect to the rules governing access

67 Ibid., para. 130.
68 See *Lenaerts*, I Post di Aisdue 2019/1, available at: http://www.aisdue.eu/web/wp-content/uploads/2019/04/001C_Lenaerts.pdf (30/6/2021).
69 *Riffel*, J. Int'l Econ. L. 2019/3, p. 503 (with reference to CETA Opinion, para. 148, 160).
70 CJEU, Opinion 1/17, ECLI:EU:C:2019:341, para. 160.
71 Ibid., para. 190.

to judicial bodies and their independence. Any dispute settlement system must be financially accessible.[72]

If these conditions are not respected by a future agreement, the CJEU will not allow the EU to become a party to such an agreement on dispute settlement. It will be interesting to see at the multilateral level, whether the EU will be able to convince other States to endorse all the aforementioned conditions, notably in the context of prospective negotiations for an MIC Statute. Therefore, although the CJEU only dealt with the narrow question of whether CETA's ICS was compatible with EU primary law, its Opinion will likely have consequences well beyond this context, including in relation to a future MIC. When the CJEU decided on CETA's compatibility with EU law, the MIC was the invisible elephant in the room: *first*, because in CETA, the EU commits to pursuing the establishment of an MIC; *second*, because the European Commission promotes this option as the only possible future for ISDS involving the EU in its contributions to UNCITRAL's Working Group III.[73]

A similar question involving the compatibility of ISDS in CETA with the German Constitution is currently pending before the German Constitutional Court (BVerfG).[74] Where the CJEU stressed the constitutional foundations of the EU, the BVerfG discusses the (German) constitutional identity.[75]

D. Negotiation and Outcome of the CETA Investment Chapter

Soon after the shift of competences from its Member States to the EU in 2009, the EU made clear that it would start to take advantage of this. A first negotiating mandate given to the Commission to include investment law protection into a Free Trade Agreement concerned the negotiations with Canada, India and Singapore.[76]

Investment law has become an almost permanent topic of negotiations of international agreements in economic matters as the examples of TTIP, CPTPP, USMCA or ASEAN show. In North America, the North American Free Trade Agreement (NAFTA)[77] concluded in 1992 between Canada, the US and Mexico provided for

72 Ibid., para. 206.
73 See on this Article 8.29 CETA.
74 See *German Constitutional Court*, Applications for a preliminary injuction in the 'CETA' proceeding unsucessfull, Press Release No. 71/2016 of 13/10/2016, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html;jsessionid=633DB1C391D93AEC0A343F2CD3711354.2_cid361 (30/6/2021).
75 BVerfG, 13.10.2016 – 2 BvR 1368/16, paras. 1–73, available at: https://www.bundesverfassungsgericht.de/e/rs20161013_2bvr136816en.html (30/6/2021).
76 See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs – EC negotiating mandate on investment (12 September 2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en (30/6/2021): 'Enforcement: the agreement shall aim to provide for an effective investor-to state- dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's)'.
77 See Chapter 11 NAFTA, available at: https://investmentpolicy.unctad.org (30/6/2021).

ISDS in its Chapter 11 and was frequently used as a legal basis for arbitral proceedings against the US as well as against Canada.[78] NAFTA can be seen as the first broad Mega Regional Trade Agreement containing an investment chapter. An investment chapter was also included in Part III of the Energy Charter Treaty (ECT) that entered into force in April 1998 and to which the EU is also a party.[79] Since early 2014, it was discussed whether ISDS should be made part of the FTA under negotiation between the EU and the US (Transatlantic Trade and Investment Partnership, TTIP) or whether it should be excluded from the negotiation agenda.[80]

In May 2009, Canada and the EU announced the launch of trade negotiations at the Canada-EU Summit in Prague, Czech Republic.[81] During the CETA negotiations, the first version of an investment chapter was already 'leaked' as part of a Consolidated CETA Draft of 13 January 2010,[82] so only a few weeks after the entry into force of the Lisbon Treaty and well before a mandate was given to the Commission to start negotiations on this issue. Here investment arbitration was retained as the mechanism for settling investor-State disputes. On the European side, the Council adopted Negotiating Directives on investment issues on 12 September 2011 concerning the negotiations with Canada, India and Singapore.[83]

78 Details on NAFTA investor-State Arbitrations available at: http://www.state.gov/s/l/c3439.htm (30/6/2021).

79 See Part III Energy Charter Treaty.

80 See for example the EU Commission President *Jean Claude Juncker* '[…] Nor will I accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes. The rule of law and the principle of equality before the law must also apply in this context.' in *Juncker*, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, available at: https://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf (30/6/2021), p. 8; In Germany, the German Federal Council rejected the inclusion of a specific ISDS-mechanism in TTIP in its Resolution of 11 July 2014, BR-Drs. 295/14, available at: http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14(B).pdf?__blob=publicationFile&v=1 (30/6/2021): '[…] 9. Der Bundesrat hält spezielle Investitionsschutzvorschriften und Streitbeilegungsmechanismen im Verhältnis Investor und Staat zwischen der EU und den USA für verzichtbar und mit hohen Risiken verbunden. Gründe dafür sind insbesondere: Beide Partner gewährleisten für Investoren einen hinreichenden Rechtsschutz vor unabhängigen nationalen Gerichten. Durch Investor-Staat-Schiedsverfahren können allgemeine und angemessene Regelungen zum Schutz von Gemeinwohlzielen, die in demokratischen Entscheidungen rechtsstaatlich zustande gekommen und rechtmäßig angewandt wurden, ausgehebelt oder umgangen werden. […]'.

81 *Kellogg*, in: Hübner (ed.), p. 108.

82 Investment Chapter, leaked version of the CETA draft text of 13 January 2010, 'Draft Consolidated Text: Canada-EU Comprehensive Economic and Trade Agreement', available at: https://wiki.laquadrature.net/images/3/33/CETA_draft_jan_2010.pdf (30/6/2021).

83 See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs – EC negotiating mandate on investment (2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en (30/6/2021): 'Enforcement: the agreement shall aim to provide for an effective investor-to state- dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's)'.

Further leaked versions were circulated *inter alia* in 2011,[84] 2012,[85] on 15 and 21 November 2013,[86] on 1 August 2014[87] and September 2014.[88] The September 2014 version was the released agreement's completed text from the Canada-EU Summit in Ottawa. In August 2014, Canada and the EU announced the complete text of the Canada-EU Trade Agreement, marking the conclusion of negotiations. The most dramatic change then took place between the 2014 and 2016[89] versions. In a public consultation held by the Commission in 2014,[90] an overwhelming lack of support for ISDS by European stakeholders was revealed, which later culminated in the European Parliament (EP) issuing a resolution to the Commission containing a number of stipulations directing the reform of the investment protection provisions under the CETA.[91] With the EP's competences strengthened by the Treaty of Lisbon,[92] it became imperative that the EU Commission negotiating on behalf of EU Member States approached its Canadian counterpart to address the recommendations set out in the EP's resolution. Although this EP resolution was primarily directed towards the TTIP negotiations, its adverse effects on the CETA Investment Chapter were obvious.

In February 2016, Canada and the EU announced the completion of the legal review of the agreement's English text. The outcome of the legal review saw the previous Article X.17 evolved into Article 8.18, reflecting the new EU approach for settling investor-State disputes through an Investment Court System, as opposed to *ad hoc* arbitration contemplated in earlier CETA Drafts pre-dating 2016.

84 Article X.18 (Investment/Establishment Chapter), leaked version of the CETA draft text of January 2011, 'Canada-EU CETA Draft Consolidated Text – Post Round VI', available at: https://wiki.laquadrature.net/images/6/69/CETA_draft_jan_2011.pdf (30/6/2021).

85 Article X.18 (Investment/Establishment Chapter), leaked version of the CETA draft text of February 2012, 'Draft CETA Investment Text', available at: https://wiki.laquadrature.net/images/c/cc/CETA-Draft_Consolidated_text-February_2012.pdf (30/6/2021).

86 Article X.1 (Investor-to-State Dispute Settlement Text), leaked version of the CETA draft text of 15 November 2013, available at: https://www.laquadrature.net/files/Draft-CETA-DisputeSettlement-nov-15.pdf (30/6/2021).

87 Article X.17(3) (Investor-State Dispute Settlement Text), leaked version of the consolidated CETA draft of 1 August 2014, 'Consolidated CETA Text', available at: https://old.laquadrature.net/files/ceta-complet.pdf (30/6/2021); Article X.17(4) (Investor-to-State Dispute Settlement Text), leaked version of the consolidated CETA draft of 1 August 2014, 'Consolidated CETA Text', available at: https://old.laquadrature.net/files/ceta-complet.pdf (30/6/2021).

88 Article 8.18(5) (Resolution of Investment Disputes), Finalised CETA Draft Text September 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (30/6/2021).

89 *CJEU*, Press Release No 52/19, 30 April 2019 (Opinion 1/17); *Hübner et al.*

90 *European Commission*, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), Commission Staff Working Document, 13 January 2015, SWD(2015) 3 final, available at: https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (30/6/2021).

91 See in this regard, *European Parliament*, Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 2014/2228(INI).

92 On the strengthening of the EP by the Treaty of Lisbon see *Craig/Búrca*, p. 50; *Rittberger*; *Judge/Earnshaw*; *Corbett/Jacobs/Shackleton.*

After over seven years of intensive negotiations, the finalised CETA Draft was eventually signed by the Parties on 30 October 2016.[93] The European Council President *Donald Tusk* and the Canadian Prime Minister *Justin Trudeau* signed the agreement. By February 2017, the European Parliament approved the CETA, while on the other side of the Atlantic, the Canadian bill to implement the CETA was granted royal assent in May 2017. On 21 September 2017, the CETA provisionally entered into force, with the exception of some parts of the Investment Chapter. The agreement will take full effect once all EU Member States have formally ratified it.[94] This process is ongoing.

I. The Necessity of ISDS in CETA

While it has been widely accepted that both substantive and procedural protection for enterprises investing in developing countries or emerging markets offers substantial benefits[95] and responds to the actual need to correct deficiencies of the legal protection available in some host states, the current debate about ISDS questions the necessity of investment protection and especially of investor-State arbitration between developed OECD countries.[96]

However, it has to be stressed that there have been about 250 investment disputes against EU Member States until the end of 2020; 60 of these known cases involve non-EU investors claiming against an EU Member State, and 25 of these cases are specifically transatlantic, with Poland having the highest share of the disputes with seven cases, Romania and Spain had each five cases, Estonia had three cases, Croatia and the Czech Republic had two cases each and Slovakia had one case.[97] Out of these 25 investment disputes against EU Member States, 20 have been initiated by US or Canadian investors with only a very low success rate. This high aggregate number of claims especially against Central and Eastern European countries shows the apparent mistrust in the judicial system of these countries.

Legal protection is necessary when obligations are not complied with. The fact that certain types of obligations are habitually complied with, e.g. because the domestic legal system of a host State conforms to rule of law requirements and offers adequate rule of law guarantees in case of violations, does not mean that there should not be a fall-back protection option available in the rare instances where this is not the case. It

93 *CJEU*, Press Release No 52/19, 30 April 2019 (Opinion 1/17); *Hübner et al.*

94 See https://eur-lex.europa.eu/content/news/eu_canada_trade_agreement-ceta.html (30/6/2021).

95 *UNCTAD*, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, in: UNCTAD Series on International Investment Policies for Development (2009), available at: http://unctad.org/en/docs/diaeia20095_en.pdf (30/6/2021); For a summary of different argumentation on the effects of BITs see *Vandevelde*, pp. 115–120.

96 See e.g., *Schäfer*, ZRP 2014/5, pp. 154 ff.; *Pernice*, EuZW 2014/14, pp. 521 ff.

97 For details, see the UNCTAD database, available at: https://investmentpolicy.unctad.org/ (30/6/2021).

is a fact that even in OECD countries the legal protection of foreign investors does not always live up to the demands of the rule of law.

In the 2020 'Rule of Law Index' of the World Justice Project (WJP), Canada is ranked in the 9th position globally, while the US is ranked in the 21st.[98] Nevertheless, there is also evidence that US courts, especially civil juries, can show prejudice against foreign investors. The most frequently cited example in this context is the *Loewen*-case,[99] where a foreign investor faced punitive damages awarded by a jury in a civil litigation. But, as is clear from the facts of this NAFTA decision, the problem was not the fact that 'excessive' punitive damages (four times the amount of the actual damage) were awarded, but that in the course of the jury trial the court failed to provide a fair trial.[100] Thus, foreign investors may be subject to discrimination,[101] may not receive a fair trial in the domestic courts,[102] or may otherwise be deprived of fundamental rule of law guarantees even in highly developed OECD countries.[103] Furthermore, corruption exists not only in developing countries but also in OECD Member States.[104] As reflected in the 'Corruption Perceptions Index 2020' (CPI) of Transparency International, some of the EU Member States still score below 50% in the corruption perception index.[105]

In fact, several EU Member States are listed low in different indexes on corruption, the rule of law and judicial independence. While it may be politically expedient to consider all EU States to conform to the rule of law and to provide sufficient legal protection to their own citizens and to foreigners (including foreign investors), it is a fact that a number of them do not fully live up to the standard of good governance and the rule of law expected from an OECD country: Especially judicial independence is a requirement stemming from the right to an effective remedy (also enshrined in

98 See WJP Rule of Law Index 2020, available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020 (30/6/2021), p. 16.

99 *Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003).

100 Ibid., para. 119 ('By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.').

101 *S. D. Myers v. Canada*, UNCITRAL (NAFTA), Award (13 November 2000), para. 252 ('The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account: – whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals; – whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.'); See also in regard to favoritism in decisions of government officials, The Global Competitiveness Report 2013–2014 (2013), p. 416. On this index the US lists as No. 54 – behind Turkey, Iran Costa Rica or Serbia.

102 *Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 137 ('[…] [T]he whole trial [before a Mississippi court] and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.').

103 See references and examples for misconduct *Pahis*, Yale Law Journal 2009/8, p. 1900.

104 *Liu/Mikesell*, Public Administration Review 2014/3, p. 346.

105 Transparency International's 'Corruption Perceptions Index 2020', available at: https://www.transparency.org/en/news/cpi-2020-western-europe-eu (30/6/2021).

Article 47 of the Charter of Fundamental Rights of the EU)[106] assuring the fairness, predictability, certainty and stability of the legal system in which businesses operate.[107] In the 2020 WJP rule of law index , the 'civil justice' system of a number of EU Member States ranked above 50, with Croatia being ranked at 52, Italy at 54, Bulgaria at 56 and the poorest rank being Hungary at 96.[108] According to the ICSID database at the time of writing, these EU Member States are respondents in approximately 49 ISDS disputes either pending or concluded before ICSID, with Croatia and Hungary each involved in 15 cases respectively, while Italy is a respondent in ten cases and Bulgaria in nine cases.[109] This data clearly suggests that foreign investments in these EU Member States are subject to a high risk of future disputes compared to the other Member States with lesser or no record of investor-State disputes. With a below-par record of access to justice in the aforementioned EU States, the availability of ISDS as a means to an efficient justice system for foreign investors cannot be overemphasised. On adherence to the rule of law, the 2020 WJP rule of law index[110] lists 128 countries in total, of which Bulgaria ranked as number 53, Croatia 39, Romania 32, Greece 40, Hungary 60, Italy 27 and Slovenia 24.

It is also worth mentioning that in the 2020 EU Justice Scoreboard, one of the core findings noted is the 'persistent challenges regarding the perception of judicial independence'.[111] Therein, it is further reported that political and governmental interference followed by economic pressure and other specific interests has resulted in a perceived lack of judicial independence in about two-fifths of EU Member States. Furthermore, the CPI 2020 of Transparency International[112] lists the CPI score of Latvia at 57, Italy and Malta at 53, Greece at 50, Slovakia at 49, Croatia at 47, with Bulgaria, Hungary and Romania at 44. Among the accession candidates, Serbia ranks at number 38, Montenegro at number 45, Macedonia at number 35, Turkey at number 40, and Albania at number 36.

Modes of dispute settlement strengthen the degree of compliance in general, and the availability of any means of legal recourse for the individual serves the protection

106 Article 47 Charter of Fundamental Rights of the EU [2000] OJ C364/01, '(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. […]'.

107 *European Commission*, The 2015 EU Justice Scoreboard, 9 March 2015, COM(2015) 116 final 37, available at: http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf (30/6/2021).

108 See WJP Rule of Law Index 2020, fn. 98, p. 29.

109 See ICSID Case Database, available at: https://icsid.worldbank.org/cases/case-database (30/6/2021).

110 See WJP Rule of Law Index 2020, fn. 98, p. 7.

111 *European Commission*, 2020 EU Justice Scoreboard – Questions and Answers, available at: https://ec.europa.eu/commission (30/6/2021).

112 Transparency International's 'Corruption Perceptions Index 2020'.

of legal rights. Ideally, such availability alone will contribute to compliance.[113] This is also one of the main ideas of strong individual (subjective) rights in EU economic law, as they are found in procurement or state aid law as well as in the entire area of fundamental freedoms and their enforcement.[114] Furthermore, the fact that obligations are usually complied with in Canada and most EU Member States as well as the EU itself does not mean that an additional compliance mechanism should be abolished for the cases where they do not.

Finally, even sophisticated legal systems in Canada and most parts of the EU alone do not guarantee that non-commercial risk will be dealt with in a non-discriminatory and fair manner before national courts. Therefore, ISDS can serve as a last option for foreign investors. The availability of particular legal remedies is of importance when disputes emerge. The large amount of EU investments in Canada and *vice versa* indicates that investment provisions in FTAs are not a one-way street in favour of Canadian investors. ISDS therefore performs a protective function by helping to reduce non-commercial risks for European investors.

The size and complexity of the EU and its Member States, as well as the Canadian government with multiple functions (legislative, executive/administrative and judicial) on different levels (municipal, state/provincial and federal), can act in a number of combinations to the detriment of foreign investors. This despite all political sub-units such as states/provinces and municipalities being bound by investment agreement terms.

Furthermore, domestic courts enforce domestic rights, but they often do not have jurisdiction to enforce international law directly. In this context, it has to be noted that the CETA, just like the EU-Singapore FTA, explicitly excludes the direct applicability of the agreement.[115] This is particularly noticeable because in many European legal systems – such as those of Germany, the Netherlands and Austria – treaties normally become not only part of domestic law but can also be directly applied and enforced by domestic courts and tribunals as long as they are sufficiently clear and precise. Thus, such legal orders would generally permit the direct invocation of investment protection standards before their courts. However, the possibility of such direct invocation is explicitly excluded in the CETA by the 'no direct effect' rule. Therefore, because the direct applicability of the CETA is excluded, chapters including substantive investment protection standards are – from an investor's perspective – almost useless without a corresponding ISDS mechanism. In the absence of the abil-

113 See also *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, OECD Working Papers on International Investment 2012/3, available at: http://dx.doi.org/10.1787/5k46b1r85j6f-en (30/6/2021), p. 10.

114 *Masing*; *Everling*, Neue Zeitschrift für Verwaltungsrecht 1993, p. 215.

115 Article 30.6 CETA ('Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.'); similar, Article 16.16 EU-Singapore FTA 'No Direct Effect' ('For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.').

ity of domestic courts and tribunals to directly apply such standards, only recourse to ISDS will effectively permit the invocation and enforcement of investment protection standards. At the same time, the exclusion of direct applicability of CETA standards makes clear that no national court can set aside national legislative measures even if these are not in conformity with the CETA's substantive investment protection standards. Thus, the direct relevance of the CETA for the national lawmaker is only a limited one.[116] As already mentioned, the ICS cannot set aside national law that is not in conformity with CETA Chapter 8, but can only award compensation.

In regard to attracting foreign investment from the EU as well as from Canada, investment protection is at least to be seen as a neutral factor. Many economists even argue in favour of ISDS having an FDI-stimulating effect.[117] Thus, in a competition of governments and economic systems, ISDS has to be seen as one (out of many) factor(s) for promoting economic activity and attractiveness; more efficient and effective protection will most likely increase FDI in the EU.[118] Often the mere availability of legal recourse for individual investors will deter host States from acting in violation of basic due process principles and will thus contribute to compliance. A functioning legal system complying with basic rule of law criteria will in turn be more attractive to foreign investors than a system devoid of such attributes.

Furthermore, it is most questionable whether the EU can afford to exit the negotiation floor in a regulatory competition between the economic superpowers, i.e. the EU, China and the US, leaving the shaping of a future ISDS mechanism to other players. With a global economic weight equal to one-quarter of global GDP and nearly half of global FDI outflows,[119] the EU's potential in investment negotiations is more than evident. Currently, there is the unique possibility for the EU to influence the development of an ISDS Model Chapter with other countries following suit.

II. Future Termination of EU Member States – Canada Investment Agreements

Canada has concluded seven BITs with EU Member States (Croatia, the Czech Republic, Hungary, Latvia, Poland, Romania and the Slovak Republic).[120] Based on these

116 *Thym*, Verhinderte Rechtsanwendung: deutsche Gerichte, CETA/TIIP und Investor-Staat-Streitigkeiten, Verfassungsblog, 4/1/2015, available at: http://www.verfassungsblog.de/verhinderte-rechtsanwendung-deutsche-gerichte-cetatiip-und-investor-staat-streitigkeiten (30/6/2021).

117 For a positive effect within North-South-relations, see *UNCTAD*, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, in UNCTAD Series on International Investment Policies for Development (2009).

118 On this *Bungenberg*, KSzW 2011, p. 116.

119 *UNCTAD*, World Investment Report 2012 – Towards a New Generation of Investment Policies (2012), p. 85.

120 Canada – Croatia BIT (1997), entered into force January 2001; Canada – Czech Republic BIT (2009), entered into force January 2012; Canada – Hungary BIT (1991), entered into force November 1993; Canada – Latvia BIT (2009), entered into force November 2011;

EU Member States-Canada IIAs, there have been approximately seven arbitral proceedings to date,two of which were initiated against Romania,[121] two against Croatia,[122] then one each against Poland,[123] the Slovak Republic[124] and the Czech Republic.[125] There have been no arbitral proceedings from EU investors against Canada. Notably, as an outcome of the finalised CETA text in Chapter 8, the existing EU Member States-Canada BITs will have to be terminated once the CETA Investment Chapter enters into force.

Following the rules of customary international law as codified in Article 54 of the Vienna Convention of the Law of Treaties (VCLT), '[t]he termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.'

As far as the existing EU Member States-Canada IIAs are concerned, the consent of all Parties involved to terminate the existing agreements between them is already foreseen in the CETA. According to Article 30.8 (1) CETA: 'The agreements listed in Annex 30-A shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement.'

Annex 30-A CETA lists the existing BITs between Canada and the EU Member States identified above and includes the 'Exchange of Notes between Canada and Malta Constituting an Agreement Relating to Foreign Investment Insurance, done at Valletta on 24 May 1982.'[126]

Although the CETA has been provisionally applied since 21 September 2017, this provisional application of Chapter 8 is limited to specific provisions which, in particular, do not include the ISDS provisions.[127] The ISDS provisions along with other provisions of the CETA will only fully and definitively come into force upon final ratification of the agreement by all the EU Member States.

Canada – Poland BIT (1990), entered into force November 1990; Canada – Romania BIT (2009), entered into force November 2011; Canada – Slovakia BIT (2010), entered into force March 2012.

121 *Edward and Jak Sukyas v. Romania*, UNCITRAL Ad-Hoc (legal basis, Canada – Romania BIT 2009, case pending); *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31 (legal basis: Canada – Romania BIT, case pending).

122 *Haakon Korsgaard v. Croatia*, UNCITRAL (legal basis, Canada – Crotia BIT 1997, case pending); *Mr. Nedjeljko Ulemek v. Croatia*, UNCITRAL (legal basis: Canada-Croatia BIT 1997, Award of May 25, 2008 (not public, IAReporter 16/2011 states that all claims were dismissed).

123 *Lumina Copper v. Republic of Poland*, UNCITRAL (legal basis Canada – Poland BIT 1990, case pending).

124 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic,* ICSID Case No. ARB/14/14 (legal basis: Slovak Republic/Czechoslovakia-US BIT; Canada-Slovak Republic BIT, case pending).

125 *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL (legal basis: Canada-Czech Republic BIT; all of claimants' claims were dismissed).

126 See Annex 30-A CETA.

127 Notice Concerning the Provisional Application of the CETA, OJ L 238 of 16/9/2017, p. 9.

Notably, a sunset clause is provided in Article 30.8 (2) CETA which guarantees that notwithstanding the termination of the agreements listed in Annex 30-A, a claim may still be submitted under the defunct BITs if the 'challenged treatment' occurred before the agreement was terminated, and not more than three years have elapsed since the termination. Consequently, this provision preserves existing claims pending before ISDS tribunals arising under the BITs listed in Annex 30-A, including future claims provided they meet the aforesaid conditions.

E. The CETA Substantive and Procedural Framework – A Paradigm Change?

I. The CETA Substantive Framework

A permanent point of discussion during the negotiation of CETA was that this agreement and especially its investment chapter would undermine democratic principles of the participating States, especially the right to regulate. An overly-broad investment protection which could be enforced by investors themselves would lead to a 'regulatory chill',[128] whereby sovereign States would be deprived of their right to act and to implement their public policy considerations. During negotiations, all actors and thus also the negotiating teams were constantly reminded that any investment protection should reflect a more balanced approach between public and private interests, and thus limit the Contracting Parties in the exercise of their sovereign 'right to regulate' as little as possible. This 'more balanced approach', which was also pointed out by the CJEU in the *CETA* Opinion, is reflected throughout the entire investment chapter, be it the scope of application, the substantive standards or the dispute settlement system. For instance in Article 8.2, which discusses the general scope of application of the investment chapter, one can observe a balancing exercise between guaranteeing the protection of investors in as many sectors as possible, while ensuring that national interests in sensitive industries, such as entertainment and aviation, are protected and can be regulated locally. This was done to protect local interests in these sensitive industries. Furthermore, a broad exception for 'activities carried out in the exercise of governmental authority' from market access provisions, performance requirements, and key investment protection standards such as national treatment and most-favoured nation treatment indicates that the Parties wanted to protect their right to regulate and ensure a wide leeway in performance of any actions, which are normally considered a part of sovereign functions.[129]

128 In this vein see e.g. *Seattle to Brussels Network*, Seattle to Brussels Network refutes European Commission's defense of controversial investor-to-state dispute settlement, available at: http://www.tni.org/sites/www.tni.org/files/download/s2b_response_to_dgtrade_long.pdf (30/6/2021); Further on this issue, see *Neumayer*, International Journal of Sustainable Development 2001/3, p. 231; *Schill*, Journal of International Arbitration 2007/5, p. 469; *Tienhaara*, in: Brown and Miles (eds.), p. 607.

129 See *Bungenberg/Hazarika/Adekemi*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Art. 8.2, mn. 127.

1. The Scope of Application

Compared to previous generations of investment agreements, CETA Chapter 8 contains multiple clarifications and also limitations to the scope of its application. One of the central issues concerning the scope of application is to what extent an IIA should cover different types of investments. On the one hand, CETA retains the broad asset-based definition found, for example, in German and Austrian BITs, comprising both portfolio investments and FDI.[130] This is not surprising, but at least interesting to note, taking into consideration the above mentioned limited exclusive competences as regards internal EU powers to negotiate and conclude agreements.

Remarkable is the fact that the introductory '*chapeau*' of the investment definition contains language reminiscent of the so-called *Salini* elements,[131] but only in a reduced way, the 'contribution to the development of the host State' is left out, in line with recent investment jurisprudence.[132] Chapter 8 thus can be regarded as a manifestation of the political will of the Parties to create an additional hurdle ensuring that only a more limited number of 'true' investments will be protected by the investment chapter. On the other hand, bondholder claims as controversially discussed since the *Abaclat*[133] and subsequent Argentinian bondholder cases[134] are not excluded. At the same time, Chapter 8 excludes investor-State claims for debt restructuring.[135]

Regarding the scope of application *ratione personae*, Chapter 8 refers to an investor as 'a natural person or an enterprise of a Party, that seeks to make, is making or has made an investment in the territory of the other Party.'[136] As regards natural persons, the text refers to citizenship; concerning enterprises, the main criterion appears to be incorporation. With respect to the latter, Chapter 8 makes clear that mere shell companies incorporated in either of the Parties should not benefit from the investment protection under the agreement. This is done by a definitional clarification excluding enterprises without any 'substantial business activities' in either of the Parties.[137]

130 Article 8.1 CETA (Definition of Investment).
131 See *Bungenberg*, JWIT 2014/3–4, p. 415.
132 See *Reinisch*, in: Capaldo (ed.), p. 837.
133 *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).
134 *Giovanni Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8, tribunal constituted on 3 July 2008; *Ambiente Ufficio S.p.A. and others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013).
135 Annex 8-B CETA, para. 2.
136 Article 8.1 CETA (Definition of Investor).
137 Article 8.1 CETA: 'For the purposes of this definition, an enterprise of a Party is: (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or […]'.

2. Extension of Scope of Application to Admission/Market Access

While it was clear that the EU institutions were generally determined to continue a policy of market liberalisation,[138] it was less clear which course to adopt for the future, whether to have separate provisions on market access or to extend national treatment to the pre-investment stage.[139] The CETA text shows that it is primarily the Canadian approach that was pursued. Its national treatment obligation extends to 'establishment, acquisition (and possibly expansion) of investments'.[140] Explicit provisions on market access and the extension of the scope of application of IIAs to the pre-establishment phase is not the norm in international investment law. In this regard, the CETA thus stands in sharp contrast with traditional IIAs by not only extending the scope of application of its non-discrimination standards of protection to the pre-establishment phase but also by including an explicit provision on market access in its investment chapter.[141] The EU and Canada are prepared to extend market access clauses to the pre-investment phase of foreign investment, and the 'negative list' approach adopted by Article 8.4, in particular, can be interpreted as a strong signal that the Parties seek to achieve rapid and broad market access for their respective investors. Nevertheless, market access remains closely linked to the economic sovereignty of States, which the Parties want to protect. This is especially apparent from the second paragraph of Article 8.4 as well as from its exclusion from the scope of ISDS under the CETA.[142]

The extensive prohibition of mandatory performance requirements in relation to both goods and services also has to be noted as an innovative step.[143] Also, advantage conditioning requirements/non-mandatory performance requirements are prohibited. Article 8.5 of the CETA thus has the features of a so-called 'TRIMS+' clause for pre- and post-establishment.[144] This article clearly reduces the scope of the Parties'

138 See only *European Commission*, Towards a comprehensive European international investment policy, 7 July 2010, COM(2010) 343 final, p. 4 ff., ('[…] our trade policy will seek to integrate investment liberalisation and investment protection').

139 See also the discussion in *Woolcock*, The EU Approach to International Investment Policy after the Lisbon Treaty, Study for the EP Committee on International Trade 2010, pp. 31 ff., available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-INTA_ET(2010)433854 (30/6/2021).

140 See Article 8.6 CETA; See also Article 4 Canada 2014 Model FIPA, available at: https://www.italaw.com/sites/default/files/files/italaw8236.pdf (30/6/2021).

141 See *De Mestral/Vonhaker*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.4, mn. 2.

142 Ibid., mn. 5.

143 See Article 8.5 CETA (Performance Requirements).

144 For further reference on the different types of prohibition of performance requirements see *Nikièma*, Performance Requirements in Investment Treaties, IISD Best Practices Series, December 2014, pp. 7 ff.; As regards Article 8.5 of the CETA particularly see *Bernasconi-Osterwalder/Mann*, in: Mbengue/Schacherer (eds.), p. 354 ('[...] Article 8.5 imposes an extensive series of prohibitions on governments to impose performance requirements on foreign investors. While some of these are already contained in the WTO Agreement on Trade related Investment Measures (TRIMS), they are reiterated and broadened here [...]').

possible use of regulatory powers and limits the possible obligations which may be imposed on foreign investors.[145] Nevertheless, the prohibition of performance requirements is seen as less problematic when an agreement is concluded between Parties with equal industrial strength.[146] Furthermore, the text foresees carve-outs where certain sectors are explicitly exempted from the prohibition of performance requirements such as governmental procurement, air-services, cultural industries (Canada) and audio-visual industries (EU); the Parties' regulatory space can be increased in a tailor-made way.[147]

Finally, Article 8.5 is only subject to State-to-State dispute settlement and not to ISDS. Investors thus cannot claim a violation of Article 8.5 before a CETA tribunal. This is also likely to attenuate the effects of the – substantively – far-reaching performance requirements in Article 8.5 accordingly.

3. The Standards of Protection

The very purpose of BITs is to eliminate certain unwelcome State measures like uncompensated, discriminatory and arbitrary expropriation of foreign investments, violations of basic notions of fairness and equity, as well as a lack of basic protection of foreigners, as they are laid down in the typical IIA provisions of fair and equitable treatment (FET) and full protection and security (FPS), or discriminatory action outlawed by most-favoured-nation (MFN) and national treatment (NT).[148]

Every treaty obligation entails some limitation on the actual exercise of sovereignty.[149] But it is also true that investment tribunals have so far emphasised the sovereign right of host States to regulate, holding that changes in the regulatory environment or legitimate regulatory actions as such do not normally constitute violations of FET[150] or indirect expropriation. This public policy emphasis is now underlined by the wording of the substantive standards of protection together with an explicit article

145 See *Binder*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.5, mn. 52; See on this also *Bernasconi-Osterwalder/Mann*, in: Mbengue/Schacherer (eds.), p. 353.

146 See respectively *Binder*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.5, mn. 54; *Bernasconi-Osterwalder/Mann*, in: Mbengue/Schacherer (eds.), p. 354.

147 *Binder*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.5, mn. 55, referring to the recommendations along these lines in *Nikièma*, Performance Requirements in Investment Treaties, IISD Best Practices Series, p. 16.

148 Generally on these protection standards, see e.g. *Schreuer*, JWIT 2005/6, p. 357; *Reinisch* (ed.), Standards of Investment Protection, p. 259 ff; *Muchlinski et al.* (eds), pp. 363 ff.; *Dolzer/Schreuer*, pp. 130 ff.; *Kläger*; *Bungenberg et al.* (eds.), International Investment Law – A Handbook.

149 See *The S.S. 'Wimbledon'*, *United Kingdom and ors v. Germany*, Judgment, 17 August 1923, PCIJ Series A no 1, ICGJ 235 (PCIJ 1923), p. 25.

150 See e.g. *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 332; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 177; *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 290; *Mobil Investments Canada Inc & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 153.

on the right to regulate.[151] Article 8.9 CETA 'sets the tone'[152] for the application and interpretation of the investment protection standards, especially with Article 8.9 paras. 1 and 2 CETA operating as a reaffirmation of the sovereign right of States to regulate in the public interest. Nevertheless, Article 8.9(1–2) CETA does not prevent liability for regulatory measures, it simply makes clear that governments may adopt and maintain the measure – but are obliged to pay compensation if they violate any of the investment protection standards.[153]

The core standards of investor rights may impede regulation where it would lead for example to uncompensated (indirect) expropriation. But they merely restate what host States owe to foreign investors under general international law, especially what is owed under customary international law. The current limited scope of investment protection standards in the CETA is not likely to seriously affect the 'right to regulate' of the States Parties to this agreement. As also the CJEU has confirmed, it is in general unlikely that these standards will compromise the 'right to regulate' of host States.

In the unlikely case that an individual investment award could be regarded as such an encroachment on the States Parties' right to regulate, the CETA provides for an immediate treaty remedy: the possibility to correct such an interpretation either by the appellate instance[154] in the specific case or via an agreed interpretation of the Contracting Parties.[155]

The core of any IIA or BIT concluded by EU Member States in the past has always been a rather similarly phrased set of substantive treatment standards, that are also all more or less part of CETA Chapter 8: the obligations of fair and equitable treatment as well as full protection and security; the two non-discrimination obligations of national treatment and MFN; the prohibitions of arbitrary or discriminatory treatment; and a guarantee that investors are not expropriated – directly or indirectly – except in the public interest, in a non-discriminatory way, according to due process and under the condition that they receive adequate, prompt and effective compensation. Finally, a 'free transfer of funds' guarantee is also found in Chapter 8, but not the so-called umbrella clause. The Draft CETA contained an EU suggestion[156] on an umbrella clause; however, in the final version, there was no agreement on the inclusion of an umbrella clause in CETA. This is not surprising given Canada's general policy not to include umbrella clauses in its IIAs.[157]

151 Article 8.9 CETA.
152 *Schacherer*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Art. 8.9, mn. 2.
153 Ibid., mn. 38.
154 See Article 8.28 CETA.
155 See Article 8.31(3) CETA.
156 EU: Inserted in square brackets after Article X.9 (Treatment of Investors and of Covered) in the Draft CETA Investment Text of 21 November 2013, leaked version of the CETA draft text, available at: https://www.laquadrature.net/files/CETA-Draft-Investment-Text-Nov21-2013-203b-13.pdf (30/6/2021). The EU has proposed what may have been intended a rather limited umbrella clause, according to which: Article X, '[e]ach Party shall observe any specific written obligation it has entered into with regard to an investor of the other Party or an investment of such an investor'.
157 See *Lévesque/Newcombe*, in: Brown (ed.), pp. 60 ff.

Nevertheless, the substantive protection standards in CETA's investment chapter embody a paradigm shift away from the traditional European BIT texts, which had almost no explanations, towards a very detailed specification of core concepts of investment protection, such as indirect expropriation, FET, FPS and MFN. Thus, also in this respect, CETA Chapter 8 displays a very cautious approach to investment protection, extending only a low level of protection which inversely implies a large freedom of host States to act and regulate, as will be summarised in this section. Thus, the entire chapter is an interesting example of the potential feedback between treaty-makers and investment tribunals. It is evident that the CETA drafters have incorporated many elements found in arbitration practice and clarified to which extent they would like to see this practice to be followed – or not – in ISDS cases under CETA.

National Treatment:[158] With regard to the formulation of the national treatment clause, the CETA text evidences a clear departure from the traditional European national treatment clauses, which are limited to the so-called post-establishment phase,[159] and extends the scope of the national treatment obligation to establishment, acquisition (and possibly expansion) of investments. This clearly shows an attempt to ensure market access/admission obligations by adopting the Canada/US approach to extend national treatment to the establishment phase.[160] The CETA national treatment clause also departs from the European tradition in so far as it is not fully unqualified, but rather incorporates language, triggering the non-discrimination obligation only 'in like situations'. This also follows US/Canadian BIT traditions[161] and is in line with the wishes of the European Parliament.[162] While useful, this addition will probably not change much, since many investment tribunals adopt a 'like circumstances' or 'like situations' test even in the absence of specific wording.[163] However, investor-State dispute settlement with respect to breaches of national treatment is only available for the post-establishment phase. The inclusion of the pre-investment phase may have a 'liberalisation' effect, re-enforcing the effects expected from the inclusion of access to the national treatment obligation.

Most favoured Nation Treatment:[164] The CETA text clearly limits the scope of the agreement's MFN clause. In the past, non-discrimination clauses requiring host States to extend to foreign investors a treatment not less favourable than that given to investors of any third Party have been interpreted by some tribunals to also include

158 See Article 8.6 CETA.
159 See in general *Baetens*, in: Schill (ed.), p. 279; *Bjorklund*, in: Reinisch (ed.), Standards of Investment Protection, p. 29.
160 See *Tropper*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.6, mn. 63.
161 See e.g. Article 3(1) of the Canadian Model FIPA 2004.
162 *European Parliament*, European Parliament Resolution of 6 April 2011 on the future European international investment policy, (2010/2203 (INI)), para. 19 ('non-discrimination (national treatment and most favoured nation), with a more precise wording in the definition mentioning that foreign and national investors must operate "in like circumstances".').
163 See e.g. *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003), para. 53; see also *Reinisch*, in: Bungenberg et al. (eds.), International Investment Law – A Handbook, p. 846.
164 See Article 8.7 CETA.

procedural or even jurisdictional issues under the so-called *Maffezini* doctrine. The result of this is that investors could avoid waiting periods before instituting investment claims[165] or even access ISDS by 'importing' the required jurisdiction from third country BITs.[166] While the jurisprudence is unclear in this regard,[167] clarification of the intended scope of MFN clauses in the CETA text gives guidance to dispute settlement under the CETA's ICS. It is clarified that MFN treatment 'does not include investor-to-State dispute settlement procedures provided for in other international investment treaties and other trade agreements.'[168] This clarification will have an important practical impact and, from the perspective of predictability and certainty, will help avoid unnecessary litigation. The CETA MFN text[169] furthermore 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 by a Party pursuant to such obligations.'[170] Thus, the provision ensures that tribunals cannot 'import' more favourable substantive treatment obligations from other IIAs. It should be noted that this is contrary to the ordinary understanding of MFN clauses in BITs and multilateral IIAs by investment tribunals.[171] The specifically negotiated limitations of the scope of FET,

165 *Emilio Agustín Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jannuary 2000), para. 54 ('[…] if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause […].'); Several tribunals have adopted this approach, see e.g. *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (11 May 2005); *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006) or *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisiction (3 August 2006); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012).

166 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Award on Jurisdiction (1 October 2007).

167 See e.g. *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 168; see also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005); *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction (22 August 2012).

168 Article 8.7(4) CETA, ('For greater certainty, the "treatment" referred to in Paragraph 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements…').

169 The EU-Singapore Investment Chapter does not contain a MFN-clause at all.

170 Article 8.7(4) CETA; This clarification was added to an earlier CETA version which did not contain such language. Apparently, it was the Commission's explict intention to deprive an MFN clause of this standard-importing function that investment tribunals have usally attributed to it. See on this issue *Reinisch*, JWIT 2014/3–4, p. 696.

171 See e.g. *Berschader v. Russian Federation*, SCC Case No. 080/2004, Award (21 April 2006), para. 179 ('It is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties […].'); *MTD*

FPS and indirect expropriation discussed below thus cannot be circumvented by reliance on more favourable provisions in third-party IIAs.[172] Furthermore, MFN will also be applicable in the pre-investment phase.[173] With this, CETA's MFN clause departs from the MFN provisions traditionally found in bilateral and multilateral investment treaties: the inclusion of the pre-investment phase may have a 'liberalisation' effect, re-enforcing the effects expected from the inclusion of access to the national treatment obligation. However, the explicit exclusion of the 'importation' of more favourable procedural treatment and better substantive treatment will considerably limit the practical use of CETA's MFN clause. Only a standard ensuring that *de facto* treatment of investors of the other Party be no less favourable than that enjoyed by investors from third States is left.

Expropriation:[174] Similarly, the right to regulate has been emphasised in the CETA's approach to indirect expropriation. The CETA definition of expropriation expressly acknowledges the 'right to regulate' and makes clear that non-discriminatory measures designed to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

The agreement contains a novelty for European investment treaty practice in so far as it includes – like the Model BITs of the US[175] and Canada[176] – an annex on expropriation,[177] which expressly specifies that an indirect expropriation occurs only if 'it substantially deprives the investor of the fundamental attributes of property in its investment.'[178] Additionally, the annex specifically reserves the right to regulate by stating the Parties' shared understanding that

> […] except in the rare circumstance where the impact of the 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.[179]

Equity v. Chile, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 100 ('[…] [T]he Tribunal considers it appropriate to examine the MFN clause in the BIT and satisfy itself that its terms permit the use of the provisions of the Denmark BIT and Croatia BIT as a legal basis for the claims submitted to its decision.'). But it is clearly within the power of the treaty-making Parties to agree on an alternative meaning.

172 See *Hoffmeister/Alexandru*, JWIT 2014/3–4, p. 388 ('Accordingly, while looking restrictive at first sight, excluding the incorporation of other normative standards into the operation of an MFN clause is actually preserving the political freedom of the EU to strive for the best available standards on the basis of full reciprocity with all its treaty partners.').

173 In the November 2013 version of the leaked CETA text, it is indicated that the current formulation is '[s]ubject to agreement by EU on inclusion of an MFN obligation regarding "establishment, acquisition, expansion of an investment".' Article X.8: Most-Favoured-Nation Treatment in the Draft CETA Investment Text of 21 November 2013.

174 See Article 8.12 CETA and Annex 8-A CETA.

175 Annex B of the US Model BIT 2012.

176 Annex B.13(1) of the Canada Model BIT 2004.

177 Annex 8-A CETA.

178 Annex 8-A(1)(b) CETA.

179 Annex 8-A(3) CETA.

This CETA understanding sets out that a finding of indirect expropriation requires a case by case, fact-based inquiry. It further provides a number of relevant factors, such as the economic impact of the measure, its duration, the extent to which it interferes with 'distinct, reasonable investment-backed expectations', and the character of the measure or series of measures, notably their object, context and intent, in order to determine whether specific measures constitute indirect expropriation. Finally, the understanding contains police powers doctrine-inspired language, trying to ensure that *bona fide* regulation in the public interest should not be considered expropriatory.[180] This is in line with the November 2013 Commission Factsheet on 'Investment Protection and Investor-to-State Dispute Settlement in EU agreements', which specifically stated

> that future EU agreements will provide a detailed set of provisions giving guidance to arbitrators on how to decide whether or not a government measure constitutes indirect expropriation. In particular, when the state is protecting the public interest in a non-discriminatory way, the right of the state to regulate should prevail over the economic impact of those measures on the investor.[181]

In defining indirect expropriation, it seems that the European Parliament's wishes that a 'clear and fair balance between public welfare objectives and private interests' were taken into consideration.[182] As a consequence, the CETA approach on indirect expropriation allows for a certain balancing between the interests of the investor and the State. Its regulation exception implicitly requires a proportionality test.[183]

Fair and Equitable Treatment:[184] The novel definition of FET makes this standard more predictable. It ensures that only a low-intensity scrutiny will be performed and that States retain broad regulatory freedom. The CETA investment chapter contains a clarification of the meaning of FET which is based on past investment awards but emphasises those elements that give host States greater regulatory freedom. The usual short FET clause stipulating that '[e]ach Party shall accord in its territory to investors and to covered investments of the other Party fair and equitable treatment'[185] is accompanied by a paragraph defining a breach of the FET obligation. This provision underlines that only egregious violations of basic rule of law obligations by host States, such as

> Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administra-

180 Annex 8-A(3) CETA.

181 *European Commission*, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements – Fact Sheet (November 2013), available at: https://www.italaw.com/sites/default (30/6/2021), p. 2.

182 *European Parliament*, European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), para. 19 (calling for 'protection against direct and indirect expropriation, giving a definition that establishes a clear and fair balance between public welfare objectives and private interests.').

183 *Kriebaum*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.12, mn. 152.

184 See Article 8.10 CETA.

185 Article 8.10(2) CETA.

> tive proceedings; Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; [or] Abusive treatment of investors, such as coercion, duress and harassment,

will qualify as breaches of FET.[186] Similar to the annex on indirect expropriation, these specifications of FET are supposed to make the standard more predictable. States retain large regulatory freedom and are also subjected to only a low rule of law-scrutiny as regards their judicial and administrative acts. The fact that the notion of 'stability', an element usually found in attempts to define the content of FET,[187] is missing in the CETA text could be viewed as an indication that the Parties intended not to make the CETA's FET version too 'investor-friendly'. It seems to underline the intention, expressed in the November 2013 Commission Factsheet, to 'reaffirm the right of the Parties to regulate to pursue legitimate public policy objectives' and to 'set out precisely what elements are covered and thus prohibited' by FET in EU investment agreements.[188] Such mutual interdependence of treaty-makers and investment tribunals is also emphasised by a provision in the CETA FET clause that offers the Contracting Parties a possibility to review and clarify the specific content of FET by adding further elements.[189] Thus, under the CETA FET clause, the FET 'evolution' has effectively been 'stopped' with the specific enumeration of elements contained in the FET clause.[190] In particular, the establishment of a permanent Tribunal of first instance and an Appellate Tribunal[191] will ensure that the same adjudicators decide on every case, thereby allowing for a more consistent and coherent jurisprudence with regards to the FET standard.[192]

Full Protection and Security:[193] CETA's Full Protection and Security standard has limiting elements as well. 'Full protection and security' is limited to 'physical security',[194] apparently countering jurisprudence according to which some tribunals held

186 Article 8.10(2) CETA.
187 *Dolzer/Schreuer*, pp. 145 ff.
188 *European Commission*, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements – Fact Sheet (November 2013), pp. 2, 7 ff.
189 See Article 8.10(3) CETA, ('The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment.'), in conjunction with Article 8.44(3)(d) CETA.
190 *Dumberry*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.10, mn. 34.
191 Articles 8.27, 8.28 CETA; See *Schacherer*, J. Int'l Disp. Settlement 2016/3, p. 631; *Van Harten*, ISDS in the Revised CETA: Positive Steps, But Is It a 'Gold Standard'?, available at: https://www.cigionline.org/publications/isds-revised-ceta-positive-steps-it-gold-standard/ (30/6/2021); *Van Duzer*, Investor-State Dispute Settlement in CETA: Is It the Gold Standard?, C.D. Howe Institute Commentary No. 459, Ottawa Faculty of Law Working Paper No. 2016–44.
192 *Dumberry*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.10, mn. 35; See on this also *Schacherer*, J. Int. Dispute Settlement 2016/3, p. 631.
193 See Article 8.10(1),(5) CETA.
194 Article 8.10(5) CETA, ('For greater certainty, "full protection and security" refers to the Party's obligations relating to physical security of investors and covered investments.').

that the standard would go 'beyond physical security'.[195] It is, however, questionable whether this will imply a significant reduction of protection for investors since most non-physical interferences often constitute violations of the FET standard.

Transfer Provisions:[196] There has always been a broad consensus that EU investment treaties should include free transfer of funds provisions.[197] Thus, Chapter 8 contains a standard transfer clause according to which '[e]ach Party shall permit all transfers relating to a covered investment to be made without restriction or delay and in a freely convertible currency'.[198] Compared with other transfer clauses found in BITs and IIAs, the CETA provision contains a number of exceptions that have become more widespread in recent times,[199] such as those exempting measures relating to bankruptcy, trading in securities, criminal offences and administrative and adjudicatory proceedings.

4. Exemptions, Reservations and Denial of Benefits

Furthermore, reservations, exceptions and denial of benefits clauses can be seen as proof for the 'return of the State' in International Investment Law. Also, CETA's reservations and exceptions article ensures the right to regulate. A Party is able to reserve for itself any regulatory space it needs for its own policy planning, recognises and maintains the flexibilities found in the TRIPS Agreement and further exempts procurement and subsidies from the Investment Chapter's non-discrimination disciplines.[200] Finally, the CETA's denial of benefits clause in Article 8.16 stands out in a number of ways when compared to the ones included in key agreements that Canada and the EU have entered into.[201] The CETA Parties were willing to let go of the benefits of a discretionary mechanism in favour of a clear right to deny investor protection under the treaty if the enterprise is owned or controlled by investors from a third country, not one of the Contracting Parties and/or if the Party has security or

195 See e.g. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award (6 February 2007), para. 303 ('the obligation to provide full protection and security [was] wider than "physical" protection and security because it was difficult to understand how the physical security of an intangible asset would be achieved.'); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award (20 August 2007), para. 7.4.15.

196 See Article 8.13 CETA.

197 *European Commission,* Towards a comprehensive European international investment policy, COM(2010) 343 final, pp. 4, 9 ('EU clauses ensuring the free transfer of funds of capital and payments by investors should be included.'); See also Council Negotiating Directives (Canada, India and Singapore), 'EU-Canada (CETA), India and Singapore FTAs – EC negotiating mandate on investment (2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en (30/6/2021).

198 Article 8.13(1) CETA.

199 *UNCTAD*, Bilateral Investment Treaties 19952006: Trends in Investment Treaty Rulemaking (2007), p. 62.

200 See *Pierdomenico*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.15, mn. 69.

201 See *Lévesque*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.16, mn. 83.

other measures in place against the third country that 'prohibit transactions' (e.g. no diplomatic relations, embargo).

5. Interim Conclusion

It can be summarised that the remaining relative indeterminacy of investment protection standards in other IIAs, which might give rise to a broad discretion of investment tribunals, has been reduced in the CETA text (as well as the EU-Singapore FTA, which contains clarifications of the meaning of expropriation as well as FET). All this will limit the discretion of the adjudicators in future disputes. CETA thus witnesses significant changes, at least compared to the previous EU Member States' approaches. Thus, the question is not whether investment chapters and ISDS reduce the sovereign discretion of States to act as they see fit. The question is rather whether they do so to a degree that unduly limits the legitimate interests of States to exercise their right to regulate. As pointed out above, the CJEU denied this.

II. The CETA Procedural Framework (Investor-State Dispute Settlement)

1. General Considerations and Background

ISDS has long been considered a crucial ingredient of effective investment protection. The direct access of private parties to seek remedies for violations of substantive investment treatment standards has been regarded as an important contribution to enhancing the effectiveness of investment protection[202] by eliminating the need for an espousal of claims under the traditional diplomatic protection paradigm. At the same time, avoiding the political harassment factor of such inter-State claims is considered to lead to a general de-politisation of investment disputes.[203] ISDS has de-politicised the traditional protection of foreign investments through diplomatic protection on the inter-State level and contributed to the legalisation and judicialisation of such disputes. Instead of depending on the political discretion of States which, once they espouse the claims of their national investors, may exercise very intensive pressure on host States, investors have the option to enforce their rights directly through ISDS.

Despite the general recognition of these advantages, it was initially, i.e. after the entry into force of the Lisbon Treaty's new investment powers of the EU, unclear whether the EU would strive for ISDS or rather settle for inter-State dispute settlement along the trade law paradigm to which the Commission has become accustomed over years of GATT and WTO experience. After an initial orientation phase, the EU in-

202 See e.g. *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007), para. 165; *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction (20 June 2006), para. 49 ('[…] assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.').

203 See already *Shihata*, ICSID Rev. 1986/1, p. 1.

stitutions finally came out in favour of adopting ISDS,[204] though the European Parliament, in particular, voiced concern about ISDS.[205] This latter concern together with increased pressure from various NGOs, lobbying against ISDS in 2013, gained such political momentum that in early 2014 the EU Commissioner called for a reflection period to consult the European public on investment and ISDS.[206]

The charges against ISDS are not new and consist of a mix of serious concerns and irrational assumptions. Among the standard points of criticism are the lack of transparency of ISDS, the impossibility to appeal against investment decisions, the alleged pro-investor bias of tribunals, and overly broad investor rights which would lead to a chilling effect on legitimate regulation by sovereign States.[207] This debate questioning the need for ISDS in future EU IIAs is surprising since EU Member States have a long-standing practice of concluding BITs.

What the critics of investor-State arbitration appear to overlook are the multiple developments in investment arbitration over the past years. In 2006, the ICSID Arbitration Rules were amended to provide more transparency, now permitting *amicus curiae* participation and more general publication of awards.[208] In a similar effort, UNCITRAL adopted Rules on Transparency in investor-State Arbitration in 2013.[209] Though the lack of an appellate structure is typical in international dispute settlement as well as in transnational arbitration, much time and effort have been spent on considering whether some form of appeal would be feasible. While grand designs of amending the ICSID Convention have not been pursued,[210] many small steps have been taken to ensure the ultimate goal of more consistency, such as appellate mechanisms in individual IIAs and the use of joint commissions consisting of representa-

204 See e.g. *European Commission*, Towards a comprehensive European international investment policy, COM(2010) 343 final, pp. 4, 10 ('ISDS is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others.').

205 *European Parliament*, European Parliament Resolution of 6 April 2011 on the future European international investment policy, (2010/2203 (INI)), para. 24 ('Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements.').

206 See *European Commission*, 'Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement', 21 January 2014, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_56 (30/6/2021).

207 See e.g. *Monbiot*, This transatlantic trade deal is a full-frontal assault on democracy, The Guardian, 4/11/2013, available at: http://www.theguardian.com/commentisfree/2013/ nov/04/us-trade-deal-full-frontal-assault-on-democracy (30/6/2021).

208 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006, available at: http://www.worldbank.org/icsid/basic doc/CRR_English-final.pdf (17/2/2014); See also *Antonietti*, ICSID Rev. 2006, p. 427.

209 *UNCITRAL,* Rules on Transparency in Treaty-based Investor-State Arbitration, adopted by UN GA Res. 68/109, 16 December 2013, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf (30/6/2021).

210 See *ICSID Secretariat*, Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper, 22 October 2004; *Sauvant/Chiswick-Patterson* (eds.).

tives of the Contracting Parties empowered to give authoritative interpretations of IIAs.[211]

The CETA draft chapter on investment was already a good example of this tendency before the change towards an Investment Court System. The November 2013 Draft CETA text on ISDS[212] clearly demonstrated mutual efforts of the negotiators to agree on a balanced and modern version of investment dispute settlement, including: alternative dispute resolution mechanisms like mediation; non-disputing party participation through *amicus curiae* briefs; a standing 'ISDS Committee',[213] tasked with interpreting the investment chapter; preventing investors from bringing multiple or frivolous claims by imposing heavy litigation cost risks; and introducing a binding code of conduct for arbitrators in order to reduce conflicts of interest.[214]

Further, all official documents published by the EU have included ISDS as an integral part of future investment chapters to be concluded by the EU. Since CETA and the EU-Singapore Free Trade Agreement explicitly exclude their direct applicability, the rights contained therein cannot be invoked before national courts and tribunals. Thus, an investment chapter without a corresponding ISDS mechanism is, from an investor's perspective, of limited use.

As mentioned above, since late 2015, the EU Commission has included in all proposals for Investment Protection and Resolution of Investment Disputes (TTIP,[215] CETA,[216] EU-Vietnam)[217] an ICS which is a two-tier mechanism for ISDS, combining elements of traditional ISDS with judicial features.[218] In CETA, the ICS was included only during the 'legal scrubbing' and was found the first time in the very final version of CETA Chapter 8. Preceding that, the classical arbitration based ISDS was the negotiated CETA option.

2. Scope of Application and Jurisdiction of the ICS

Article 8.18 sets out the scope of the CETA investor-State dispute settlement regime, expressly limiting actionable investment claims to specific treaty breaches. This ap-

211 See e.g. NAFTA, Article 1131 or Article 31 of the 2012 US Model BIT.
212 CETA 'Investor-to-State Dispute Settlement Draft Text', leaked version of the CETA draft text of 15 November 2013, available at: https://www.laquadrature.net/files/Draft-CETA-DisputeSettlement (30/6/2021).
213 Ibid., Article x-12(3) (Applicable Law and Rules of Interpretation) and Article x-26(3) Committee, ISDS Draft Text.
214 See also *European Commission*, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements – Fact Sheet (November 2013), p. 2, evidencing the Commission's intention to continue this course of action.
215 *Bungenberg/Reinisch*, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, para. 42.
216 See Article 8.29 CETA (Establishment of a multilateral investment tribunal and appellate mechanism).
217 See Article 3.41 EU-Vietnam IPA (Final Text as on 2 April 2019).
218 *Reinisch*, J. Int'l Econ. L. 2016/4, p. 761.

proach differs from the ISDS clause found in older IIAs like the ECT.[219] An investor cannot bring claims relating to the acquisition or establishment of an investment.[220] Having a business activity in the territory of a Party is a critical condition to qualify as a protected 'investor'.[221] A 'shell' or 'mailbox' company cannot bring a claim under Chapter 8, and an investor who seeks access to the ICS for a claim must come with 'clean hands', as investments tainted by fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process may not be submitted under Article 8.18.[222] The scope of actionable investment claims curtails the discretionary power of CETA tribunals in exercising jurisdiction over unintended claims falling outside the scope of Article 8.18 CETA.[223]

The mediation provisions were inserted in order to respond to a growing desire for settling investor-State disputes and, more generally, disputes arising under CETA through alternative settlement techniques.[224] Article 8.20 CETA serves the purpose of facilitating the search for a mutually agreed solution to a dispute between an investor and a State through a comprehensive and expeditious procedure with the assistance of a mediator.[225]

Article 8.25 states explicitly that the Parties consent to ISDS via the ICS, which is highly relevant for ISDS. Article 8.25 attempts to ensure that the respondent's consent in paragraph 1 and the matching consent of the investor meet the respective criteria for arbitration agreements under the ICSID Convention and the New York Convention (NYC) indicating the intent and understanding of the Contracting Parties to CETA.

3. Establishment of the ICS – A General Overview

The ICS is composed of the 'Tribunal' as a tribunal of first instance[226] and the 'Appellate Tribunal'[227] or 'Appeal Tribunal'. [228] Members of these tribunals are selected in a manner different from that in traditional investor-State arbitration (ISA), with investors losing their influence on the appointment of adjudicators. Article 8.27(2) CETA stipulates that the 15 Members of the Tribunal shall be appointed by the bi-

219 Article 26(1) ECT provides for the submission of disputes 'relating to an Investment', this is a broad term short of been specific to particular treaty claims.
220 Canada's statement on the implementation of CETA, Chapter 8 (Section f), available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/canadian_statement-enonce_canadien.aspx?lang=eng#a13 (30/6/2021).
221 Article 8.1 CETA (Definition, an enterprise of a Party).
222 Article 8.18 para. 3 CETA.
223 Article 8.18 para. 5 CETA confirms that a CETA tribunal shall not decide a claim that falls outside the scope of Article 8.18.
224 See *Verbist*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Art. 8.20, mn. 77.
225 Article 1, Annex 29-C CETA.
226 See Article 8.27 CETA.
227 See Article 8.28 CETA.
228 See Article 3.39, Section B – EU-Vietnam IPA.

lateral high-level CETA Joint Committee[229] for a renewable five-year term. Five of the Members of the Tribunal shall be nationals of a Member State of the EU, five shall be nationals of Canada, and the other five shall be third-country nationals. Similar mechanisms are foreseen in the EU-Singapore[230] and EU-Vietnam-Agreements,[231] only that there we find a different number of adjudicators.

Qualifications for appointment resemble those of other international courts and tribunals by requiring specific knowledge in the field. In particular, Article 8.27(4) CETA warrants that the Members of the Tribunal shall possess 'qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence', and they shall have demonstrated expertise in the field. The adjudicators should especially be capable of balancing public and private interests.[232] Similar provisions are contained in the EU–Vietnam FTA and are suggested for TTIP.[233]

In recent years ethical issues emerged in ISDS. In the CETA, adjudicators are prevented from having any governmental affiliation and from taking instructions from others concerning matters related to disputes. Tribunal Members are to avoid conflicts of interest and are explicitly required to comply with the ethical rules derived from the IBA Guidelines on Conflicts of Interest and supplemental rules such as a CETA Code of Conduct; similarly, 'double hatting' is excluded.[234] Notably, including the IBA Guidelines in the CETA universe 'is a kind of daring experiment, which has rarely been replicated within the investment regulatory field.'[235]

Individual cases shall be adjudicated by 'divisions' of three Members of the Tribunal with third-country nationals presiding over such tribunals.[236] These three Members of the Tribunal are to be appointed by the President of the Tribunal on a yet-to-be specified 'random and unpredictable' rotation system.[237] This case-allocation mechanism is a truly novel feature and is similar to that found in some domestic judicial systems.[238] It is clearly different from the traditional ISA approach where the disputing

229 Pursuant to Article 26.1 CETA, the CETA Joint Committee shall be composed of 'representatives of the European Union and representatives of Canada' and 'co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees'.
230 Article 3.9 para. 2, EU-Singapore IPA, available at https://eur-lex.europa.eu/resource.html?uri=/DOC_2&format=PDF#page=29 (30/6/2021).
231 Article 3.38 para. 2, EU-Vietnam FTA.
232 See *Hoffmeister*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article. 8.28.
233 Article. 3.38 para. 4, Section 3 EU–Vietnam IPA; Article 9(4), Section 3, Commission draft text TTIP – Investment, 16 September 2015, available at: https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (30/6/2021).
234 See Article 8.30 para. 1 CETA.
235 See *Fach Gomez*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article. 8.30, mn. 113.
236 See Article 8.27(6) CETA.
237 See Article 8.27(7) CETA.
238 *Reinisch*, J. Int'l Econ. L. 2016/4, p. 764.

parties are free to select 'their' arbitrators,[239] partly subject to the condition that they should not be nationals of disputing parties.[240]

The ICS also incorporates the 2013 UNCITRAL Rules on Transparency in Treaty-based ISA.[241] Under these Rules, the repository promptly makes 'available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made' upon commencement of the arbitration proceedings.[242] A broad range of documents relating to the case should be published, including the statement of claim and defence, any written submission and the award.[243] Canada has already aimed for a high degree of transparency in the past, while the EU Member States have always showed more reluctance.[244] The ICS also provides for third-party and *amicus curiae* participation. This permits, for instance, a non-disputing Party to the treaty (i.e. usually the home State of the investor) to participate,[245] and also 'any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party.'[246] Further, tribunals may allow NGOs to submit *amicus curiae* briefs.[247] Overall, such transparency may contribute to the legitimacy of the investment treaty regime, even as it also catalyses the regime's more fundamental transformation.[248] Also, third-party funding (TPF) is addressed via transparency and an obligation to disclose TPF.[249]

Awards rendered by the Tribunal (of first instance) can be appealed to the 'Appellate Tribunal' within 90 days of their issuance.[250] The appeal system enlarges the annulment grounds of the ICSID Convention[251] with the power to review errors of law and

239 See e.g. Article 9 UNCITRAL Arbitration Rules, as revised in 2013, available at: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (30/6/2021).

240 See e.g. Articles 38, 39 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed on 18 March 1965, entered into force 14 October 1966, 575 UNTS 160. Section 39 ICSID provides: 'The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the Parties'.

241 Article 18, Section 3 – Commission Draft Text TTIP; Article 8.36 CETA; Article 3.46, Section 3 – EU-Vietnam IPA.

242 Article 2, UNCITRAL Transparency Rules (2013).

243 Article 3(1), UNCITRAL Transparency Rules (2013).

244 See *Calamita*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.36, mn. 18 f.

245 Article 22, Section 3 – Commission Draft Text TTIP; Article 8.38 CETA.

246 Article 23(1), Section 3 – Commission Draft Text TTIP.

247 Article 23(5), Section 3 – Commission Draft Text TTIP.

248 See *Calamita*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.36, mn. 66.

249 See Article 8.26 CETA.

250 See Article 8.28(9)(a) CETA; Article 29(1), Section 3 – Commission Draft Text TTIP; Article 28(1), Section 3 – EU-Vietnam IPA.

251 See Article 52(1) ICSID Convention, in force 14 October 1966.

manifest errors in the appreciation of facts.[252] Based on these grounds, the Appellate Tribunal may uphold, modify or reverse the Tribunal's award. If the Appellate Tribunal rejects the appeal, the Tribunal's award becomes final.[253] If the appeal is upheld, the Appellate Tribunal can wholly or partially modify or reverse the legal findings and conclusions in the original award.[254] However, the Appellate Tribunal does not itself render a modified final award. Rather, the first instance Tribunal subsequently has to issue a revised award within 90 days of receiving the report of the Appellate Tribunal.[255]

Introducing a 24-month time limit in Article 8.39 for the issuance of the final award may provide a useful tool to request more time discipline from the Tribunal and the parties.[256]

4. Applicable Law, Content of Awards and their Enforceability

The applicable law-limitations in Article 8.31 are a reaction to the backlash against *ad hoc* investment arbitration and the CJEU jurisprudence on the autonomy of EU law.[257] This provision makes clear that the Contracting Parties have specific expectations on how claims under Section F should be settled and implicitly bars domestic and EU law from the set of laws potentially applicable. Together with the explicit reference to the VCLT, this is meant to limit the power of the Tribunal. Furthermore, it provides methodological guidance on how the Tribunal must consider issues related to domestic law.[258] The requirements set out by the CJEU in the *CETA* Opinion 1/17 will shape the functioning of the provision in practice.[259] Article 8.31 provides directives and formulates expectations towards the Tribunal. Furthermore, the Contracting Parties can always use their interpretative powers as a remedy.

Also Article 8.39 – dealing with the 'final award' – is 'remarkably extensive in comparison to traditional BITs and other FTAs', again reflecting 'the heated debates, which accompanied the CETA negotiations in particular in the last phase'.[260] Punitive damages are not allowed, any monetary damages must not be greater than the loss suffered by the investor, and any restitution of property or repeal or modification of the measure will have to be taken into account in the calculation of damages. Overcompensation should thus be avoided. With respect to costs, the 'loser pays'-principle

252 Article 8.28(2) CETA; Article 29(1), Section 3 – Commission Draft Text TTIP; Article 28(1), Section 3 – EU-Vietnam IPA.
253 Article 29(2), Section 3 – Commission Draft Text TTIP; Article 8.28(9)(c)(ii) CETA; Article 29(2), Section 3 – EU-Vietnam IPA.
254 Article 29(2), Section 3 – Commission Draft Text TTIP; Article 8.28(2) CETA; Article 28(3), Section 3 – EU-Vietnam IPA.
255 Article 28(7), Section 3 – Commission Draft Text TTIP; Article 29(4), Section 3 – EU-Vietnam IPA; Article 8.28(7)(b) CETA.
256 *Marboe*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article. 8.39, mn. 112.
257 See *Scheu*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article. 8.31, mn. 75 f.
258 Ibid., mn. 76.
259 Ibid., mn. 77.
260 *Marboe*, in: Bungenberg/Reinisch (eds.), CETA Investment Law, Article 8.39, mn. 108.

is opted for and should provide comfort to governments when defending themselves against unmeritorious claims.[261]

Whether Article 8.41 CETA gives sufficient enforcement options of ICS awards in the hopefully exceptional case that the losing Party to a dispute is not willing to comply with its obligation is questionable and remains to be seen. Whether courts in third states are willing to regard ICS awards as being covered by at least the NYC is an open question.

The ICS approach taken by the CETA Contracting Parties is ambiguous; it seeks to abandon investment arbitration, while striving to use its enforcement instruments. At the outset, in case of enforcement under the ICSID Convention as well as the New York Convention, the enforcing courts are responsible for the interpretation and application of those conventions. As long as enforcement is sought within the EU or Canada, investment dispute settlement under CETA might work. On the European side, if an EU Member State is not willing to comply with an award, this could even lead to infringement proceedings under Article 258 and 259 TFEU, launched either by the Commission or other EU Member States. Moreover, if a CETA Party does not comply with its obligation under the Agreement, the possibility of State-to-State Arbitration under Chapter 29 CETA could also be triggered.

As a step towards a totally new and innovative approach, the idea of a Multilateral Investment Court was introduced in the spring of 2016 by the European Commission. This new international dispute settlement mechanism should provide a response to various criticisms made in recent years, especially in connection with CETA and TTIP, of international investment law in general and of *ad hoc* arbitration between investors and States in particular. The MIC was first mentioned by Commissioner *Malmström* in the INTA Committee on 18 March 2015 and at the informal Foreign Affairs Council on 25 March 2015.[262] On 10 July 2017, UNCITRAL also decided to work on a reform of investment arbitration, including the possible establishment of a Multilateral Investment Court.[263] On 20 March 2018, the Council gave the EU Commission a mandate to negotiate the establishment of such a multilateral court for investment disputes.[264]

Some of the recent trade agreements of the European Union (Canada, Mexico, Singapore, Vietnam) have already provided that the Parties are seeking a multilateral system to transfer the bilateral investment court system*:*

> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.

261 Ibid., mn. 111.

262 *Malmström*, Remarks at the European Parliament on Investment in TTIP, 18/3/2015, available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1279&title=Speech-Remarks-at-the-European-Parliament-on-Investment-in-TTIP (30/6/2021).

263 See UNCITRAL Working Group III discussions on ISDS reform, available at: https://uncitral.un.org/en/working_groups/3/investor-state (30/6/2021).

264 See *Council of the EU*, Negotiating Directives for the Establishment of a Multilateral Court for the Resolution of Investment Disputes, 20 March 2018, available at: http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/de/pdf (30/6/2021).

> Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[265]

The European Parliament also 'shares the ambition of establishing, in the medium term, a multilateral solution to investment disputes'.[266] At the same time, it made clear that it was not considered an alternative to continuing the classic *ad hoc* arbitration.[267] The new EU approach is currently being explained to the trading partners of the EU to make them accept the idea of an MIC. However, this task will also come to the EU Member States as civil society pressure continues to grow. Certainly, the only way into an institutionalised system is one that makes Member State investment protection agreements compatible with the EU constitutional law requirements.

Therefore, many discussions and publications currently revolve around this Multilateral Investment Court.[268] However, according to the CJEU's *CETA* Opinion, the European Union can only participate in such a multilateral investment court if this new dispute settlement mechanism fulfils certain conditions.[269] Even before this Opinion, the Court had very clearly emphasised the autonomy of EU law.[270] This meant that the European Union, among others, could not accede to the European Convention on Human Rights and Fundamental Freedoms.[271] With the *Achmea* decision,[272] the CJEU recently ruled against the admissibility of bilateral intra-EU investment treaties and the settlement of disputes based thereon, largely on grounds of upholding the autonomy of EU law. Consequently, approximately 150 intra-EU BITs must now be terminated by the Member States.[273]

265 Article 8.29 CETA; Article 15, Section 3 EU-Vietnam IPA; Article 3.12 EU-Singapore IPA.

266 *European Parliament*, European Parliament Resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, (2015/2105(INI)), available at: https://www.europarl.europa.eu/doceo/document/A-8-2016-0220_EN.html (1/7/2021), para. 68.

267 *European Parliament*, European Parliament Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), (2014/2228(INI)), para. 2.d)xv).

268 *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS Supplemental Report 2017; *Bungenberg/Reinisch*, Von bilateralen Schieds- und Investitionsgerichten zum multilateralen Investitionsgerichtshof; *Howse*, Yearbook of European Law 2017, p. 209; *Happ/Wuschka*, Indian Journal of Arbitration 2017/1, p. 113; *Calamita*, JWIT 2017, p. 585; *Wilske et al.*, Indian Journal of Arbitration Law 2018/2, p. 79.

269 See on the CJEU CETA Opinion 1/17: *Bungenberg/Titi*, CETA Opinion – Setting Conditions for the Future of ISDS, fn. 63.

270 See already CJEU, Opinion 1/91, ECLI:EU:C:1991:490, para. 30 ff.; CJEU, Opinion 1/09, ECLI :EU:C:2011:123, para. 67.

271 CJEU, Opinion 2/13, ECLI:EU:C:2014:2454.

272 CJEU, Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.

273 *European Commission*, Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment, 19 July 2018, COM(2018) 547 final.

Up to now, the reform discussions in UNCITRAL WG III are still ongoing; the authors of this contribution submitted a first Draft Statute to UNCITRAL in October 2020.[274] The Draft Statute is meant to stimulate discussions and to demonstrate that it is possible to create a Multilateral Investment Court on the basis of a treaty. The institutional and general legal setting of this Draft Statute advocates the establishment of an international organisation based on a treaty, not just open to States but to international organisations as well. The Statute prescribes the MIC's jurisdiction over investor-State as well as State-State disputes. By joining the MIC, Members recognise its international and domestic legal personality, accord it with the privileges and immunities required for its independent functioning, and contribute to its budget. The Draft Statute also provides for a bench of judges (sitting as a Court of First Instance and an Appellate Court), a Secretariat, a Plenary Body and an Advisory Centre. The Statute envisages that judges will be appointed for a longer period of time, be independent as well as impartial and highly qualified. The proposed mechanism for the selection of judges is premised on the need to ensure that all regions and major legal systems are adequately represented. The Draft Statute expressly enshrines the rule of law, transparency, efficiency, consistency and Members' right to regulate. It contains the fundamentals of procedure and incorporates *inter alia* the UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration. The MIC may regulate its own rules of procedure in greater detail and adapt to the specific needs of future disputes. With regard to the enforceability of MIC decisions, the Statute foresees a treaty-based obligation of all MIC Members to recognise and enforce them. Arrangements on enforcement in third States can be foreseen in a separate treaty. The new enforcement system also provides for the establishment of an enforcement fund.

5. Interim Conclusion

Not only does this agreement give a new approach by shifting from arbitration to a court-like system of adjudication, it also introduces various new elements into the ISDS Part of the Chapter, be it the general transparency obligations, including TPF, the scope of the applicable law, the content of the award and finally the cost allocation. Some of these new elements can be attributed to a more 'rule of law'-oriented system, some others can be seen as more State-friendly provisions, for instance, the explicitly limited scope of claims that may be submitted against a Party.

F. Conclusion: The New EU Approach – A Change of Paradigms?

The CETA Investment Chapter may serve as an important template for future EU investment agreements and thus deserves close scrutiny. A careful consideration of

274 *Bungenberg/Reinisch*, Draft Statute of the Multilateral Investment Court, available at: https://www.nomos-elibrary.de/10.5771/9783748924739.pdf?download_full_pdf=1 (1/7/2021).

the CETA Chapter 8 text indicates that a change of paradigms did take place which needs to take effect with the Chapter's full entry-into-force.

The first ever EU investment chapter in a broader trade agreement takes up a number of 2004 US/Canada Model BIT-inspired additions, new features such as further details concerning the exact meaning of FET and other standards, as well as a completely new ISDS approach. The additional wording within the substantive standards will probably serve as useful guidance to adjudicators in determining whether breaches of investment standards have occurred. But whether the modifications will lead to an overall increase or decrease of investment protection and whether they will enlarge or narrow down the regulatory space of host States will ultimately depend upon the application of the agreement by individual investment tribunals.

An even more drastic step would be the establishment of an MIC – but this fundamental change of ISDS is a long way down the road.

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