

The evolution of CETA rules

[illegible]

EPRS | European Parliamentary Research Service
Authors: Laura Puccio and Roderick Harte
Members' Research Service
June 2017 – PE 607.251

After a public consultation on investment protection and investor-to-state dispute settlement in the framework of the Transatlantic Trade and Investment Partnership (TTIP) with the United States, the European Parliament requested the replacement of the traditional arbitration framework with a new court system. The European Commission and Canada subsequently renegotiated the relevant provisions of the Comprehensive Economic and Trade Agreement (CETA) to institute a new investment court system (ICS). This in-depth analysis looks at the recent evolution of investment protection in the EU's trade agreements from the classic arbitration framework to the ICS.

This publication is best read together with two previous in-depth analyses on substantive investment protection rules: Laura Puccio, [Investment rules in trade agreements: Developments and issues in light of the TTIP debate](#), EPRS, European Parliament, September 2015; and Laura Puccio, [CETA: Investment and the right to regulate](#), EPRS, European Parliament, February 2017.

Refer also to an 'at a glance' note on the setting up of a multilateral investment court: Roderick Harte, [Prospects for a Multilateral Investment Court](#), EPRS, European Parliament, June 2017. And for further references, see the EPRS topical digest on: [CETA Agreement with Canada](#), EPRS, European Parliament, February 2017.

PE 607.251

ISBN 978-92-846-1171-3

doi:10.2861/856144

QA-01-17-626-EN-N

Original manuscript, in English, completed in June 2017.

Disclaimer and Copyright

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2017.

Photo credits: © Kheng Guan Toh / Fotolia.

epers@ep.europa.eu

<http://www.epers.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)

EXECUTIVE SUMMARY

Since the entry into force of the Lisbon Treaty, the European Union (EU) has begun negotiating EU-wide bilateral investment agreements including investment provisions in its free trade agreements. The Comprehensive Economic and Trade Agreement with Canada (CETA) is the first EU agreement signed by the EU containing investment protection provisions. Investment provisions include investment liberalisation measures and an investment protection framework including a dispute settlement mechanism for disputes arising between investors from the partner country and the host state. In most investment agreements, this investor-state dispute settlement (ISDS) uses an international arbitration framework. Several concerns raised by civil society with respect to this international arbitration framework led the EU to begin a process to reform the arbitration provisions. As a consequence of a consultation on the Transatlantic Trade and Investment Partnership (TTIP) with the United States of America, the European Parliament requested the replacement of international arbitration with a new system in the framework of EU trade and investment negotiations. The EU and Canada subsequently renegotiated CETA and established a new investment court system (ICS).

While procedurally the framework remains similar to the revised arbitration procedure of the first CETA draft, the ICS itself departs substantially from the arbitration model. The ICS is made up of a tribunal and appellate body. As opposed to the arbitration framework, parties to the dispute will not be able to choose their tribunal members. These will instead be selected on a rotational basis from a group of judges, appointed for a specified period of time by the CETA Joint Committee. The ICS was inspired by the World Trade Organization Appellate Body, both for the selection and remuneration of judges. Judges will receive a retainer fee that may be turned into a salary if workload justifies it, as in the WTO framework. The main reason for the retainer system is the relatively low annual average of cases brought under investment agreements. For example, the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty, two of the treaties with the largest total number of investor-state disputes, averaged respectively 2.7 and 6.6 cases per year. Because of the low number of cases and to contain the cost of establishing an ICS, CETA uses the International Centre for Settlement of Investment Disputes (ICSID) as an administrative secretariat, charged with providing organisational and logistical assistance for the ICS proceedings.

The change to an ICS has been welcomed by some parties previously critical of arbitration, but which were open to reform. However, some of the acclaimed system innovations will be decided only after the establishment of the court (such as the code of conduct), and developments will therefore be monitored. For those supporting arbitration, the switch to an ICS represents a compromise, as it maintains the international investment law dispute settlement framework, although the investor has no say in selecting the tribunal members, as it did under arbitration. The main opposition to the ICS comes from those who primarily favoured a domestic approach to such disputes. The ICS is an international court and provides an international route for the protection of foreign investment, which differs from the human rights route open to domestic investors. Criticisms will probably continue in the discussions on a proposed multilateral investment court. Supporters of the domestic approach have also raised doubts regarding the compatibility of the ICS with the principle of autonomy of the EU legal order. The ICS can, however, be differentiated, for various reasons mentioned in this paper, from past CJEU opinions related to the autonomy of the EU legal order.

TABLE OF CONTENTS

1. Introduction	4
2. Investor-state dispute settlement: introduction and issues	5
2.1. Investor-state disputes: courses of action	5
2.2. Arbitration and ISDS	7
2.3. Criticisms of ISDS	9
2.4. Initial reform of ISDS frameworks	11
2.4.1. Initial reform of ISDS in concluded EU trade negotiations.....	11
2.4.2. Consultation process under TTIP and creation of a new investment court model ...	12
3. Investment court system in CETA.....	13
3.1. Tribunal structure: comparison of WTO dispute settlement and ICSID	13
3.2. Procedure and structure	15
3.2.1. Consultation procedure	17
3.2.2. Procedures for submission of claims to tribunal and early dismissal rules	17
3.2.3. Appeal procedures	18
3.2.4. Final awards and enforcement rules.....	19
3.2.5. Damages and procedure costs	19
3.3. Is CETA's ICS really a standing tribunal?	20
3.3.1. Administrative secretariat.....	20
3.3.2. Judges: competences, remuneration and obligations	21
3.4. Further issues	23
3.4.1. Limiting access to benefits: Who can bring a claim before the ICS?.....	23
3.4.2. The question of autonomy of the EU legal order and the proposed ICS	26
3.4.3. The multilateral future of ICS	28
4. Main references.....	29
5. Annex – Selected differences across selected arbitration fora.....	30

List of main acronyms used

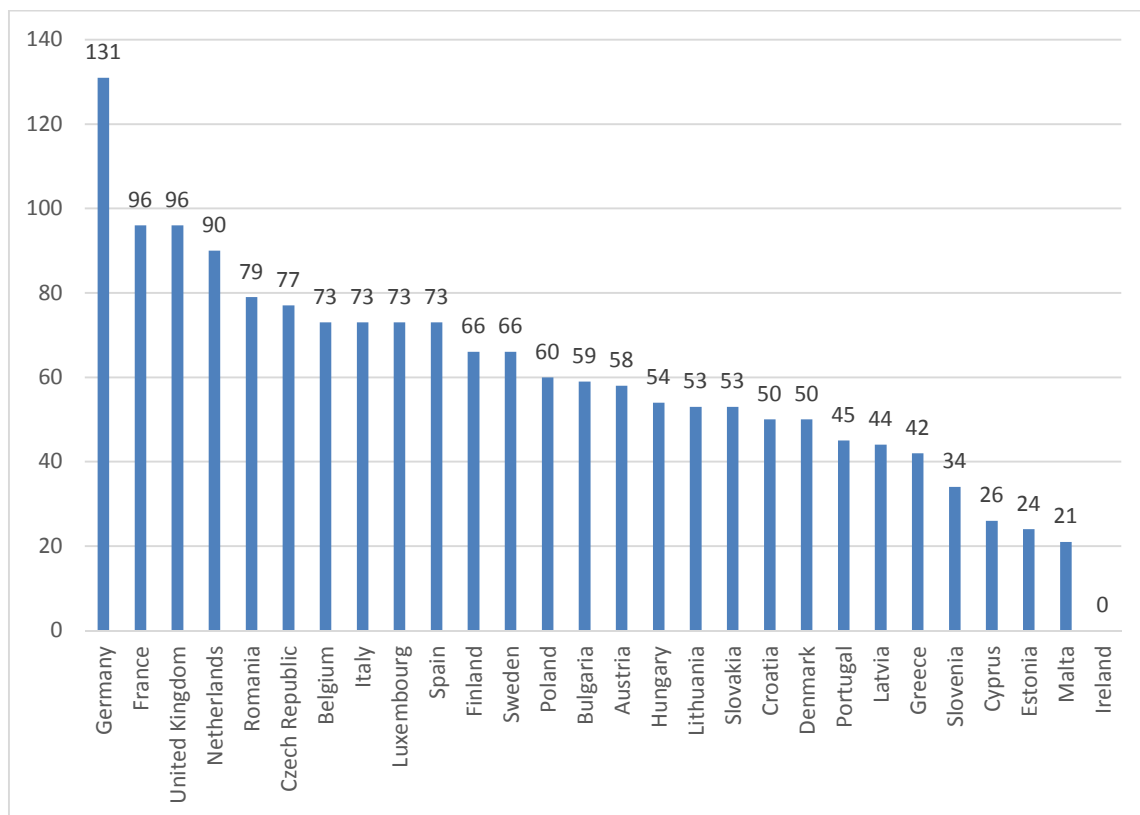
BIT:	Bilateral investment treaty
CETA:	Comprehensive Economic and Partnership Agreement
CJEU:	Court of Justice of the European Union
ECHR:	European Convention for the Protection of Human Rights and Fundamental Freedoms (often referred to as the European Convention on Human Rights).
ECtHR:	European Court of Human Rights
ECT:	Energy Charter Treaty
EUSFTA:	EU Singapore Free Trade Agreement
ICC:	International Chamber of Commerce
ICS:	Investment court system
ICSID:	International Centre for Settlement of Investment Disputes
IIA:	International investment agreement
ISDS:	Investor-state dispute settlement
LCIA:	London Court of International Arbitration
NAFTA:	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PC:	European and Community Patent Court
PCA:	Permanent Court of Arbitration
SCC:	Stockholm Chamber of Commerce
SME:	Small and medium-sized enterprises
SSDS:	State-to-state dispute settlement
TFEU	Treaty on the Functioning of the European Union
TTIP:	Transatlantic Trade and Investment Partnership
UNCITRAL:	UN Commission on International Trade Law
UNCTAD:	United Nations Conference on Trade and Development
WTO AB:	WTO Appellate Body
WTO DSB:	World Trade Organization Dispute Settlement Body

1. Introduction

International investment agreements (IIAs) mainly entail provisions for the protection of foreign investments in the host country and provide for a dispute settlement mechanism to enforce those investors' rights. Traditionally, investment agreements have used the following instruments for solving disputes with investors: foreign investor access to domestic courts; state-to-state dispute settlement (SSDS) via diplomatic protection; and investor-state dispute settlement (ISDS) via international arbitral proceedings.

Until the Lisbon Treaty, IIAs were negotiated by Member States. After the entry into force of the Lisbon Treaty, foreign direct investment (FDI) was included in the scope of the common commercial policy (Article 207 TFEU). The European Union also began to negotiate international investment agreements.¹

Figure 1 – Total bilateral investment agreements in force, by EU Member State



Source: [UNCTAD data](#) (accessed on 2 May 2017).

EU-negotiated investment agreements, or investment protection provisions within EU trade agreements, will replace the existing bilateral investment agreements concluded by EU Member States with a third country. Replacement implies that once the EU provisions on investment enter into force, Member States' bilateral agreements existing with that same third country will be terminated (see, for example, Article 30.8 CETA).

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada is the first agreement signed by the EU that also includes investment provisions for the protection of investments and a dispute settlement procedure to enforce those protection rights. The ISDS procedure in CETA was initially negotiated on the basis of a

¹ The data in Figure 1 include only bilateral investment treaties (BITs) currently in force with Member States (other international agreements with investment provisions were not included). The data include BITs concluded between EU Member States (also known as intra-EU BITs).

traditional arbitral proceeding. After the public consultation conducted by the European Commission in the framework of the EU-USA trade negotiations for a transatlantic trade and investment agreement, the European Parliament asked that a new system of dispute settlement be defined, with appointed judges. The European Commissioner for Trade therefore proposed the template for a new investment court in the framework of the TTIP negotiations. Even though negotiations for CETA had concluded, a similar proposal for a new investment court was also made to Canada. With Canada's agreement, the new investment court system (ICS) was introduced in CETA, replacing the previously negotiated arbitration provisions.

While the Council has decided to provisionally apply CETA, investment provisions will not be applied as yet, and will enter into force only after the ratification procedure is completed in both Canada and the EU.² The existing bilateral investment agreements concluded between the EU Member States and Canada therefore remain applicable; and will only have to be discontinued when CETA enters into force.

Table 1 – Bilateral investment treaties in force between EU Member States and Canada

BIT with Canada	Entry into force
Croatia	30 January 2001
Czech Republic	22 January 2012
Hungary	21 November 1993
Latvia	24 November 2011
Poland	22 November 1990
Romania	23 November 2011
Slovakia	14 March 2012

Source: [UNCTAD data](#) (accessed on 2 May 2017).

The CETA investment court could be used as a model for other ongoing trade negotiations conducted by the EU, where the EU would like to institute a similar tribunal. The ICS introduced in CETA remains at the centre of discussions and debates, leading to several constitutional challenges at Member State level.³ In particular, criticism mainly questions the extent to which the new ICS solves the issues raised with respect to the traditional ISDS system using arbitration. In the EU, another important point of debate concerns the compatibility of the investment court with the principle of autonomy of the EU legal order and the role of the EU courts.

2. Investor-state dispute settlement: introduction and issues

2.1. Investor-state disputes: courses of action

Foreign investors may find themselves in dispute with the host states in which they operate when particular actions by the host adversely affect their investments. When the investor wishes to challenge a host state's action, two routes typically exist:

² For EU ratification, this entails that all EU Member States' national ratification procedures are completed.

³ For example: A constitutional challenge against CETA (including the investment court system) is currently before the German Federal Constitutional Court (which last year already refused to issue an interim order that would have prohibited the signature of the agreement by the German government); in France a constitutional challenge was submitted in February 2017 and is pending decision; a constitutional challenge was also issued in Canada.

- i. the domestic court route, which in most cases directly applies domestic laws on property rights, or
- ii. the international law route consisting of either:
 - a. an indirect challenge via state-to-state dispute settlement, using the diplomatic protection route, or
 - b. a direct challenge via investor-state dispute settlement (ISDS).

Under the ISDS-mechanism, investors have direct access to protection under international law, in contrast to the diplomatic protection procedure in which the investor is represented by its home state in proceedings against the host state.⁴

Both ISDS and state-to-state mechanisms will normally consist of two procedural phases: a consultation phase and a dispute resolution phase. Most treaties will first require consultation for the parties to agree on a settlement of the dispute without reaching the confrontational proceedings of the dispute phase. The consultation phase is normally confidential and, accordingly, the least transparent part of the whole proceeding. The proceedings enter the dispute phase if the parties are unable to reach a settlement in the consultation phase. The dispute phase can take place in front of different fora, depending on the agreement under which the parties have initiated proceedings.

In earlier agreements that included investment protection provisions, domestic courts – using domestic law⁵ or state-to-state dispute settlement (SSDS)⁶ – were the main dispute settlement mechanisms for conflicts between individuals and states. Traditionally, international public law instruments did not envisage individuals' rights to bring claims directly under treaty provisions, and individuals therefore had to pass through states via diplomatic protection procedures (via the SSDS). However, the rise of individuals as actors of international public law brought the development of investor-state dispute settlement (ISDS) in which investors were empowered to bring direct claims against their host states via international arbitration tribunals. The investor then had a choice between bringing the claim to domestic courts or to the ISDS framework. In some treaties, the ISDS framework is accessible only after exhausting domestic remedies.⁷

⁴ J. W. Salacuse, *The Law of Investment Treaties*, Oxford University Press, 2010; K. Nadakavukaren Schefer, *International Investment Law - Text, Cases and Materials*, Edward Elgar Publishing, 2013.

⁵ See for example: Article IX of the Friendship, Commerce and Consular Rights Treaty between Austria and the United States (1929). A recent exception using domestic courts for disputes is found in the [Australia-USA Free Trade Agreement](#). On the choice made in the Australia-United States Free Trade Agreement, see: W. S. Dodge, [Investor-State Dispute Settlement between developed countries: reflections on the Australia-United States Free Trade Agreement](#), *Vanderbilt Journal of Transnational Law*, vol. 39, 2006; L. E. Trakman, [Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo](#), *UNSW Law Journal*, vol. 35(3), 2012.

⁶ See for example: Treaty of Friendship, Commerce and Navigation between the USA and Germany; Treaty of Friendship, Commerce and Navigation between the USA and Italy; also on diplomatic protection, see: A. Alvarez-Jiménez, *Foreign Investors, Diplomatic Protection and the International Court of Justice Decision on Preliminary Objections in the Diallo Case*, *North Carolina Journal of International Law and Commercial Regulation*, vol. 33 (2007).

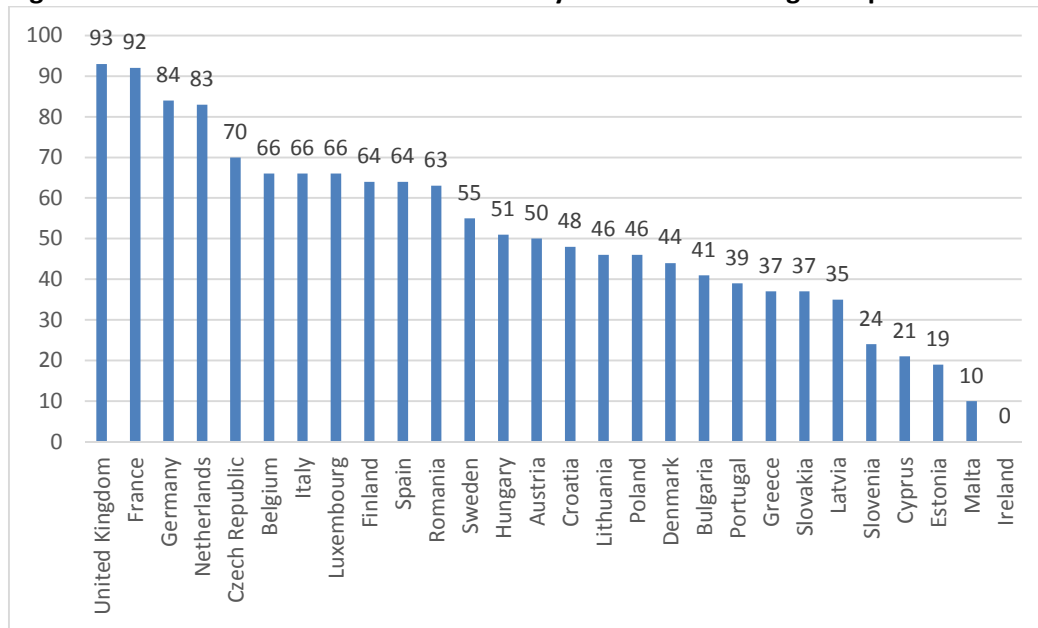
⁷ On the relations between domestic courts and international arbitration in investment law, see: C. Schreuer, [Calvo's Grandchildren: the return of local remedies in investment arbitration](#), *The Law and Practice of International Courts and Tribunals*, vol. 1, 2005; W. Ben Hamida, *Investment Treaties and Domestic Courts: A Transnational Mosaic Reviving Thomas Wälde's Legacy*, in Jacques Werner and Arif Hyder Ali (eds), [A Liber Amicorum: Thomas Wälde: Law Beyond Conventional Thought](#), CMP Publishing Ltd., 2009.

2.2. Arbitration and ISDS

Arbitration is a dispute resolution method by which the parties to a dispute agree to submit their dispute to a third party (the arbitrator or arbitrators) according to agreed-upon norms and procedures, and to carry out that third party's decision. Although arbitration was originally used by states to resolve conflicts peacefully, today it also provides a very common method for settling investor-state conflict and commercial disputes between private parties. Some of the benefits commonly associated with investor-state arbitration proceedings, as compared to regular court proceedings, are de-politicisation, a perception of speed, and lower expenses.⁸ This has led to the development of a complex system of international commercial arbitration, including the establishment of various institutions and legal regimes.⁹

International arbitration is currently the most used dispute settlement framework for investor-state disputes in IIAs around the world (the UNCTAD database finds ISDS in 1 969 treaties currently in force, of a total of 2 577 mapped treaties).¹⁰ It is also the main system currently used in EU Member States (see Figure 2) and is the system currently used in seven EU Member States' bilateral investment agreements with Canada.¹¹

Figure 2 – EU Member State treaties currently in force containing ISDS provisions



Source: [UNCTAD](#) (accessed on 2 May 2017).

⁸ UNCTAD, [Investor-State Disputes: Prevention and Alternatives to Arbitration, UNCTAD Series on International Investment Policies for Development](#), 2010.

⁹ J. Salacuse, op. cit., pp. 353-392.

¹⁰ [UNCTAD data](#) (accessed on 2 May 2017).

¹¹ Source: [Agreement between the government of the Republic of Croatia and the Government of Canada](#) for the promotion and protection of investments; [Agreement between Canada and the Czech Republic](#) for the promotion and protection of investments; [Agreement between the Government of Canada and the Government of the Republic of Hungary](#) for the promotion and protection of investments; [Agreement between the Government of Canada and the Government of Latvia](#) for the promotion and protection of investment; [Agreement between the Government of Canada and the Government of the Republic of Poland](#) for the promotion and reciprocal protection of investments; [Agreement between the Government of Romania and the Government of Canada](#) for the promotion and reciprocal protection of investments; [Agreement between Canada and the Slovak Republic](#) for the promotion and protection of investments.

Arbitral tribunals are not permanent tribunals; instead they are set up at the request of parties when a conflict arises. Arbitral tribunals are normally hosted within the administrative framework of institutions such as the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce's Institute of Arbitration (SCC), the London Court of International Arbitration (LCIA) and the Permanent Court of Arbitration (PCA).¹²

With the exception of ICSID, all institutions can host arbitration of disputes by any parties as long as they agree to begin arbitration proceedings under these institutions. ICSID normally only has jurisdiction over conflicts arising between member parties to the ICSID Convention.¹³ In cases of disputes between, on the one hand, a member state or investor from a member state and, on the other hand, an investor from a non-member or non-member state, ICSID can still have jurisdiction under the additional facility rules.¹⁴

Arbitral tribunals can be instituted following very different sets of rules. Some treaties will define ad hoc rules for arbitration and the arbitration fora are obliged to follow these rules. All fora also have their own set of rules¹⁵ that can be applied to the dispute if the Treaty is otherwise silent, or designate those rules as arbitration rules. The parties can also ask the fora to adhere to the rules defined under the UN Commission on International Trade Law (UNCITRAL),¹⁶ if the treaty makes reference to those rules as residual rules. A comparison of these arbitration rules is provided in the annex to this in-depth analysis.

Generally, ISDS provisions in treaties will include the following steps in relation to arbitration proceedings:¹⁷

- Arbitration is subject to the consent of the parties. In some cases, this consent is not unequivocally given in the treaty. It must instead be stipulated, every time a dispute arises, in a written agreement to arbitrate concluded between the investor and the state.
- For most arbitration fora, this agreement to arbitrate is the main element giving the forum the jurisdiction to institute the arbitral tribunal according to the rules applicable in the dispute.
- Once the parties agree on the arbitrators and the tribunal is established, proceedings may start. At the end, an award is issued with the judgement of the tribunal. The award determines the amount of compensation and, if so decided, allocates legal costs. It is final and binding on the parties, but does not create a

¹² [International Centre for Settlement of Investment Disputes](#) (ICSID), [International Chamber of Commerce](#) (ICC), [the Stockholm Chamber of Commerce's Institute of Arbitration](#) (SCC), the [London Court of International Arbitration](#) (LCIA) and [the Permanent Court of Arbitration](#) (PCA).

¹³ [ICSID Convention](#).

¹⁴ [ICSID Additional Facility rules](#).

¹⁵ For ICSID, see the rules contained in the ICSID Convention or the Additional Facility mentioned above in footnotes 13 and 14; [International Chamber of Commerce](#) (ICC), the [Stockholm Chamber of Commerce's Institute of Arbitration](#) (SCC), [the London Court of International Arbitration](#) (LCIA) and [the Permanent Court of Arbitration](#) (PCA).

¹⁶ [UNCITRAL arbitration rules](#), as amended in 2013.

¹⁷ For more information on this different phases, refer to T. Cole et al., [Legal instruments and practice of arbitration in the EU](#), Policy Department on Citizens' Rights and Constitutional Affairs, European Parliament, 2014.

binding precedent applicable in other cases. In practice, however, tribunals often refer to earlier arbitration decisions.

Judicial review of an arbitration award is generally limited. Some arbitration rules do allow a limited review or annulment procedure, but these are not appeal procedures, as they do not result in the submission of a new revised award. An annulment or revision procedure often results in (partially) vacating a previous award. To give an example, the annulment procedure under the ICSID Convention is currently extremely limited. Under Article 52 of the Convention,¹⁸ annulment can only be obtained for the following reasons: the tribunal was not properly constituted; a fundamental procedural rule was not respected; the tribunal exceeded its powers or it did not state the reasons for its award; and corruption of one of the tribunal members.

2.3. Criticisms of ISDS

The goal of investment treaties was to protect foreign investors. The international public law framework provided a guarantee against legal changes in domestic law that would deny a minimum of investment protection, as well as provide a neutral depoliticised dispute settlement forum for disputes between foreign investors and host states arising out of foreign investments. Hence, legal protection under investment treaties, including ISDS, was meant to create legal certainty for investors and thus increase foreign investment in countries.¹⁹

Despite these sound objectives, the existence of ISDS-mechanisms has been criticised on several grounds, among which:²⁰

- Arbitral awards under ISDS are at times inconsistent and incoherent in their interpretation of IIA provisions.²¹ Though this lack of consistency is partly due to the vast variety of wordings used in the different investment treaties, it has allegedly resulted in more uncertainty and unpredictability, rather than an increase in legal certainty.
- A fear of potential reduction in states' sovereign power to regulate; as the introduction of particular types of legislation to pursue legitimate policy objectives could lead to claims under ISDS from foreign investors whose business operations are affected. This is said to create a 'chilling effect' through which states prefer not to regulate an issue in order to avoid any liability (especially under rules on indirect expropriation and legitimate expectations).²²

¹⁸ [ICSID Convention](#).

¹⁹ For a deeper analysis of the rationale for international investment protection, refer to: Laura Puccio, [Investment rules in trade agreements: Developments and issues in light of the TTIP debate](#), EPRS, 2015.

²⁰ An overview of these critics was also presented in the briefing: Marta Latek, [Investor-State Dispute Settlement \(ISDS\) – State of play and prospects for reform](#), EPRS, European Parliament, 2015; see also: T. Cole et al., op. cit.18; Hindelang, Study on Investor-State Dispute Settlement ('ISDS') and alternatives of dispute resolution in international investment law, in Kuijper et al., [Investor-State dispute settlement \(ISDS\) provisions in the EU's international investment agreements](#), Policy Department on External Policies of the Union, European Parliament, 2014.

²¹ UNCTAD, [Reform of Investor-State Dispute Settlement: In search of a roadmap](#), United Nations, 2013.

²² J. Kelsey and L. Wallach, [Investor-state' disputes in trade pacts threaten fundamental principles of national judicial systems](#), University of Auckland and Public Citizen's Global Trade Watch, Washington DC, 2012.

- Foreign investors may seek to relocate headquarters or establish subsidiaries in specific states to benefit from provisions in particular IIA's. This is also referred to as 'forum shopping' or 'national planning'.²³ The relation with domestic courts has also been problematic.²⁴ In some cases, investors initiated parallel proceedings. To avoid this problem, three main approaches were developed. Those states preferring disputes to take place in domestic courts introduced the requirement to exhaust local remedies first. That approach was, however, criticised as lengthening the procedure and increasing costs, depriving the investors of two of the advantages of the ISDS framework (speed and costs). These critics generally preferred an approach that imposed a choice on the investor between domestic and international arbitration proceedings (this type of clause is called a 'fork-in-the-road'). The 'fork-in-the-road' implied that once the investor had made a choice between domestic or international arbitration proceedings, it could not go back on that decision afterwards. A third approach, called 'no u-turn' allows investors to choose domestic proceedings first and then revert to arbitration. However, if the investor goes for arbitration, it can no longer bring a claim before domestic courts.
- ISDS proceedings lack transparency, as confidentiality is a central characteristic of arbitration.²⁵ Most arbitration fora require the parties' consent to publish information on the disputes (see Annex), making it unlikely that this will change anytime soon.
- Some arbitrators may have been counsel to the parties involved in the dispute in the past, expressed an opinion on the issue in an academic article or in a previous award, or simultaneously acted as counsel to other parties in a similar case. These situations raise questions about certain arbitrators' impartiality (even though all fora require arbitrators to act impartially and independently).²⁶
- Arbitration costs are often shared by parties (not based on the rule that the loser pays the costs) and when the state loses a claim, damages have a tendency to be extremely high. According to UNCTAD: states won 36.4 % of known arbitration proceedings; investors won 26.7 %; 24.4 % were settled; the rest were either discontinued or decided in favour of neither party (without awarding damages).²⁷ Some considered that the costs of proceedings were (too) high for small and medium-sized enterprises (SMEs), although OECD data shows that SMEs have also used arbitration proceedings.²⁸

²³ UNCTAD, op. cit.

²⁴ See above, note 7.

²⁵ UNCTAD, op. cit.

²⁶ OECD, [Investor-state dispute settlement: summary reports by experts at 16th Freedom of information roundtable](#), OECD (2012).

²⁷ [UNCTAD data](#), accessed on 10 May 2017; NB: these data are calculated on 495 concluded treaty-based arbitration proceedings.

²⁸ D. Gaukrodger and K. Gordon, [Investor-State Dispute Settlement: A scoping paper for the Investment Policy Community](#), OECD Working Papers on International Investment, OECD, 2012/03.

Some of these issues can be tackled through a better definition and clarification of the rules on investment in IIAs.²⁹ This was also the main approach in NAFTA, where some investors challenged regulatory actions by NAFTA states under the NAFTA investment chapter.³⁰ These challenges prompted the latter to limit the freedom of interpretation of arbitrators by enacting a binding interpretative note.³¹

2.4. Initial reform of ISDS frameworks

2.4.1. *Initial reform of ISDS in concluded EU trade negotiations*

The initial approach proposed by the European Commission for CETA and the EU-Singapore FTA (EUSFTA) used arbitration as a means for investor-state dispute settlement proceedings. It combined some features of a procedure similar to the one in ICSID with several innovations following some of the new practices introduced in different IIAs or following UNCITRAL rules:³²

- In ICSID, arbitrators are selected from a list of arbitrators nominated by the parties to the convention. A similar approach was originally taken in CETA and EUSFTA, where parties to the agreement agreed on a list of arbitrators from which they could then choose the members of the tribunal. As in ICSID, the parties to the dispute (including therefore the private investor) agree on the selection of the arbitrators forming the arbitral panel. Commentators preferring a permanent international court or domestic courts desired to avoid private investors choosing their own arbitrator (working therefore as a sort of ‘private tribunal’). The European Commission considered that this problem was indirectly solved by the requirement that arbitrators be selected from the list pre-defined by the parties to the agreement. Nevertheless, the Commission solution did not break the link between the investor and the arbitrator, as the investor would have a say in the choice of the arbitrator.
- While most treaties and arbitration fora rules require both arbitrator impartiality and expertise in international public law, CETA also included a code of conduct for arbitrators.
- CETA (as well as the current EUSFTA) allowed for the submission of ‘amicus curiae’. These are submissions from groups that have an interest in the matter and want to submit their exposition of the problem at hand. ‘Amicus curiae’ were introduced in CETA in the same form as the relevant UNCITRAL provisions.
- CETA introduced a ‘no u-turn’ clause, whereby investors starting arbitration proceedings under the treaty had to discontinue local court proceedings begun on the same claim. It also included early dismissal of frivolous claims. Moreover, CETA introduced a provision ensuring that third parties ‘letter box’ companies

²⁹ L. Puccio, [Investment rules in trade agreements: Developments and issues in light of the TTIP debate](#), EPRS, European Parliament, 2015.

³⁰ For an overview of NAFTA cases, S. Sinclair, [NAFTA Chapter 11 investor-state disputes](#), Canadian centre for policy alternatives, 2015.

³¹ Binding interpretations can be issued by the NAFTA trade Commission pursuant [Article 1131\(2\) of NAFTA. Binding Interpretation issued by the NAFTA trade Commission](#) inter-alia on Fair and Equitable Treatment.

³² Elfriede Bierbrauer, [Negotiations on the EU-Canada comprehensive economic and trade agreement \(CETA\) concluded](#), Directorate General for External Policies – Policy Department, European Parliament, 2014.

could not access the benefit of protection under the agreement (see section 3.4.1 of this in-depth analysis).

- A clause limiting remedies (in particular no punitive damages and limitation to financial compensation for losses).
- CETA also included a 'rendez-vous' clause, i.e. a clause allowing for the possibility of future discussion on the institution of a proper appellate body mechanism.

2.4.2. Consultation process under TTIP and creation of a new investment court model

The public consultation launched by the Commission on investment protection in the EU-USA negotiations for a TTIP confirmed the desire of sections of EU civil society for further reform of international investment provisions. The replies to the consultation indicated either concern or opposition to the use of ISDS in TTIP and provided comments on the EU's approach within TTIP.

According to the Commission report on the consultation,³³ it received a total of 149 399 replies: 139 464 of these were submitted as collective submissions, 6 346 were resubmissions and 3 589 were individual submissions. Respondents from throughout the EU participated, although 97 % of replies came from the following seven Member States: the United Kingdom (34.8 %), Austria (22.6 %), Germany (21.8 %), France (6.5 %), Belgium (6.3 %), the Netherlands (3.3 %), and Spain (1.7 %). Respondents included: 8 academic submissions (including one joint submission from 120 academic experts); 60 companies (of which 19 were large firms, including some of the bigger users of ISDS, such as Chevron, Japan Tobacco, Philip Morris); business associations; consumer associations; consultancy and law firms; government institutions (in particular, regional governments and parliaments or political parties, as well as some cities); trade unions; think tanks; and non-governmental organisations (both at the EU and national level). Some law associations also contributed to the consultation as well as some of the main arbitration courts such as the Permanent Court of Arbitration, the Stockholm Chamber of Commerce and ICSID.

In general, according to the European Commission report, NGOs³⁴ considered that only domestic courts should be used to settle disputes between states and foreign investors. Several of these respondents suggested that domestic courts ensure the principle of equality before the law, while ISDS would advantage investors. A significant number of NGOs and some trade unions suggested that state-to-state dispute settlement should instead be considered sufficient to deal with investment issues. A certain number of respondents did not reject ISDS entirely and offered specific comments on a possible ISDS mechanism, while still preferring domestic courts.

Unlike the other respondents, business associations and large companies, as well as the International Chamber of Commerce, argued in favour of ISDS, pointing to challenges that cannot be brought under certain national systems. The example given in the case of TTIP was that discrimination in favour of local companies was allowed under US law and therefore non-discrimination claims could be dealt with only under international investment law frameworks. Some of these respondents argued that recourse to ISDS

³³ Commission staff working document, [Report on the online public consultation on investment protection](#) and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD(2015) 3 final, 13 January 2015.

³⁴ Almost half of the NGOs who answered the question on the relation between ISDS with domestic courts.

allows for redress of international law infringements, which some national courts are prevented from applying. All large companies and business associations were found to be against the obligation to exhaust domestic remedies, as this would increase the costs and make ISDS inaccessible to SME investors.

Following the consultation, the European Commission paused negotiations on the investment chapter but reopened discussions of the features of a possible investment chapter in TTIP with stakeholders, and in particular with the International Trade Committee (INTA) of the European Parliament, and the EU Member States. The Commission submitted a concept paper in May 2015, proposing further changes to ISDS, to seek support for the chapter within the European Parliament.³⁵ In its resolutions on the TTIP negotiations adopted in July 2015, the European Parliament requested the replacement of ISDS with a new system.³⁶

The Commission subsequently, in September 2015, submitted the proposal for a new investment court system (ICS) to be negotiated in TTIP.³⁷ While supporting the possibility of exploring the institution of a new ICS in TTIP, during the debate, Members of the European Parliament also requested the replacement of ISDS in other trade and investment agreements under negotiation or under finalisation by the EU, including CETA. In its resolution on the Commission's 'trade for all' strategy,³⁸ the European Parliament called for the continuation of the debate on the ICS and, in particular, its relation with the EU legal system and the power of the EU courts.³⁹ The Parliament also hinted at the multilateralisation of the investment court proposal.⁴⁰

In the meantime, the European Commission and Canada negotiated the replacement of the ISDS framework contained in CETA with the institution of an ICS.⁴¹ The EU and Canada have been gathering support from other trade and investment partners in order to propose the start of negotiations on a multilateral investment court.⁴²

3. Investment court system in CETA

3.1. Tribunal structure: comparison of WTO dispute settlement and ICSID

CETA proposes a new court system composed of: (i) a tribunal with 15 publicly appointed judges (Article 8.27); and (ii), an appellate tribunal (Article 8.28), whose size will be decided at a later stage by the CETA Joint Committee. The figures below illustrate the system created for the tribunal and for the appellate tribunal. The investment court

³⁵ European Commission, [Concept Paper Investment in TTIP and beyond](#) – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court.

³⁶ [European Parliament resolution of 8 July 2015](#) on negotiations for the Transatlantic Trade and Investment Partnership (2014/2228(INI)).

³⁷ European Commission - Press release, [Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations](#), 16 September 2015.

³⁸ European Commission, [Trade for all: Towards a more responsible trade and investment policy](#), 2015.

³⁹ [European Parliament resolution of 5 July 2016](#) on a new forward-looking and innovative future strategy for trade and investment (2015/2105(INI)).

⁴⁰ *ibid.*

⁴¹ European Commission press release, [CETA: EU and Canada agree on new approach on investment in trade agreement](#), 29 February 2016.

⁴² European Commission fact sheet, [A future multilateral investment court](#), 13 December 2016; Roderick Harte, [Prospects for a Multilateral Investment Court](#), EPRS, European Parliament, June 2017.

system proposed draws inspiration from the quasi-judicial system of dispute settlement created for the WTO Appellate Body (AB).

Figure 3 – Comparison of CETA Tribunal, WTO DSB panels and ICSID arbitral panels

	CETA Tribunal	WTO DSB: Panels	ICSID (under the Convention rules)
Administrative structure	ICSID	WTO secretariat	ICSID
Permanent tribunal structure vs list of individuals	1 President 1 Vice President (Chosen among third-country judges) 15 judges (5 EU, 5 Canada and 5 third-country)	Indicative list of individuals drawn up by the WTO Secretariat	Arbitrators from the ICSID Panel of arbitrators or other arbitrators chosen by the parties
Selection procedure for specific configuration	Appointed by the President on a rotational basis	Appointed by the secretariat (nominations can be opposed by parties for compelling reasons)	Appointed by the parties or by default by the President of the World Bank
Specific configuration	3 judges (1 EU, 1 Canada and 1 third-country) OR 1 judge (from third-country)	3 or 5 panelists	3 judges (1 EU, 1 Canada and 1 third-country) OR 1 judge (from third-country)

Source: EPRS.

Figure 4 – Comparison of CETA Appellate Tribunal, WTO DSB Appellate Body and ICSID appeal facility (1994 proposal)

	CETA appellate Tribunal	WTO DSB: Appellate Body	ICSID Appeal facility: 2004 proposal
Administrative structure	CETA Joint Committee must decide: • administrative support • remuneration • number of members • other administrative decisions	WTO secretariat	ICSID
Permanent tribunal structure vs list of individuals	EU judges Canada judges Third-country judges	7 Appellate Body members appointed for four-year terms	15 elected members composing the Appeal Panel
Selection procedure for specific configuration	Appointed by the president on a rotational basis	Appointed on a rotational basis	Appointed by the Secretary General of ICSID
Specific configuration	Judges (Numbers to be determined)	3 Appellate Body Members	3 Appeal Tribunal members

Source: EPRS.

In CETA, judges can only be selected from a group of pre-appointed judges, as is the case for the AB. These judges are appointed for a pre-defined term by the CETA Joint

Committee and not by the disputing parties, as was the case in traditional arbitration proceedings. The 15 judges forming the Tribunal are appointed by the CETA Joint Committee as follows: 5 EU nationals, 5 Canadian nationals, and 5 third country nationals. The tribunal that sits on a particular case is normally made up of three judges (or a single judge if agreed by the parties in the dispute). These judges are selected by the President of the Tribunal on a rotational basis. Similarly, the proposed appellate tribunal would be composed of members appointed by the CETA Joint Committee.

The proposals for both tribunals (First Instance and Appeal) are, in this respect, very similar to the WTO AB. The AB is composed of seven members,⁴³ who are appointed to serve for four-year terms, with the possibility of a single reappointment. Appointments are decided by the Dispute Settlement Body (DSB), made up of the General Council of the WTO, which is the highest level decision-making of the WTO after the Ministerial Conference. Cases are assigned to AB members on a rotational basis.

In contrast, selection of judges under CETA's ICS is quite different from arbitration fora or WTO panel methods.⁴⁴ In ICSID, arbitrators are chosen on an ad hoc basis by the parties – ICSID only provides an indicative list of arbitrators from which parties can choose.⁴⁵ However, parties can always propose an individual that is not a member of the ICSID panel of arbitrators and conciliators. Similarly, the WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons,⁴⁶ from which panellists may be drawn (Article 8.4 of the DSU⁴⁷). WTO members regularly propose names for inclusion in that list, and, in practice, the DSB always approves their inclusion without debate.⁴⁸ It is not necessary to be on the list to be proposed as a potential panel member in a specific dispute. Anyone who is well-qualified and independent (Articles 8.1 and 8.2 of the DSU) can serve as a panellist.

3.2. Procedure and structure

Though the appointment of judges certainly differs from a traditional ISDS system, the procedure does not change much from traditional arbitration proceedings. Notwithstanding, the Commission has maintained the innovations introduced to avoid issues connected inter alia to forum shopping and frivolous claims.

When disputes arise between an investor of one of the parties and the other party to the agreement, the investor has three choices of procedure: (i) domestic courts or other international courts where appropriate; (ii) mediation under Article 8.20 CETA; or (iii) the dispute settlement procedure under Chapter 8 of CETA.

In CETA, the ICSID convention, the ICSID Additional Facility, the UNCITRAL rules, or any rules agreed upon by the parties can be considered residual rules, i.e. rules which cover issues not included in the provisions of the agreement.

⁴³ WTO website on [Appellate Body Members](#).

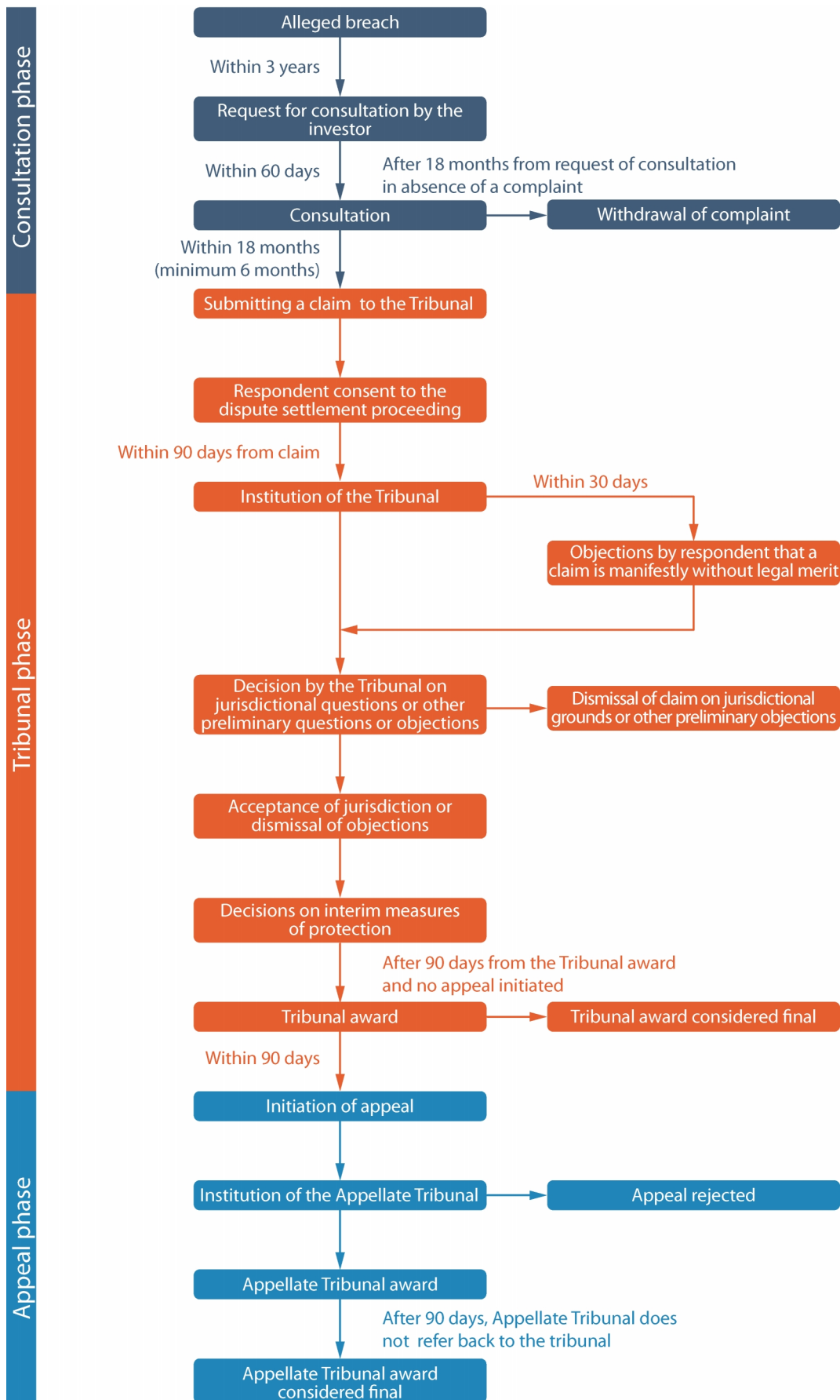
⁴⁴ Panels are the first step of dispute settlement proceedings in the WTO when consultations have failed to find amicable solutions. Panels are the quasi-judicial bodies, in way tribunals, in charge of adjudicating disputes between Members in the first instance. They are normally composed of three, and exceptionally five, experts selected on an ad hoc basis.

⁴⁵ [ICSID panel](#) of arbitrators and conciliators.

⁴⁶ Dispute Settlement Body - [Indicative list of governmental and non-governmental panelists](#).

⁴⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes ([DSU](#)).

⁴⁸ Detailed procedure on the [WTO website](#).

Figure 5 – From consultation to appeal procedure under CETA

Source: EPRS.

3.2.1. Consultation procedure

The dispute settlement procedure for investor-state disputes in CETA starts with a consultation procedure. The request for consultation must include the provisions of the CETA agreement that were allegedly breached, the legal and factual basis for such claims, and the relief sought. The request for consultation must be issued within three years of the occurrence of the alleged breach. In cases where the investor has initially sought remedies at the domestic level, requests for consultation must be sent within two years after ceasing to pursue the claim before the domestic court, and in any event, no later than ten years after the investor acquired knowledge of the breach.

If satisfactory conclusion of the conflict cannot be reached via consultation, the investor must submit a claim to the tribunal within a maximum period of 18 months from the request for consultation. Investors have to wait at least 180 days (i.e. 6 months) after the request for consultation before submitting their claim to the tribunal. This rule ensures that consultation takes place for at least 6 months in the hope of early amicable resolution of the conflict. If the investors have not submitted a claim after 18 months, they will be deemed to have withdrawn from consultation. They will also be deemed to have withdrawn any request for determination of the respondent (when the EU is involved, the investor may need to determine whether it is the EU or a single Member State that is responsible). As a consequence of that withdrawal, the same investor will not be allowed to submit a new claim with respect to the same measure.

3.2.2. Procedures for submission of claims to tribunal and early dismissal rules

After 90 days of the submission of the request for consultation, an investor can ask for a determination of the respondent to their case, in order to be able to submit a claim to the tribunal. In CETA, an investor must be informed of the determination within 50 days.

Once an investor has submitted a claim to the tribunal, the respondent must consent to the settlement, before the tribunal can be instituted. States are always permitted to block the initiation of proceedings on the basis of Article 8.16 CETA (denial of benefit).

Box 1 – Denial of benefit clause

The denial of benefit clause can be used when a third country investor owns or controls the enterprise and the denying party adopts or maintains a measure with respect to the third country that:

- (i) relates to the maintenance of international peace and security; and
- (ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this chapter were accorded to the enterprise or to its investments.

Accordingly, the denial of benefit can only be used in very narrowly defined situations. Third country controlled or owned Canadian and EU enterprises that comply with the definition of investment under CETA (see section 3.4.1 of this in-depth analysis) are allowed to bring claims under chapter 8. They can only be denied benefits under chapter 8 if the country of origin of the investor controlling the enterprise is subject to measures in the framework of security policy that would be otherwise circumvented if the benefit of the chapter is granted. This could include for example: embargo measures; individual sanctions freezing assets, or other actions taken to combat terrorism in the UN framework.

In order for an investor to submit a claim to the tribunal, the following requirements must be respected:

1. written submission of the investor giving their consent to the settlement by the tribunal;

2. 180 days elapse from the submission of the request for consultations and, if applicable, at least 90 days from the submission of the notice requesting the determination of the respondent;
3. requirements with respect to the determination of the respondent rules under Article 8.21 CETA are fulfilled;
4. requirements with respect to the request for consultations are fulfilled (mentioned earlier in section 3.2.1 of this paper);
5. identification of the exact same claims as in the consultation request;
6. any existing proceedings before courts or tribunals under domestic and international law with respect to the same measure alleged to constitute a breach referred to in its claim are discontinued;
7. rights to initiate any claim or proceeding before the tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach in its claim are waived.

Requirements 6 and 7 above are intended to ensure that there are **no parallel proceedings**, to avoid ‘forum shopping’. Investors are obliged to make a choice between the dispute settlement proceeding under CETA and other remedy routes available under domestic and international law.⁴⁹

Non-compliance with these requirements means early dismissal of the claim. The proceeding can also be subject to early dismissal by the Tribunal, pursuant to Article 8.32 CETA (claims manifestly without legal merit)⁵⁰ and Article 8.33 CETA (claims unfounded by the law). These provisions allow early dismissal on the basis of merit and jurisdiction, **to avoid frivolous claims or other abuses** (such as claims brought by firms that restructure their operations solely for the purpose of bringing a claim under that investment agreement).

3.2.3. Appeal procedures

Within 90 days of the final awards, appeal procedures can be initiated. The scope of the appeal is specified in Article 8.28 CETA, allowing for full review of the case.

CETA includes the limited annulment procedure under **Article 52 of the ICSID Convention**,⁵¹ but also adds review on the **grounds of facts, as well as law**, which are not covered by the ICSID Convention.

Box 2 – Grounds for annulment under ICSID Convention

- The tribunal was not properly constituted.
- A fundamental procedural rule was not followed.
- The tribunal exceeded its powers.
- The tribunal did not state the reasons for its award.
- Corruption of one of the tribunal’s members.

⁴⁹ Those requirements are waived for locally established enterprises only in cases where the respondent or host state has deprived the investor of control of the locally established enterprise or has otherwise prevented the locally established enterprise from fulfilling the requirements of Article 8.22 CETA (pursuant to paragraph 3 of that article).

⁵⁰ For more on the practice in ICSID on such claims, refer to: M. Potestà and M. Sobat, [Frivolous claims in international adjudication](#): a study of ICSID Rule 41(5) and of procedures of other courts and tribunals to dismiss claims summarily, 2012.

⁵¹ [ICSID Convention](#).

3.2.4. *Final awards and enforcement rules*

Article 8.41 CETA specifies that an award shall be binding on the disputing parties and in respect of that particular case. A disputing party shall recognise and comply with an award without delay. The article also specifies when a party in a dispute can seek enforcement of the award and under which legal framework execution should be sought. Awards issued under CETA fall under the scope of the New York Convention.⁵²

3.2.5. *Damages and procedure costs*

One of the issues raised in the context of existing ISDS mechanisms is the costs of damages for the states, as well as investor accessibility to such instruments, due to the high costs generally associated with arbitration proceedings. The way in which the costs of proceedings are ultimately allocated could affect a party's decision to initiate such proceedings or not. Multinationals and large companies in particular could consider potentially bearing these costs much less of a liability than SMEs, let alone natural persons.

Article 8.39 CETA specifies the nature of the remedies that can be awarded by the tribunal. The tribunal may award only:

- (i) monetary damages and any applicable interest;
- (ii) restitution of the property.

Restitution of property does not necessarily mean physical restitution of the good, but can also mean that the respondent may pay monetary damages equivalent to the fair market value of the property at the time immediately before the expropriation or impending expropriation became known (whichever is earliest). This is normally the remedy granted for illegal expropriation.⁵³

Article 8.39(3) CETA limits **monetary damages to the loss suffered** by investors, to avoid exponential increases in damages. The tribunal shall not apply punitive damages (Article 8.39(4) CETA).

Costs of proceedings are borne by the unsuccessful party, unless such an appointment is unreasonable (adjustment is made proportionally). This is presumably in order to facilitate access to remedy for SMEs. The need to account for the more modest resources of SMEs is also present in Article 8.39(6) CETA, whereby the CETA Joint Committee can introduce further rules aimed at reducing the financial burden of natural persons and SMEs.

This rule on costs is the same as in the previous proposal in CETA, and is also found in the EU-Singapore FTA, where under Article 9.26, the unsuccessful disputing party in principle bears the costs of arbitration and other reasonable costs, including of legal representation. Only in exceptional circumstances can a tribunal divide these costs between the disputing parties, in particular when it considers such a division appropriate in light of the circumstances of the case. Moreover, when a claim is only partially successful, the costs awarded will be adjusted proportionately to the extent of the successful parts of the claim. In principle therefore, only when their entire claim is awarded will parties bear no legal costs. In all other instances they will have to bear some or even all costs. Under CETA, this framework appears to have been slightly upgraded to improve less affluent parties' accessibility to arbitration proceedings. Although the default award of costs is similar to that under the EU-Singapore FTA, CETA also includes

⁵² [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#), New York, 1958.

⁵³ L. Puccio, op. cit.

a provision that enables the CETA Joint Committee to consider additional rules to reduce the financial burden on claimants who are natural persons or SMEs (Article 8.39(6) CETA). Of course, it remains to be seen whether the CETA Joint Committee will introduce such additional rules in the future.

3.3. Is CETA's ICS really a standing tribunal?

3.3.1. *Administrative secretariat*

The administrative secretariat handles organisational and logistical issues related to arbitration proceedings. The European Commission does not intend to create a new standing institution for CETA's ICS.

The main reason is likely related to the question of balancing the need for a permanent tribunal, while at the same time mitigating the cost of a new institution. This reasoning is justified when looking at the actual number of cases brought under ISDS frameworks. It is difficult at present to gauge the number of cases that could be initiated under CETA, and therefore problematic to estimate the exact cost of having a separate secretariat for CETA's ICS. However, the number of cases per year has not, under other single IIAs, been high. Indeed UNCTAD reports a total figure of 767 treaty-based investor-state arbitrations over the 1987-2017 period.⁵⁴ UNCTAD also records the existence of 2 446 agreements (bilateral investment treaties (BITs) and IIAs) with ISDS provisions.⁵⁵ More claims were issued under certain agreements than others, therefore computing an average of annual cases taking all the agreements into account would not be meaningful. However, two examples provide an illustration. The North American Free Trade Area (NAFTA), with one of the highest number of ISDS cases, saw the initiation of 59 cases from 1994 to 2016 according to UNCTAD.⁵⁶ That accounts, on average, for 2.7 cases per year. Most of the global investor-state dispute cases have been issued under the Energy Charter Treaty,⁵⁷ accounting for 99 cases from 2001 to 2016, which amounts to an average of almost 6.6 cases per year.⁵⁸

Under the TTIP proposal,⁵⁹ the European Commission suggested either ICSID or the PCA perform the task of administrative secretariat. ICSID and PCA are the only arbitral institutions that are international governmental organisations and not private entities. They could also be viewed by the European Commission as good hosts for a future multilateral court for investment-state disputes. ICSID may indeed harbour some ambitions in this respect.⁶⁰ The choice of ICSID for CETA could be related to its current role in NAFTA, but also to the fact that it is currently the main forum for ISDS globally (see table below). ICSID accounted for 475 cases from 1987 to 2 May 2017 (including

⁵⁴ Data from the [UNCTAD ISDS database website](#) (accessed on 2 May 2017).

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ The [Energy Charter Treaty](#) provides a multilateral framework on energy and includes a framework for the protection of foreign investment.

⁵⁸ [UNCTAD data](#) (accessed on 2 May 2017).

⁵⁹ [Commission draft text TTIP – investment](#).

⁶⁰ ICSID was, alongside the ICC, the forum chosen for investor-state dispute settlement under the proposed [multilateral agreement on investment](#), negotiated in the framework of the OECD between 1995 and 1998. Even though the OECD negotiations failed, that treaty represented international ambition for a multilateral agreement on investment, and the presence of ICSID is of significance.

both ICSID and ICSID Additional Facility cases), which constituted 63 % of UNCTAD reported cases between 1987 and 2 May 2017.⁶¹

Table 2 – ICSID versus other arbitral rules (cumulative cases 1987 - 2 May 2017 period)

CRCICA (Cairo Regional Center for International Commercial Arbitration)	1
ICC (International Chamber of Commerce)	6
ICSID (International Centre for Settlement of Investment Disputes)	426
ICSID AF (ICSID Additional Facility)	49
LCIA (London Court of International Arbitration)	1
MCCI (Moscow Chamber of Commerce and Industry)	3
PCA (Permanent Court of Arbitration)	0 ⁶²
SCC (Stockholm Chamber of Commerce)	36
UNCITRAL (United Nations Commission on International Trade Law)	234

Source: UNCTAD [ISDS Database](#) (accessed on 2 May 2017).

3.3.2. Judges: competences, remuneration and obligations

Pursuant to Article 8.27(4) CETA, judges appointed must possess the qualifications for the appointment to judicial office or be jurists of recognised competence in their respective countries. They must have demonstrated expertise in public international law and competence in international investment law, international trade law, and the resolution of disputes arising under international investment, or international trade agreements. The same principles apply to appellate tribunal members (Article 8.28(4) CETA).

Appointment as a judge to the tribunal is not a full time job at present, but may become so should the CETA Joint Committee agree to transform the system of retainer fees into a salaried position.

Again, the system proposed is similar to the WTO Appellate Body system. Article 17(3), Dispute Settlement Understanding (see extracts below), specifies that ‘all persons serving on the Appellate Body shall be available at all times and on short notice’; a similar phrasing was used in Article 8.27(11) CETA. As mentioned by UNCTAD:

Appellate Body Members are remunerated on a part-time basis. They are commonly not resident in Geneva, where the WTO has its headquarters and where Appellate Body proceedings take place. Members travel from their respective countries of residence whenever they have to hear and decide an appeal. The part-time employment arrangement of Appellate Body Members reflects the expectation in 1995 on the part of WTO Members that the Appellate Body would not be that busy and that a full-time employment arrangement for its Members was, therefore, not justified. In recent years, however, the workload of the Appellate Body has been such that membership of the Appellate Body is a de facto full-time job. The demands of the job are such that it is very

⁶¹ NB: UNCTAD reported cases may not include all the cases that took place over the 1987-2017 period (2017 – up to beginning of May 2017).

⁶² UNCTAD data does not have complete data on state-investor arbitration cases. Indeed the table above reports zero cases for the PCA, while in reality, there have been a number of cases. These might have taken place in the PCA using UNCITRAL rules and therefore might have been included by UNCTAD under the UNCITRAL heading. The complete list of cases administered by PCA can be found on the [PCA website](#).

*difficult, if not impossible, for Appellate Body Members to pursue other professional activities.*⁶³

Appellate Body members are also paid on the basis of a retainer fee, which is laid down in the Decision Establishing the Appellate Body (WT/DSB/1).⁶⁴ This latter fee amounts to a minimum of CHF7 000 per month, plus a fully-adequate daily fee, travel expenses, and a per diem.

Most probably, the choice of reusing the retainer fee system in CETA also results from the fact that the European Commission does not expect many cases to be initiated under CETA. However, the Commission did envisage the possibility for the retainer fee to become a full salary if the workload justifies the full-time employment of the judges in Article 8.27(15) CETA. Decisions on the number of judges, remuneration, and administration of the CETA appellate body should be taken at a further stage by the CETA Joint Committee under Article 8.28(7) CETA.

Judges of both tribunals are bound by Article 8.30 CETA on ethics requiring them:

- to be independent, not affiliated to governments;
- not to take any instructions from organisations or governments on matters related to the dispute;
- not to participate in consideration of any disputes that would create, directly or indirectly, a conflict of interest;
- to comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration and any additional rules adopted under Article 8.44(2) CETA.⁶⁵

The Committee on Services and Investment has to adopt a code of conduct for the members of the Tribunal, on agreement of the parties, and upon completion of their respective internal requirements and procedures.

Some critics, such as the Deutscher Richterbund (German Magistrates Association), still consider that the model for remuneration and selection of judges casts doubts on their independence in professional and financial terms.⁶⁶ As the CETA court is a dispute settlement body operating under international public law, the model of selection and remuneration used in CETA, as previously mentioned, was modelled on the WTO Dispute Settlement Body and in particular on the Appellate Body, which differs substantially from the model used for the selection and remuneration of judges in domestic courts (model of reference for the Magistrates Association).

⁶³ UNCTAD, [Dispute Settlement: World Trade Organization](#), 2003.

⁶⁴ Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, [WT/DSB/1](#), 19 June 1995.

⁶⁵ Article 8.44(2) CETA: the Committee on Services and Investment can issue supplemental rules addressing the independence and impartiality of the members of the tribunal.

⁶⁶ German Magistrates Association, [Opinion on the establishment of an investment tribunal in TTIP – the proposal from the European Commission on 16 September 2015 and 11 December 2015](#), No 04/16, February 2016. ([original version in German](#)).

3.4. Further issues

3.4.1. *Limiting access to benefits: Who can bring a claim before the ICS?*

The definitions of investment and investor enshrined in CETA give the scope '*ratione personae*' of the CETA investment chapter; in other words, they indicate which investor can claim protection under the rules of that agreement.

An **investment** under Article 8.1 CETA means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment; the definition continues with an exhaustive list of what an investment can be. How the definition of investment characterises the investor is important. An investment is an asset that is 'owned or controlled directly or indirectly' by an investor. The terms 'directly or indirectly' signify that, in principle, a parent company owning, directly or via an intermediate company, could be considered an investor.

The article further defines who can be an **investor** under CETA. An investor is defined as either 'a natural person' or 'an enterprise of a party', with the explicit exclusion of a branch or a representative office. A branch or a representative office does not require a separate legal entity and therefore cannot be considered as constituting an investor in its own right under CETA (the investor can however be the headquarters of a company). A subsidiary could be considered as an investor in its own right, as it has distinct legal personality from the parent company.

A natural person is defined for Canada as either a citizen or a permanent resident in Canada. Therefore a third country national residing permanently in Canada can fall under the definition of a natural person. In the EU (with the exception of Latvia), a natural person is defined as a person having the nationality of one of the EU Member States.

In CETA, an enterprise of a party is defined in two different ways. In both definitions, the treaty tries to ensure that a company that can bring claims under CETA has a **substantial link to one of the parties to the treaty**. The two definitions are:

- 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
- an enterprise that is constituted or organised under the laws of that party and is directly or indirectly owned or controlled by a natural person of that party or by an enterprise mentioned under paragraph (a).

The **first definition** of enterprise contains two conditions: (i) that the enterprise is organised under the laws of that party, and (ii) that there are 'substantial business activities' in the territory of that party, i.e. that the company holding the investment is actually engaged in business activities. This definition allows an enterprise owned and controlled by an investor that is neither owned or controlled by a Canadian or European natural or legal person, to bring claims under CETA, but only as long as it fulfils the condition of being incorporated under the laws of a party and has substantial business activity in that party.

The **second definition** of enterprises drops the requirement of 'substantial business activities', but requires that the enterprise is 'directly or indirectly owned or controlled by a natural person of that party'. The condition of substantial business activity is dropped in these situations because the link to one of the parties to the treaty is either justified via ownership requirement (i.e. owned directly or indirectly by a natural person of the party) or through control over the firm directly or indirectly.

The requirement for substantial business activity was introduced to avoid letter-box companies, owned by third nationals (not resident in Canada permanently), obtaining legal claims under the treaty. Although there is no case-law on provisions in EU investment treaties as yet (because there are none yet in force), the formulation of ‘substantial business activity’ to limit claims is used in different investment treaties. In most treaties, it is used as a requirement for the state to exercise its right to denial of benefits. The definition of ‘substantial business requirement’ given in the context of the denial of benefits clause could be reused under CETA, even though CETA does not introduce such a requirement in the ‘denial of benefits clause’ (but rather under the definition of investor).

Box 3 – Definition of substantial business activity in past cases regarding ‘denial of benefits’ clauses

Cases exist under the Energy Charter Treaty (ECT) and under some US agreements that define ‘substantial business activity’. In the *AMTO* case under the ECT, ‘substantial business requirement’ was analysed in terms of substance and not in terms of magnitude.⁶⁷ Moreover, in another ECT case, the tribunal decided that administrative activities can be considered substantial business activities, therefore the term ‘activities’ not only refers to manufacturing or core business activity but could also include commercial or administrative activities. In a case under the US-Bolivia BIT and UK-Bolivia BIT,⁶⁸ the tribunal followed the same analysis as in the ECT case, stating that ‘substantial business activity’ does not refer to magnitude but to materiality of activity. The company was therefore considered to have substantial business activity since it maintained offices in the said territory, held shareholders’ as well as Board of Directors’ meetings and prepared the minutes of these meetings. Having premises with full time employees and bank relations in the country was considered proof that the company was not a mailbox company. Nevertheless, all cases might not be consistent with this interpretation. For example, in the *PAC RIM CAYMAN LLC* case under the Dominican Republic, Central America and United States Free Trade Agreement (CAFTA),⁶⁹ the financial administration of the shares of the investment from the USA was considered insubstantial. Finally, UNCTAD suggested that municipal fiscal law could be used to define what substantial business activities are (i.e. using the definition that in some fiscal systems is given to substantial business activities for taxation purposes).⁷⁰

The cases mentioned above analyse the substantial business activity requirement as part of the denial of benefits clauses. It is important therefore to distinguish the denial of benefits clause requirement from a similar requirement to prove substantial business activity included in the framework of the definition of investor (as is the case in CETA).

The denial of benefits clause is a right granted to the state to refuse the privileges under a BIT to certain companies that nevertheless in principle would have a claim under that treaty. Because the denial clause is a right that is granted to the state, the burden of proof regarding the conditions (including the condition of ‘no substantial business activity’) for exercising such right falls upon the state. In contrast, in the case of CETA, the requirement of substantial business activity – as part of the definition of ‘investor’ – defines who may claim under the agreement. The burden of proof that ‘substantial

⁶⁷ [Limited Liability Company AMTO v. Ukraine](#) case, Arbitration No 080/2005 Arbitration Institute of the Stockholm Chamber of Commerce.

⁶⁸ [Guarachi America and Rurelec](#) case, PCA Case No 2011-17.

⁶⁹ [PAC RIM Cayman LLC v. The Republic of El Salvador](#), ICSID Case No. ARB/09/12.

⁷⁰ UNCTAD, [Scope and Definition](#), UNCTAD series on issues in International Investment Agreements II, 2011.

business activities' are exercised, in order to invoke protection under CETA, remains with the investor. Therefore, the inclusion of 'substantial business activities' reverses the burden of proof.

Furthermore, the substantial activity' requirement is contained in the definition of investor instead of the denial of benefit clause. A company (not owned or controlled by a natural person of a party) that cannot prove substantial business activity is automatically excluded from the rights and protection under CETA. This would justify early dismissal of the claim by the tribunal on jurisdictional grounds. The denial of benefits clause would instead need to be activated by the state.⁷¹

The focus of the Commission's innovations concerning the scope of *ratione personae* in CETA's investment protection provisions is mainly directed towards avoiding forum shopping and benefits granted to letterbox firms. Investment protection under CETA remains a protection for foreign investors. This point has been criticised by civil society as a form of positive discrimination against foreign investors.⁷² Whether the investment protection under CETA consists of positive discrimination depends on the domestic framework and whether it affords similar protection as that granted under CETA.

It is true, however, that domestic investors will not have access to protection under CETA. This is due to the particularity of international public law as originally a means to set obligations for states in their dealings with other states' territory, property and natural and legal persons. International investment law evolved in that particular context and has since developed to allow for frameworks where foreigners could have direct standing under international public law.⁷³ Protection of legal and natural persons against the actions of their own states developed with human rights law. In Europe, domestic investors can bring expropriation claims under the European Convention for the protection of Human Rights and Fundamental Freedoms (also referred to as the European Convention on Human Rights, ECHR). However, in the context of human rights,⁷⁴ deference is still given firstly to domestic courts to ensure that the alleged violation is rectified. The ECHR imposes a requirement for the exhaustion of domestic remedies before bringing claims before the European Court of Human Rights.⁷⁵ The exhaustion requirement under the ECHR is considered important, as application by

⁷¹ There have been divisions in past arbitral decisions on exactly when the state can exercise such rights of denial. In some cases (such as the *Pac Rim* and *Guarachi Rurelec* cases mentioned above), the benefits were denied under the denial of benefit clause after the investor issued the claim. In ECT cases (such as *Plama Consortium* or *Yukos Limited*), however, the denial should be invoked before benefits are claimed by the investor.

⁷² A. Wessels, FFII, [Multilateral investment court strengthens investments vis-à-vis democracy and fundamental rights, March 2017](#); Greenpeace, [Letter for the public consultation on a multilateral reform of investment dispute resolution](#), 15 March 2017.

⁷³ Many ISDS frameworks do not require exhaustion of domestic remedies as opposed to claims brought under customary international public law via diplomatic protection. The latter required exhaustion of remedies with the aim of preserving state sovereignty and engaging international responsibility only as a last resort. See: S. D'Ascoli and K. M. Scherr, [The rule of prior exhaustion of local remedies](#) in the international law doctrine and its application in the specific context of human rights protection, EUI Working Paper Law 2007/02.

⁷⁴ With some exceptions in some African frameworks.

⁷⁵ Article 35 of the ECHR. For more details, see European Court of Human Rights, [Practical guide on admissibility criteria](#), 2014.

domestic courts of human rights was also an objective of that convention.⁷⁶ Moreover, the subsidiarity of international human rights courts could also be seen as a remnant of the traditional non-interference principle, which would then be waived only as a last resort. The absence of the requirement to exhaust domestic remedies is seen as an advantage of the international investment system, both in terms of speed and the cost of the proceedings.⁷⁷

3.4.2. *The question of autonomy of the EU legal order and the proposed ICS*

A central issue in the current debate on the establishment of the ICS concerns its compatibility with the principle of autonomy of the EU legal order. This principle of EU law entails above all that the EU and its institutions cannot be bound to an external judicial body for the interpretation of EU law.⁷⁸ Instead, the Court of Justice of the European Union (CJEU) has the exclusive power to give definitive interpretations of EU law so as to ensure its uniform application across the EU. Any establishment of an ICS should not subsequently lead to a situation in which an outside tribunal issues interpretations of EU law that are binding on the EU and its institutions.

Early critics⁷⁹ of the ICS refer in particular to the CJEU Opinion 1/09 on the establishment of a European and Community Patent Court.⁸⁰ In this opinion, the CJEU argued that the establishment of a patent court in the framework of the European Patent Convention would violate EU law. The two main grounds for this incompatibility were:

- (1) the patent court would have received exclusive competence to hear disputes between individuals on patents issues, thus completely transferring competences that were previously under the purview of national courts, to a non-EU court,⁸¹ and
- (2) the patent court, although a non-EU court, would have been required to interpret EU law as part of the applicable law under the agreement instituting the patent court.⁸²

The ICS under CETA would differ from the patent court case for two main reasons:

Firstly, domestic court competences are not transferred to the ICS. The investor still has the choice to bring the case before a domestic court. However, it remains true that, if the ICS is chosen as a forum, other domestic proceedings are excluded. The investor waives its right to bring the claim in front of domestic courts. This is already a feature

⁷⁶ S. D'Ascoli and K. M. Scherr, *op. cit.*

⁷⁷ Z. Douglas, J. Pauwelyn, J. E. Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice*, Oxford University Press, 2014. For a deeper and more comprehensive analysis of the differences between the CETA ICS and the European Court of Human Rights refer to the following European Parliament Policy Department study: S. Hindelang and T. M. Hagemeyer, *In pursuit of an international investment court - recently negotiated investment chapters in EU comprehensive free trade agreements in comparative perspective*, Directorate General for External Policies of the Union – European Parliament, 2017.

⁷⁸ This principle has also been understood to serve other purposes, namely the protection of fundamental rights, the protection of political institutions' scope of manoeuvre and independence from international law (see: C. Eckes, [International Rulings and the EU legal order: autonomy as legitimacy?](#), [Centre for the law of EU external relations](#), T.M.C. Asser Instituut inter-university research centre, 2016).

⁷⁹ See: German Magistrate Association, *op. cit.*

⁸⁰ [Opinion 1/09 of the court](#) (Full Court) 8 March 2011, ECR 2011 I-01137.

⁸¹ [Opinion 1/09 of the court](#) (Full Court) 8 March 2011, ECR 2011 I-01137, para. 72-89.

⁸² [Opinion 1/09 of the court](#) (Full Court) 8 March 2011, ECR 2011 I-01137, para. 71-73, 78-79.

present in some existing BITs, seeking to avoid proliferation of parallel proceedings and forum-shopping.

Secondly, the ICS is not competent to apply domestic or EU law. Under Article 8.18 CETA, the tribunal's jurisdiction is limited to the resolution of claims concerning the interpretation and application of the provisions of CETA's Investment Chapter. In addition, Article 8.31 CETA provides that the tribunal will have no jurisdiction to rule on the legality of a measure under EU law. Instead, the tribunal will have to consider EU law as a matter of fact and follow the prevailing interpretation given to that law by courts in the EU. Moreover, any meaning given to EU law by the tribunal will not be binding upon courts in the EU.

Box 4 – Article 8.31 CETA: Applicable law and interpretation

1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.
3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

At the same time, various parties have argued that the establishment of an ICS does violate the principle of autonomy of the EU legal order.⁸³ Some of the key arguments raised by these parties include:

- An ICS tribunal might have to interpret and apply EU law, either indirectly or directly, as its purpose is to enable investors to challenge national acts (which could involve EU law) or EU acts and decisions. Its scope is not as such limited to interpreting provisions of CETA's Investment Chapter.
- An ICS tribunal might be faced with a situation in which no prevailing interpretation given to EU law exists and it will thus have to come up with an interpretation itself. Even though an ICS tribunal's interpretation of EU law is ultimately not binding upon courts in the EU, it does carry a certain value (including financially) and could set a precedent for future rulings.
- An ICS tribunal faced with a question on the interpretation of EU law would not have to consult the CJEU. Moreover, since investors are not obliged to go through national courts before initiating proceedings before an ICS tribunal, no possibility exists for prior CJEU involvement through a preliminary reference procedure (Article 267 TFEU). This risks effectively side-lining the CJEU.

⁸³ Notable examples include letters from the [European Association of Judges](#), the [German Association of Judges](#) and [a group](#) of 101 law professors.

Nevertheless, the above issues could be raised in relation to any international judiciary authority (including the WTO) trying to uphold international law in the context of conflicts between EU law and international public law obligations undertaken by the EU. Pushing the legal autonomy principle to this extent would make EU law impossible to review under international public law.

Frequent references and comparisons have also been made in this context to the CJEU's opinion on the EU's accession to the ECHR,⁸⁴ in which it held that the Agreement on the accession of the EU to the ECHR was incompatible with EU law, in part because it endangered the autonomy of the EU legal order. The Agreement was, in particular, found to be incompatible, because the European Court of Human Rights (ECtHR) would be the last instance court on claims of compatibility between the ECHR and EU law. This would mean that the ECtHR could be called upon to review a previous interpretation of the CJEU.⁸⁵ This case must again be distinguished from the ICS, as the latter does not have an appeal function and is not meant to review judgments of the CJEU or any domestic courts.

Whether or not the ICS tribunal envisioned is in conformity with EU law may ultimately come down to an opinion of the CJEU. The CJEU will, however, have to be asked for such an opinion by an EU institution or Member State on the basis of Article 218(11) TFEU. In October 2016, the Belgian government agreed to request an opinion regarding the compatibility of CETA's ICS system with EU law as part of an agreement with the Walloon government, after the latter had threatened to withhold its support for CETA.⁸⁶ Slovenia is reportedly considering a similar request.⁸⁷ Up to now, however, no request for an opinion has been sent to the CJEU by either Member State.

The Legal Service of the European Parliament issued a legal opinion analysing all the aforementioned arguments. It concluded that the establishment of an ICS tribunal can be considered in conformity with the principle of autonomy of the EU legal order. In light of this legal opinion by its legal service, the European Parliament did not adopt a resolution to submit CETA to the CJEU.⁸⁸ Furthermore, the motion was perceived by many Members of the European Parliament as a move to delay the provisional application of CETA, which in any case did not include application of the investment chapter.⁸⁹

3.4.3. *The multilateral future of ICS*

CETA includes an obligation to pursue the establishment of a multilateral investment tribunal and appellate body with other trading partners. However in CETA, the rules for a multilateral mechanism for investment dispute can replace the original mechanism

⁸⁴ [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454.

⁸⁵ See in particular paragraphs 236 to 248 of Opinion 2/13.

⁸⁶ See Statement by the [Kingdom of Belgium on the conditions attached to full powers](#), on behalf of the Federal State and the federated entities, for the signing of CETA, and in particular paragraph B of the statement.

⁸⁷ See: L. Ankersmit, '[Opinion 2/15 and the future of mixity and ISDS](#)', 18 May 2017.

⁸⁸ [Motion for a Resolution](#) of 8 February 2017 to wind up the debate on the statement by the Commission on the conclusion of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (2017/2525(RSP)).

⁸⁹ [Council Decision \(EU\) 2017/38 of 28 October 2016](#) on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 2017 OJ L 11.

foreseen in the CETA rules only after a decision by the CETA Joint Committee. At the same time, Article 8.29 CETA states that ‘the CETA Joint Committee **shall adopt** a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism’ (see box 5 for the full text of the provision). This constitutes an obligation for the CETA Joint Committee to issue such a decision and make appropriate transitional arrangements.

Canada and the EU have begun looking for international support for the idea of a multilateral investment court. The multilateral investment court would establish a permanent body to decide investment disputes.⁹⁰ The permanent body would adjudicate the claim on the basis of the existing and future investment treaties.⁹¹ The Commission completed the consultations on the options for a multilateral reform of investment dispute resolution on 15 March 2017.⁹² In the months ahead, it will further explore the possibilities for establishing a multilateral investment court with the international community, and it is expected to formally request a mandate to start negotiations before the end of 2017.⁹³

Box 5 – Provisions on the establishment of a multilateral tribunal

Article 8.29 CETA Establishment of a multilateral investment tribunal and appellate mechanism

The Parties **shall pursue** with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. **Upon establishment of such a multilateral mechanism**, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

4. Main references

Kuijper, P. J., et al., Investor-state dispute settlement (ISDS) provisions in the EU’s international investment agreements, European Parliament Policy Department External Policies, [Vol. 1 \(Workshop\)](#) [Vol. 2 \(Studies\)](#), European Parliament, 2014.

Latek, M., [Investor-State Dispute Settlement \(ISDS\) – State of play and prospects for reform](#), EPRS, European Parliament, 2015.

Nadakavukaren Schefer, K., International Investment Law - Text, Cases and Materials, Edward Elgar Publishing, 2013.

Peterson, L. E., [All roads lead out of Rome: divergent paths of dispute settlement in bilateral investment treaties](#), International Sustainable and Ethical Investment Rules Project, Nautilus Institute for Security and Sustainable Development, 2002.

Puccio, L., [Investment rules in trade agreements: Developments and issues in light of the TTIP debate](#), EPRS, European Parliament, 2015.

Salacuse, J. W., The law of investment treaties, Oxford University Press, 2010.

For additional references: Bæverström, J., [TTIP and ISDS](#), EPRS, European Parliament, 2015.

⁹⁰ Roderick Harte, [Prospects for a Multilateral Investment Court](#), EPRS, European Parliament, June 2017.

⁹¹ European Commission, [The Multilateral Investment Court project](#), 21 December 2016.

⁹² Currently, the Commission report on the consultation is not [published online](#). Consultations, for which the authors gave permission for online publication, are accessible on [the Commission website](#).

⁹³ European Parliament resolution of 8 February 2017 on the conclusion 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 (2017/2525(RSP)).

5. Annex – Selected differences across selected arbitration fora

Fora	Jurisdiction	UNCITRAL rules	Choice of the arbitrators	Requirements on arbitrators	Appeal/review	Transparency rules
ICSID and ICSID Additional Facility	Open only to parties from ICSID Convention contracting parties; one member in the dispute must be from an ICSID contracting party to refer to the ICSID 'Additional Facility'; only if ICSID is explicitly mentioned in the Treaty provision.	Yes.	Parties may draw up a list of arbitrators from which the arbitrators are chosen normally by the parties; in case of disagreement, choice is given to the President of the World Bank acting as Chairman of the Administrative Council.	Required to be of ' <i>high moral character and recognised competence in the fields of law ... and may be relied upon to exercise independent judgement</i> '. <i></i>	No appeal but internal annulment procedure foreseen under ICSID Convention; full review by domestic courts available under ICSID additional facility.	Revision of the rules increased transparency by: - allowing knowledge of basic facts of the case and parties involved, - further disclosure depends on parties, - non-parties can submit amicus letters.
ICC	Defined only by the investment treaty on which dispute is based or by the agreement to arbitrate.	Yes.	Choice of the parties; in case no arbitrator has been chosen by the parties, the Court chooses the arbitrator.	Impartiality and independence; the sole arbitrator or the President of the three-arbitrator panel cannot be of the nationality of the parties in the dispute.	Review by domestic courts.	Confidentiality is a basic principle, disclosure of information is left to parties' discretion; the parties may enter confidentiality agreement as a safeguard against disclosure.
LCIA	Defined only by the investment treaty on which dispute is based or by the agreement to arbitrate.	Yes.	The Court itself; parties may nominate but the Court can reject the nomination.	Court makes appointed with due regard to criteria decided by the parties; sole arbitrator or President not of the same nationality as the parties.	Normally no possibility of appeal or review.	Confidentiality is a basic principle; even parties are prohibited to disclose information.
PCA	Defined only by the investment treaty on which dispute is based or by the agreement to arbitrate.	Yes.	Parties or if disagreeing, the Secretary General of PCA.	Impartiality and independence requirements.	Review by domestic courts.	UNCITRAL transparency rules: - publication only with consent of parties, - hearings in private unless agreed by the parties.
SCC	Defined only by the investment treaty on which dispute is based or by the agreement to arbitrate.	Yes (since 1 January 2015).	Board of Directors.	Impartiality and independence requirement; the sole arbitrator or the President of the three-arbitrators panel cannot be of the nationality of the	Review by domestic courts.	Confidentiality but publication can be done if both parties accept.

				parties in the dispute, unless parties have agreed otherwise		
Ad hoc	Treaty provides for jurisdiction.	Only if mentioned in the treaty.	Depends on treaty rules; if silent on this, either UNCITRAL rules if chosen, or the chosen forum rules.	Depends on treaty rules; if silent on this, either on UNCITRAL rules if chosen or it will depend on the chosen forum rules.	Depends on the treaty. Normally contains at least a review or annulment procedure.	UNCITRAL transparency rules are often applied.

After a public consultation on proposed reforms to investment protection and the investor-dispute settlement framework of the Transatlantic Trade and Investment Partnership (TTIP) with the United States of America, the European Parliament requested the replacement of the traditional arbitration framework with a new court system. The European Commission and Canada subsequently renegotiated the relevant provisions of the Comprehensive Economic and Trade Agreement (CETA) to establish a new investment court system (ICS).

The ICS departs substantially from the arbitration model, in particular on the appointment of judges. Procedurally the ICS remains similar to treaty-based arbitration proceedings and retains all the innovations introduced in the early draft of CETA. Those innovations aim, among other things, to prevent ‘forum shopping’ and abuse of the system.

Some of the innovations introduced will require further decisions in CETA’s established Committees, such as on the code of conduct and decisions on appellate body judges. Some concerns raised regarding the basis for differences between ISDS and domestic court systems persist in the ICS context. These relate both to the different treatment between foreign and domestic investors, and to uncertainty regarding the compatibility of the ICS system with the principle of autonomy of the EU legal order. On this last point, however, the ICS framework can be distinguished for various reasons from past opinions on the European and Community Patent Court and the EU’s accession to the European Convention on Human Rights.

This is a publication of the
Members' Research Service

Directorate-General for Parliamentary Research Services, European Parliament



PE 607.251
ISBN 978-92-846-1171-3
doi:10.2861/856144

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.